NO. H200039
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PEOPLES TRUST COMPANY

PETITIONER

AND:

CENSORIO GROUP (HASTINGS & CARLETON) HOLDINGS LTD.
PETER CENSORIO also known as PETER ANTHONEY CENSORIO and PETER ANTHONY CENSORIO
STRADA 39 TRUST
BANCORP GROWTH MORTGAGE FUND II LTD.
BANCORP BALANCED MORTGAGE FUND II LTD.
BANCORP FINANCIAL SERVICES INC.
PK CAPITAL LTD.
ALL CANADIAN INVESTMENT CORPORATION
FBM CANADA GSD, INC.
MEDINA CONCRETE SERVICES LTD.
TUCUVAN CONSTRUCTION LTD.
OMNI DRYWALL LTD.
1223293 B.C. LTD.
RAHUL GLASS LTD.
SERIN INVESTMENTS LTD.
CLARION PROPERTY CORPORATION
G.I.H. PROPERTIES LTD.
BARRY CHARLES HOLDINGS LTD.
BECISON HOLDING CORPORATION
SANDRA CHAPPELL
CREST CAPITAL CORPORATION
DURHAM CAPITAL MANAGEMENT INC.
YORK VENTURES LTD.
HI-GROVE HOLDINGS (1995) LTD.
DIANE RAUCH
JEFFREY RAUCH
PAVILION INVESTMENTS INC.
RODNEY GRANT KENYON
ALAN LONG
MANDATE MANAGEMENT CORPORATION

RESPONDENTS

JOINT BOOK OF AUTHORITIES

Counsel for the Respondents
Bancorp Growth Mortgage Fund II Ltd., Bancorp Balanced Mortgage Fund II Ltd. and Bancorp Financial Service Inc. **(Name of the Respondents)**

William Roberts
Lawson Lundell LLP
Barristers and Solicitors
1600 – 925 West Georgia Street
Vancouver, B.C. V6C 3L2
Telephone: 604-685-3456

Counsel for the Respondents
Patrick Hunter, Brian Gillis, Nader Vatanchi, Gloria Bevacqua, Jeffrey Winters, Alexandra Graham, Jim Graham, Mario Tunucci, Nick Desantis, and 1166538 BC Ltd. **(Name of the Respondents)**

Desmond J Macmillan
300 - 1055 W. Hastings Street,
Vancouver, BC V6E 2E9
Telephone: 1 888-486-3471

Counsel for the Applicant
D. Manning & Associates Inc. **(Name of Applicant)**

Alan A. Frydenlund, Q.C.
Owen Bird Law Corporation
29th Floor – 595 Burrard Street
PO Box 49130
Vancouver, B.C. V7X 1J5
Telephone: 604-688 -0401

Counsel for the Respondents
Luigi Garcea and Cheryl Serraglio **(Name of the Respondents)**

Wes McMillan
1550 – 1185 West Georgia Street
Vancouver, BC V 6E 4E6
Telephone: 604-569-2652

JOINT BOOK OF AUTHORITIES

INDEX

Case Law

Text

18. Frank Bennet, *Bennett on Receiverships*, 2nd Edition. (Toronto: Carswell, 1999)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bamrah v. Waterton Precious Metals Bid Corp.,*
2020 BCCA 122

Date: 20200430
Docket: CA45979

Between:

Nandeep Bamrah

Appellant
(Petitioner)

And

Waterton Precious Metals Bid Corp.

Respondent
(Respondent)

Before: The Honourable Madam Justice Dickson
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated February 28, 2019 (*Bamrah v. Waterton Precious Metals Bid Corp.*, 2019 BCSC 258, Vancouver Docket S157396).

Counsel for the Appellant: R.P. Agarwal

Counsel for the Respondent: M. Pontin
M.F. Rozee

Place and Date of Hearing: Vancouver, British Columbia
March 2, 2020

Place and Date of Judgment: Vancouver, British Columbia
April 30, 2020

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Dickson
The Honourable Mr. Justice Grauer

Summary:

This appeal is from an order setting the fair value of shares owned by the appellant, a dissenting shareholder in Chaparral Gold Corp. ("Chaparral"), pursuant to s. 245(2)(a) of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57. The respondent, Waterton Precious Metals Bid Corp. ("Waterton"), acquired Chaparral by way of a court-approved plan of arrangement for CAD $0.61 per share. The appellant petitioned the Supreme Court of British Columbia, seeking to have it appraise the fair value of the appellant's shares at USD $1.60 and $1.85. The court set the fair value of the shares at $0.61.

Held: Appeal dismissed. The judge applied the correct legal framework for determining the fair value of a dissenting shareholder's shares and appropriately considered the objective market evidence as indicative of fair value. The judge did not, as the appellant submits, make palpable and overriding errors of fact in his analysis of market factors. The judge was entitled to prefer the market-based analysis of the respondent's expert over the theoretical analysis of the appellant's expert. There was ample evidence to support the judge's conclusion that the transaction price of $0.61 was the highest price available in an open and unrestricted market, negotiated by informed and prudent parties, acting at arm's length and under no compulsion to act.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I. Introduction

[1] This is an appeal from an order of the Supreme Court of British Columbia, which set the fair value of a dissenting shareholder's shares in Chaparral Gold Corp. ("Chaparral") at $0.61 cents as of December 11, 2014.

[2] The respondent corporation, Waterton Precious Metals Bid Corp. ("Waterton"), acquired Chaparral under a plan of arrangement for CDN $0.61 cash per share (the "Arrangement"). The appellant was a minority shareholder of Chaparral who opposed the Arrangement and exercised his dissent rights under the *British Columbia Business Corporations Act*, S.B.C. 2002, c. 57 [*BCBCA*]. He petitioned the Supreme Court seeking to have it find the fair value of Chaparral shares to be between USD $1.60 and $1.85.

[3] In reasons for judgment indexed at 2019 BCSC 258 (the "Reasons"), Justice Funt determined that the fair value for the dissenting shareholder's shares was the price under the Arrangement, described as the "deal price" in the Reasons,

that is $0.61 per share. He found that this price was arrived at by sophisticated, arm's length parties, negotiating in an unburdened open market, and that these conditions ensured the price was reflective of fair value.

[4] The appellant argues that the judge:

- erred in law by failing to apply the established legal framework for determining the fair value of a dissenting shareholder's shares pursuant to s. 245(2)(a) of the *BCBCA*; and

- committed palpable and overriding errors in relation to certain findings of fact in his analysis of market forces.

[5] For the reasons that follow, I would dismiss the appeal. In my view, the judge applied the correct legal test and his findings of fact were amply supported by the evidentiary record.

II. Background

[6] Chaparral is a British Columbia corporation engaged in the development of two early-stage mining properties in Nevada, United States of America (the "U.S.").

[7] Chaparral's corporate history was summarized in paras. 23–27 of the Reasons:

> [23] Chaparral is a mining company engaged in the exploration and development of gold (and silver) deposits in Nevada, U.S.A. Chaparral's principal mining assets are two wholly-owned mining properties: Goldfield and Converse.
>
> [24] Chaparral was formed in September 2013 to participate in a spin-out transaction among International Minerals Corporation ("IMZ"), Hochschild Mining plc ("Hochschild"), HOC Holdings Canada Inc. ("HOC Canada"), a wholly-owned subsidiary of Hochschild, and itself.
>
> [25] Prior to the spin-out, the Goldfield and Converse mining properties were held by IMZ. Under the spin-out, HOC Canada acquired all of the issued and outstanding shares of IMZ; each IMZ shareholder was entitled to receive cash consideration of US $2.38 per IMZ share and the number of common shares in Chaparral equal to his or her shareholdings in IMZ; and IMZ transferred to Chaparral its cash and receivables and all of its rights, title and interest to its wholly-owned non-Peruvian subsidiaries, and its assets and

> related liabilities, which included a 100% interest in the Goldfield and Converse properties.
>
> [26] Paradigm Capital Inc. (“Paradigm”) acted as the independent financial advisor to IMZ and provided a valuation and fairness opinion in connection with the spin-out. Paradigm was of the opinion that the fair market value of a Chaparral share was in the range of $0.58 to $0.85.
>
> [27] The spin-out transaction completed on December 20, 2013. Chaparral began trading on the TSX on December 30, 2013.

[8] By way of summary, in February 2014, Waterton made an unsolicited hostile bid to acquire all shares of Chaparral for $0.50. Chaparral’s Board of Directors (the “Board”) rejected this bid, citing various concerns including that it undervalued the company’s assets, was “financially inadequate”, and “highly conditional”: Reasons at para. 30.

[9] The company responded aggressively to the hostile take over bid. The Board appointed an independent special committee (the “Special Committee”), which comprised three independent directors, to consider the hostile bid and to make recommendations to the Board. Two of these directors were formerly independent directors of International Minerals Corporation (“IMZ”).

[10] Then, in March 2014, the company entered into negotiations with thirteen companies to explore potential transactions (the “white knights”), all of whom executed confidentiality agreements. They received access to certain corporate documents including the valuation provided by Paradigm Capital Inc. (“Paradigm”).

[11] By April 7, 2014, Chaparral received three expressions of interest for its shares, each in the range of $0.60 per share.

[12] On April 17, 2014, Chaparral disclosed a potential liability to the U.S. Environmental Protection Agency (the “EPA”). By May 5, 2014, the potential white knights that had made offers withdrew from the bidding process. Chaparral had also entered into a confidentiality agreement with an additional company, but this did not lead to an offer.

[13] On July 17, 2014, the respondent increased its offer to $0.55 per share. The Board again recommended that shareholders reject the bid, but approximately 16.83 percent of the shares were purchased by the respondent. By the end of the month, the respondent held approximately 19.72 percent of Chaparral shares, just below the 20 percent required by the *BCBCA* for effective control of the company. During this time frame, Chaparral also attempted to settle its dispute with the EPA, which was summarized as follows in the Reasons:

> [68] On May 5, 2014, Mr. N. Appleyard, Chaparral's chief executive officer, told the Special Committee that all the companies that had submitted written proposals had withdrawn from the bidding process. He also told the Special Committee that Chaparral's management team was focused on the EPA's complaint and Chaparral's potential liability, and was pursuing a couple avenues to restrict liability.
>
> [69] On May 14, 2014, the Board agreed to postpone further discussion on the Initial Hostile Bid until after Chaparral had "met with the EPA and received clarification regarding the Company's potential responsibility in connection with the Eureka smelter site remediation issue".
>
> [70] On June 12, 2014, Mr. Appleyard advised the Special Committee that "the main focus of the Company's efforts is presently concentrated on resolving the EPA issue in as timely a manner as possible" and suggested that "until the Company receives an estimate of what an equitable settlement might be,… it is not prudent to move forward with negotiations for other projects and plans".
>
> [71] On July 21, 2014, Mr. Appleyard advised that Special Committee that Metallic had made a US $100,000 settlement offer to the EPA. He reported that it had yet to receive a response to the offer, but that the management team had subsequently contacted the EPA to suggest that Metallic "would consider making an increased settlement payment if the EPA would expedite a resolution to the case, thus allowing the Company to proceed with White Knight scenarios before the Waterton deadline of July 31." Later that day, the Board authorized management to negotiate an expedited settlement with the EPA up to US $1.8 million.

[14] In August 2014, the Board changed its strategy. The Special Committee recommended opening "a dialogue with the respondent to see if a fair and reasonable transaction may be negotiated": Reasons at para. 47. The Board accepted the recommendation and instructed management to enter into negotiations with the respondent. These led to the Arrangement, in which the respondent offered to acquire all shares in Chaparral for $0.61 per share in cash.

[15] Paradigm provided an opinion to the Special Committee that the fair market value of shares was in the range of $0.45 to $0.76 per common share and that the proposed Arrangement was fair, from a financial point of view, to Chaparral shareholders. The Special Committee also considered, among other things, that the respondent's offer arose from a comprehensive negotiation process and represented a premium to current and historical trading prices of Chaparral shares. The Special Committee recommended that the Board approve the Arrangement, which then occurred in early October 2014.

[16] The Board, referring to Paradigm's opinion, then recommended that shareholders vote in favour of the Arrangement providing several reasons for supporting the transaction, including that:

- the Board had pursued a variety of strategic alternatives before negotiating with the respondent; and
- the offer price provided a "significant premium" for shareholders: Reasons at para. 57.

[17] On November 8, 2014, the EPA demanded that Chaparral pay USD $6.3 million within 30 days to resolve the environmental issues: Reasons at para. 73.

[18] The Arrangement was approved at a special meeting of shareholders on December 12, 2014. The judge found that all material information was available to Chaparral's shareholders to allow them to assess whether to approve the Arrangement. Approximately 57.91 percent of Chaparral shares were voted on the special resolution to approve the Arrangement; of those, approximately 99.48 percent voted in favour of the Arrangement: Reasons at para. 62. Only 7,642 shares were used to vote against the resolution: Reasons at para. 123. The Arrangement received court approval on December 17, 2014.

[19] On September 3, 2015, the underlying proceeding was commenced.

III. The Opinion Evidence

[20] Both the appellant's expert, Mr. Low, and the respondent's expert, Mr. Crosson, adopted the same definition of fair value (Reasons at paras. 16–17), stated by Mr. Low as being:

> Fair Value is defined as the ratable portion of 'en bloc' fair market value ("FMV") where FMV is defined as "*the monetary consideration that, in an open and unrestricted market, a prudent and informed buyer would pay to a prudent and informed seller, each acting at arm's length with the other and under no compulsion to act.*"
>
> [Emphasis in original.]

[21] Mr. Low opined that fair value of Chaparral shares was in the range of USD $1.60 to $1.85 based on theoretical measures of value derived from two going-concern valuation approaches, described in his report as follows:

> a. <u>Comparable Public Company Analysis</u> – we have identified publicly traded junior gold exploration and development companies that were considered to be similar to Chaparral. We have assessed the valuation multiples and metrics associated with these comparable public companies (Enterprise Value per Ounce of Gold Resource) to derive an implied FMV [fair market value] for Chaparral. We have adjusted the comparable public company valuation metrics to reflect average takeover premiums.
>
> b. <u>Precedent Transactions Analysis</u> - we have identified transactions involving the acquisition of junior gold exploration and development companies that we consider to be similar to Chaparral. We have analyzed the valuation multiples and metrics associated with these precedent transactions (Enterprise Value per Ounce of Gold Resource) to derive an implied FMV for Chaparral.
>
> (Reasons at para. 144.)

[22] With respect to market trading, Mr. Low's report stated that it "placed limited weight on Chaparral's publicly traded share price as an indication of the [fair market value] of the Company's shares": Reasons at para. 149. Mr. Low relied on the Ontario Securities Commission, Multilateral Instrument 61–101, *Protection of Minority Security Holders in Special Transactions* (MI 61–101), Part 1, s. 1.2, which defines a liquid market as one in which the shares of the company are subject to valuation traded for 12 months prior to the transaction. As Chaparral only traded on the Toronto Stock Exchange ("TSX") for 34 trading days prior to the respondent's

first hostile bid in February 2014, Mr. Low's report concluded that it was an insufficient period of time to establish their value in a liquid market.

[23] Mr. Low's report similarly did not assign much weight to the real evidence provided by the price in the Arrangement negotiated by Chaparral and approved by over 99 percent of its shareholders: Reasons at paras. 145–146. Furthermore, Mr. Low's report did not account for and assess the effect of Chaparral's potential EPA liability, and its disclosure in its SEDAR public filings, on the market price of Chaparral shares: Reasons at paras. 154–156.

[24] The respondent's expert, Mr. Crosson, adopted a different approach. Rather than providing a comprehensive valuation report, Mr. Crosson was asked to consider whether the price of $0.61 per share was established in the context of a fair market value transaction and to comment on both Paradigm's and Mr. Low's opinions: Reasons at para. 141. Mr. Crosson, in his report, summarized his conclusions as follows:

> In my opinion, the Paradigm Valuation's $0.45 to $0.76 per Share conclusion reasonably estimates the fair value of the Shares at October 7, 2014. Paradigm's value range captures the $0.60 per Share price indications obtained by Chaparral from "white knight" companies in April 2014, which supports the reasonableness of the Paradigm value range.
>
> …
>
> In my opinion, the Low Report's $1.85 to $2.13 per Share conclusion overstates the fair value of the Shares at December 11, 2014. Low's value range is more than three times the $0.60 per Share "white knight" indications. It is roughly five times [the] last price at which Chaparral's shares traded prior to the Initial Hostile Bid.

[25] In describing valuation approaches, Mr. Crosson expressed the opinion that where there are indicative market transactions in the subject shares, a direct approach that takes into account real evidence such as trading or transaction prices, offers to purchase or sell, and failed transactions is preferable.

[26] It was also Mr. Crosson's opinion that Chaparral shares had been exposed to the market with sufficient information to inform potential purchasers as to the characteristics of the company's assets. Mr. Crosson disagreed with Mr. Low's

opinion that the trading period was too short, explaining that the trading volume in that period equalled 22 percent of Chaparral's total outstanding shares. In his opinion, trading in Chaparral shares before the first hostile bid provided a reliable basis for estimating the fair value of the shares.

[27] With respect to the price in the Arrangement, Mr. Crosson stated that it did not appear that any party was under compulsion. He noted that the respondent did not own a controlling interest in Chaparral prior to the acquisition and was dealing at arm's length with Chaparral. Mr. Crosson expressed the view that both the market in which the shares were exposed and the market in which potential acquirers could bid were open and competitive: Reasons at para. 151.

[28] Mr. Crosson criticized various aspects of Mr. Low's opinion, including his methodology for establishing value, his selection of comparable companies and transactions, and his application of a takeover premium. He also disagreed with Mr. Low's decision to allocate a nil value to the potential EPA liability. In Mr. Crosson's opinion, it was reasonable to assume that an *en bloc* purchaser of Chaparral would "recognize a material allowance for the potential EPA liability".

IV. Chambers Judgment

[29] The judge found the deal price represented the fair value of the shares.

[30] He commenced his analysis by summarizing what he considered to be the appropriate legal framework. This included recognizing that:

- no party bears the onus of proving the fair value of the dissenter's shares, as the "ultimate onus is on the court to arrive at a fair value based upon an assessment of the evidence presented": *Ashton Mining of Canada Inc. v. Kwantes*, 2007 BCSC 1374 at para. 18, aff'd 2008 BCCA 248;
- the court's obligation is to consider all relevant evidence;
- "[t]he value attributed to the shares by the plan of arrangement is but one piece of evidence to be considered", along with other evidence such as

the history of the transacting companies, the trading price of the shares, the context of the plan of arrangement and the negotiated price per share, and expert opinions: *Grandison v. NovaGold Resources Inc.*, 2007 BCSC 1780 at para. 5;

- the focus is the *en bloc* value—that is, the fair market value of all issued shares of the company—not the fair market value of the dissenter's shares: *Grandison* at para. 152;
- fair market value is the price that an informed buyer and seller, acting rationally, at arm's length, and under no compulsion to act, would accept in an open market transaction;
- fair market value is preferably established by an actual transaction, rather than a hypothetical estimate;
- theoretical valuations are necessary where the right of dissent is engaged and there is no truly open market transaction from which to establish a fair value for the shares (e.g., where the corporate action does not involve a disposition of shares, or involves a non-arm's length transaction): *Grandison* at paras. 163–165; and
- where the right of dissent is engaged in the context of a broadly-based open market transaction involving an independent third-party, the market transaction provides the starting point, and in some circumstances, may be the best evidence of fair value: *Grandison* at para. 165.

(Reasons at paras. 13–19)

[31] In applying this framework to the circumstances of the proceeding itself, the judge decided the appropriate starting point was the deal price itself. He found that, although the respondent held nearly 20 percent of Chaparral's shares during negotiations, "the thresholds for shareholder Approval of the arrangement were not directly affected or constrained": Reasons at para. 80. The requisite approval for the

Arrangement was an affirmative vote of two thirds of the votes cast, as well as a simple majority excluding the respondent, any related party, and Stephen Kay, the Executive Chairman and a director of Chaparral. The latter ensured that shareholders could vote independently of the respondent: Reasons at paras. 83–84.

[32] The judge also found that the potential EPA liability did not force the shareholders to sell their shares. However, it was a material development negatively affecting share price that could factor into the shareholders' decision when voting on the Arrangement: Reasons at para. 85.

[33] The judge then addressed other factors that he found supported using the deal price. He reviewed the evolution of the arrangement, including the various offer prices during the hostile bids. He found that the spin-out transaction in November 2013, and Paradigm's valuation of a Chaparral share in the range of $0.58 to $0.85 at that time, provided real evidence of fair value: Reasons at paras. 98–100. He also took into consideration the prices at which Chaparral shares traded on the TSX from December 30, 2013 to February 18, 2014, finding that the trading volume "provided sufficient liquidity to warrant analysis of the trading price": Reasons at para. 151. Furthermore, he found that the offers provided by the white knights provided real evidence that the *en bloc* fair market value was approximately $0.60 per share at the relevant time: Reasons at para. 112. The judge concluded that all of these factors confirmed the fair value of the deal price.

[34] The judge also noted that, even after excluding shares held by the respondent, any related party, and Mr. Kay, the arrangement was approved by 99.19 percent of shareholders: Reasons at para. 62. He reasoned that if the fair value were in the range alleged by the appellant, then dissent rights would have been exercised by a far larger percentage of shareholders: Reasons at para. 125.

[35] Another important consideration for the judge was that Chaparral received an independent valuation from Paradigm, which had no incentive to inaccurately value Chaparral: Reasons at para. 130.

[36] The judge did not accept Mr. Low's evidence on behalf of the appellant, finding as follows:

> [146] Mr. Low discards too readily the real evidence provided by the market forces which included both the Arrangement negotiated by Chaparral and the respondent and the market trading price. For the purpose of determining fair value, where open and unrestricted market forces are engaged, a valuator should use the real evidence that may be obtained from such market forces and then adjust (e.g., minority discount), where necessary, for the particular valuation task.
>
> …
>
> [159] The essence of Mr. Low's report and his comments on Mr. Crosson's report is that they illustrate approaches that may have been taken by a hypothetical market participant in determining what price a market participant may have theoretically paid (or sold) for a Chaparral share. In the matter at bar, there is real evidence provided by the engaged market forces.

[37] From these findings, the judge concluded that the $0.61 per share deal price represented the *en bloc* fair value of the Chaparral shares and dismissed the appellant's petition.

V. The Issues

[38] Two alleged errors are raised by the appellant. Specifically, did the judge:

- err in law by failing to apply the established legal framework for determining the fair value of a dissenting shareholder's shares pursuant to s. 245(2)(a) of the *BCBCA*?; and/or
- commit palpable and overriding errors in relation to certain findings of fact in his analysis of market forces?

VI. Analysis and Decision

First Issue: Did the Judge Err in Law by Failing to Apply the Established Legal Framework for Determining the Fair Value of a Dissenting Shareholder's Shares Pursuant to s. 245(2)(a) of the *BCBCA*?

[39] The question of what legal test applies is a question of law: *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at para. 43. The applicable standard

of review on a question of law is correctness, meaning this court is free to substitute its own view for that of the judge: *Housen v. Nikolaisen,* 2002 SCC 33 at para. 8.

[40] The appellant's position is that the judge applied the wrong legal framework to his analysis of what constituted fair value. In particular, he submits that the judge erred in:

- not following the governing jurisprudence and the established legal test for determining fair value;
- relying on market forces as a "confirmatory check" that the deal price was fair value, effectively creating an unfair and unprecedented "deal price presumption";
- applying a market-based analysis, where market price was an unreliable indicator of fair value because Chaparral's mining assets were undeveloped;
- failing to apply one of the generally accepted and recognized valuation approaches and conduct a *de novo* valuation; and
- only superficially considering Mr. Low's expert valuation evidence, even though it was the only *de novo* opinion on fair value, as Mr. Crosson was instead asked whether the price of $0.61 per share was established in the context of a fair market value transaction.

[41] The respondent submits that the judge correctly set out the applicable legal framework and was entitled to consider the deal price as evidence of fair value established in an open market. The respondent's position is that the appellant is simply attempting to reargue the case from the court below.

The Legislative Provisions

[42] The key statutory provision in question is s. 245(2)(a) of the *BCBCA,* which reads:

> 245 (2) A dissenter who has not entered into an agreement with the company under subsection (1) or the company may apply to the court and the court may
>
> > (a) determine the payout value of the notice shares of those dissenters who have not entered into an agreement with the company under subsection (1), or order that the payout value of those notice shares be established by arbitration or by reference to the registrar, or a referee, of the court, …

[43] Section 237(1) defines "dissenter", "notice shares" and "payout value":

> 237 (1) In this Division:
>
> > **"dissenter"** means a shareholder who, being entitled to do so, sends written notice of dissent when and as required by section 242;
> >
> > **"notice shares"** means, in relation to a notice of dissent, the shares in respect of which dissent is being exercised under the notice of dissent;
> >
> > **"payout value"** means,
> >
> > > (a) in the case of a dissent in respect of a resolution, the fair value that the notice shares had immediately before the passing of the resolution,
> > >
> > > (b) in the case of a dissent in respect of an arrangement approved by a court order made under section 291 (2) (c) that permits dissent, the fair value that the notice shares had immediately before the passing of the resolution adopting the arrangement,
> > >
> > > (c) in the case of a dissent in respect of a matter approved or authorized by any other court order that permits dissent, the fair value that the notice shares had at the time specified by the court order, or
> > >
> > > …
> >
> > excluding any appreciation or depreciation in anticipation of the corporate action approved or authorized by the resolution or court order unless exclusion would be inequitable.

Carlock v. ExxonMobile Canada Holdings ULC, 2020 YKCA 4

[44] Following the parties filing their factums and prior to the hearing of the appeal, the Court of Appeal of Yukon rendered its decision in *Carlock v. ExxonMobile Canada Holdings ULC*, 2020 YKCA 4 [*Carlock*].

[45] *Carlock* involved an application under s. 193 of the Yukon *Business Corporations Act,* R.S.Y. 2002, c. 20 to have the Court set the fair value of shares owned by dissenting shareholders in InterOil Corporation ("InterOil"). ExxonMobil Canada Holdings ULC ("Exxon") agreed to purchase the shares of InterOil by means of an exchange of InterOil shares for Exxon shares, leading to InterOil becoming a wholly owned subsidiary of Exxon.

[46] In the initial proposed plan of arrangement, Exxon agreed to buy all of the shares of InterOil for USD $45 per share, paid in Exxon shares, plus a contingent resource payment estimated at $7.04 per share: *Carlock* at para. 29. The plan of arrangement was approved at a special meeting of the shareholders, although some shareholders with approximately 10 percent of the common outstanding shares voted against it: *Carlock* at para. 30. The Yukon Supreme Court approved the proposed plan of arrangement, but the Court of Appeal set aside that order based on procedural deficiencies or 'red flags' that called into question whether the arrangement was fair and reasonable: *InterOil Corporation v. Mulacek*, 2016 YKCA 14 at para. 40. Notwithstanding the decision, the parties reached a second proposed plan of arrangement on substantially the same terms including the transaction price, which was later calculated to total $49.98 per share: *Carlock* at paras. 31–32.

[47] The second proposed plan of arrangement was approved at a shareholder meeting, with less than 0.5 percent of shareholders exercising their dissent rights: *Carlock* at para. 33. In determining the fair value of the dissenter's shares, the chambers judge failed to give weight to the transaction price as evidence of fair value and instead relied on a theoretical valuation. In reasons indexed at 2019 YKSC 10, the judge found as follows:

> [62] I conclude that the transaction price was established in a flawed corporate governance process. The fact that the corporate governance process to establish a fair and reasonable arrangement was enhanced does not change the findings of the Court of Appeal on the original arrangement. These findings included a CEO in a position of conflict, an "independent" special committee that was not independent of management and the lack of

> necessity for the deal. In my view, the transaction price, borne of a flawed process, cannot be resurrected as the "fair value" as defined by the experts.

[48] On appeal, Justice Harris found that the chambers judge erred in principle by finding that the Court of Appeal's decision on the first plan of arrangement meant that the transaction price agreed to in both arrangements could not be relied upon as evidence of fair value: *Carlock* at para. 35. In reaching this conclusion, Harris J.A. set out the following principles at paras. 7–13:

- fair market value is defined as "the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act": 2019 YKSC 10 at para. 57;
- in determining the fair value of a dissenter's shares, the focus is not on the dissenter's shares but the *en bloc* value of all issued shares in the company: *Grandison* at para. 152; and
- the "one true rule" is that the court must consider all of the evidence, the relevant factors in the particular case, and exercise its best judgment: *Cyprus Anvil Mining Corp. v. Dickson,* 33 D.L.R. (4th) 641 at para. 51 (B.C.C.A.) [*Cyprus*].

[49] With respect to valuation methods, Harris J.A. added the following:

> [15] It is common ground that, broadly speaking, value is approached drawing on five valuation methods: (a) the quoted market price on the stock exchange ("market value approach"); (b) the valuation of the net assets of the company at fair value ("assets approach"); (c) the capitalization of maintainable earnings ("earnings of investment value approach"); (d) the "discounted cash flow" ("DCF") method taking into account a capitalization of future profits; and (e) a combination of approaches.

> [16] I pause to observe that viewing the market value approach simply as valuation based on stock market prices may be unduly restrictive where other objective market based evidence is available demonstrating the actual behaviour of market participants in a real market. Where the evidence supports the conclusion that the market is efficient, consisting of multiple informed participants capable of acting in their own self-interest, and there are no material market failures, the result of the market is likely the best and most objective evidence of value. It is rooted in reality and not based on assumptions, theory or predictions.
>
> [Emphasis added.]

[50] In language mirroring that used by the chambers judge in this case, Harris J.A. distinguished cases where theoretical valuations are necessary from those where an actual transaction is indicative of fair value:

> [19] Commonly, the determination of fair value in the reported cases occurs where there is *no* broadly based open market transaction because, for example, the transaction might not involve a disposition of shares or is not arms-length. In those kinds of circumstances, it is often necessary to resort to a theoretical search for value that attempts to estimate the value that would be the product of a hypothetical market. Where, however, there is an open market for shares or other evidence indicative of arms-length conduct of numerous market participants acting in their own self-interest and settling on a price, such evidence is particularly reliable as an indicator of fair value, as I have already explained. Objective market evidence, in the absence of evidence of market failure, is more reliable than theoretical analysis that attempts to derive a value based on assumptions about what a real market would disclose, if there were one. The behaviour of a real market is better evidence of value than a theoretical market.
>
> [Underlined emphasis added; italicized emphasis in original.]

Analysis

[51] In my view, *Carlock* provides a complete answer to this first ground of appeal. While the judge did not have the benefit of this decision, it is clear that the legal framework he applied, as summarized above, was entirely consistent with *Carlock*.

[52] In particular, the judge did not start with a “presumption” that the deal price was fair, that term being neither expressly stated nor implied in the Reasons. Rather, he correctly used the deal price as a starting point and then referred to other market-based factors to ascertain whether the price was fair to the dissenting shareholder.

[53] He also considered all relevant evidence and exercised judgment in the determination of fair value, including:

- the history of the acquiring and target company;
- the trading price of the shares in the public market;
- the evolution and formulation of the plan of arrangement;
- the value of the shares specified in the plan of arrangement; and
- the opinions regarding value of the expert witnesses.

See *Grandison* at para. 5, cited with approval in *Carlock* at para. 14.

[54] Furthermore, he was correct in relying on the negotiated deal price. As explained by Harris J.A. in *Carlock* at para. 17, "that price was the outcome of the behaviour of participants in a real market [and] is of immediate and direct probative value". In a functioning open market, as existed in this case, the transaction price is more probative of value than a theoretically derived value: *Carlock* at para. 19.

[55] Contrary to the appellant's assertion that the judge failed to conduct a *de novo* assessment of fair value, I am satisfied that the judge considered all of the evidence and the relevant market-based factors to conclude that the deal price was equivalent to the fair value of the shares. Furthermore, the judge thoroughly reviewed Mr. Low's expert report and exercised his discretion in assigning it little weight for reasons including Mr. Low's failure to assess the real evidence provided by market forces and the effect of Chaparral's potential EPA liability. The judge did, as the appellant submits, rely on market-based evidence including the Arrangement and the trading price of Chaparral shares on the TSX as a "confirmatory check" as to the fair value of the deal price: Reasons at para. 164. However, as *Carlock* makes clear, the judge was entitled to consider this evidence as indicative of fair value.

[56] Accordingly, I would not accede to this first ground of appeal.

[57] While the appellant focussed on the judge's alleged errors in his analytical approach, it is my view that the core motivation for this appeal was dissatisfaction with many of the judge's findings of fact, matters to which I shall now turn.

Second Issue: Did the Judge Commit Palpable and Overriding Errors in Relation to Certain Findings of Fact in His Analysis of Market Forces?

[58] Fixing the fair value of a dissenting shareholder's shares is "a matter of discretionary judgment": *Ashton Mining of Canada Inc. v. Vesuna,* 2008 BCCA 248 at para. 15. This court may not interfere unless the chamber judge erred in law or in principle, or the judgment is "clearly and palpably wrong" with respect to matters of fact: *Cyprus* at para. 58.

The Impugned Findings

[59] The appellant takes issue with many of the judge's findings of fact, several of which are alleged to be speculative. The impugned findings include that:

- shareholder approval of the Arrangement is real evidence that prudent and informed shareholders viewed the deal price as fair value;
- the small percentage of dissenting shares and shareholders is real evidence that there was no coercion or compulsion to act;
- the EPA liability did not compel the Chaparral shareholders to sell their shares;
- if fair value were in the range of USD $1.60 to $1.85 per share, a superior proposal would have been forthcoming; and
- a prudent shareholder would recognize Paradigm's self-interest to provide a reasonably accurate valuation to protect its business reputation.

[60] The appellant submits that the judge's findings with respect to shareholder approval, and the small percentage of dissenting shares, were in error. The appellant says that broad shareholder approval of the Arrangement is not indicative

of fair value because of free-rider and collective action problems, noting that only 58 percent of shareholders voted. Furthermore, the appellant submits that there are a range of reasons shareholders may sell their shares at a particular price or decline to exercise their dissent rights, even if the deal price were not fair value.

[61] The appellant challenges several of the judge's findings, including the latter three listed at para. 59 above, as speculative and lacking any evidentiary basis. With respect to the judge's consideration of Paradigm's valuation of Chaparral, the appellant says the judge erred by relying on market forces and failing to address Mr. Low's concerns with the Paradigm valuation.

[62] Finally, the appellant argues that the judge erred by ignoring evidence of market failure. The appellant submits that the deal price was only nominally in excess of Chaparral's cash value, thereby ascribing no value to its mining assets. Moreover, the inopportune timing of the EPA's complaint impaired the Board's ability to fully canvass the market, obtain multiple bids, and arrive at the highest possible offer.

Analysis

[63] Absent palpable and overriding error affecting the assessment of facts, findings of fact cannot be overturned on appeal: *Housen* at para. 10. A palpable error is an error that is "plainly seen", while an overriding error is one that is "determinative of the outcome of the case": *Housen* at para. 6; *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.

[64] A judge's findings regarding the weight to be given to expert evidence, including preferring one expert over another, is entitled to deference, absent a palpable and overriding error: *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.* (1997), 143 D.L.R. (4th) 635 at paras. 18–19 (B.C.C.A.), citing *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121–122 (S.C.C.). While it is open to a judge to prefer one expert over another, it is necessary to provide sound reasons for dismissing or according less weight to one of the experts' evidence: *Gill v. Lai,* 2019 BCCA 103 at paras. 46–48.

[65] I have reviewed the judge's findings in some detail above. In essence, the appellant challenges the judge's weighing of the evidence, conclusions on contentious factual matters, and preference of one expert (Mr. Crosson) over another (Mr. Low).

[66] There is simply no basis, in my view, for the appellant's submissions on these issues. There was a solid evidentiary foundation for the judge's findings that are impugned in this court. As such, there is no justification for this court to intervene.

[67] With respect to the expert evidence, the judge was careful to delineate in his Reasons the rationale for his preference of Mr. Crosson's opinions to those of Mr. Low, which included the latter's failure to adequately consider:

- the overwhelming shareholder approval of the Arrangement;
- the deal price, which was negotiated between arm's length parties, where open and unrestricted market forces were engaged;
- the fact that the deal price, in comparison to the original hostile bid offers, included a valuation of Chaparral's mining properties;
- the trading price of Chaparall shares on the TSX; and
- the effect of Chaparral's potential EPA liability, and its disclosure in its SEDAR public filings, on the fair market price of Chaparral shares.

[68] The judge provided sound reasons for preferring Mr. Crosson's market-based analysis over Mr. Low's hypothetical valuations, which are entirely consistent with the approach subsequently affirmed in *Carlock*. Although Mr. Crosson was asked to evaluate whether the deal price was established in the context of a fair market value transaction, rather than providing a comprehensive independent valuation, the judge was entitled to rely on his analysis of market forces in assessing whether the deal price was equivalent to fair value. I can find no error in the judge's approach, nor in his findings of fact with respect to the real evidence provided by market forces.

[69] Accordingly, I would not accede to this ground of appeal.

VII. Disposition

[70] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Grauer"

Most Negative Treatment: Distinguished
Most Recent Distinguished: Railside Developments Ltd., Re | 2010 NSSC 13, 2010 CarswellNS 8, 184 A.C.W.S. (3d) 1138, 62 C.B.R. (5th) 193, 909 A.P.R. 285, 286 N.S.R. (2d) 285, 95 C.L.R. (3d) 54 | (N.S. S.C., Jan 14, 2010)

1991 CarswellNS 33
Nova Scotia Supreme Court, Appeal Division

Bayhold Financial Corp. v. **Clarkson** Co.

1991 CarswellNS 33, [1991] N.S.J. No. 488, 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 294 A.P.R. 198, 30 A.C.W.S. (3d) 832, 86 D.L.R. (4th) 127

BAYHOLD FINANCIAL CORP. LIMITED v. CLARKSON COMPANY LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.

Jones, Hallett and Matthews JJ.A.

Heard: September 18,
1991
Judgment: December 2,
1991
Docket: Doc. S.C.A. 02376

Counsel: *Douglas Caldwell, Q.C.*, and *Joel E. Fichaud*, for appellant.
Harry E. Wrathall, Q.C., and *Stephen Kingston*, for respondents.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Trustee continuing bankrupt's business
XIV.4.b Personal liability of trustee
Headnote
Bankruptcy --- Administration of estate — Trustee continuing bankrupt's business — Personal liability of trustee
Receivers — Duties and liability — Court appointed receiver-manager — Personal liability for excess borrowings — Closing hotel operating at loss not inconsistent with power to manage — No personal liability for breaching contracts entered into prior to receivership.

The appellant B lent money to C, secured by a first and second mortgage against the hotel owned by C. The hotel was failing and C's controlling shareholder was heavily indebted to Revenue Canada. Revenue Canada obtained an order to appoint a receiver-manager who took possession of C's assets. The respondent **Clarkson** was the receiver-manager appointed by the court. **Clarkson** tried to renovate and improve the hotel in order to sell it as a going concern. This failed and the hotel was closed.

In the meantime, B commenced foreclosure proceedings and an order was obtained fixing the amount owed to B. At the sheriff's sale, B purchased the hotel for $200,000. Most of the proceeds were used to pay outstanding realty taxes. The surplus was paid to **Clarkson** as reimbursement for expenses to improve the hotel. The improvement expenses were fixed at a figure $63,000 above what **Clarkson** received at sale, and that balance was found to have priority over B's security with respect to the hotel's chattels. B later entered into an agreement to sell the hotel to E for $1 million including its interest in the chattels. **Clarkson** had tried to purchase the chattels; however, B did not respond. **Clarkson** finally engaged a private security firm to remove the chattels from the hotel. E offered to buy the chattels from **Clarkson**, but **Clarkson** felt that they were worth $120,000 more than E offered. **Clarkson** therefore advised E that they would have to buy the chattels at auction. E then advised B that it would not complete the purchase. B did not re-open the hotel and finally sold it for $450,000 to another party. B sued the respondents **Clarkson**, the chartered accountant in charge of the receivership and **Clarkson's** successor firm for damages for breach of duties as receiver-manager. At trial, the judge dismissed all claims, finding that **Clarkson** was not negligent in performance of its duties. The appellant appealed.

Held:

The appeal was dismissed.

There was no breach of duties by the respondents and the appellant did not suffer recoverable damages as a result of actions by the respondents. The fact that the court order gave the receiver-manager the power to carry on business did not mean that the receiver was not entitled to close the business if it operated at a loss. The receiver-manager is vested with the power to manage the business, but this does not derogate from his or her power to realize on the assets. Even though the receiver-manager did not apply to the court for approval of the closing of the hotel, it did not breach its duty to preserve the goodwill of the debtor since there was no goodwill.

A receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore, the receiver-manager was not held to be liable to pay interest that was payable during the receivership on mortgages made prior to the receivership order. While the receiver-manager should apply to the courts for approval to disregard any executory contracts, he or she is not personally responsible for breaching pre-existing contracts; however, if the receiver-manager adopts pre-existing contracts, he or she becomes personally liable for their performance. The company in receivership continues to be liable for pre-existing contracts that the receiver-manager fails to honour during the term of the receivership.

B, as a secured creditor, allowed the receiver-manager to operate the hotel and took no steps to enforce its floating charge and therefore the change did not crystallize. This then meant that it did not become fixed and therefore the assets of the company in receivership and its revenues, were not attached for the secured creditor other than as an uncrystallized floating charge. The secured creditor cannot have it both ways; that is, allow the business to be operated by the receiver-manager without intervening and then take the position that its floating charge had crystallized upon the appointment of the receiver-manager, and therefore it was entitled to all the money that the receiver-manager collected in its operation of the hotel. B, as first mortgagee in the realty and personalty, could have applied for the appointment of its own receiver if it wished to enforce its floating charge.

Table of Authorities

Cases considered:

Bank of Montreal v. Glendale (Atlantic) Ltd. (1977), 20 N.S.R. (2d) 216 (sub nom. *Glendale (Atlantic) Ltd. v. Gentleman*), 1 B.L.R. 279, 76 D.L.R. (3d) 303 (C.A.) — *referred to*

Crompton & Co. Ltd., Re; Player v. Crompton & Co., [1914] 1 Ch. 954 — *referred to*

Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd., (sub nom. *Rothberg v. Business Development Bank)* 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 (Man. C.A.) — *referred to*

Evans v. Rival Granite Quarries Ltd., [1910] 2 K.B. 979 (C.A.) — *referred to*

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.) — *referred to*

Newdigate Colliery Ltd., Re; Newdegate v. The Co., [1912] 1 Ch. 468 (C.A.) — *applied*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

*R. v. Consolidated Churchill Copper **Corp***., 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C. S.C.) — *referred to*

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.) — *distinguished*

Words and phrases considered:

CRYSTALLIZATION OF A FLOATING CHARGE

The crystallization of a floating charge means that upon the happening of some event or events the charge that had been floating over the assets becomes fixed.

Appeal from judgment of Kelly J. dated October 2, 1990, reported (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.), dismissing action for damages against receiver-manager.

The judgment of the court was delivered by *Hallett J.A.*:

1 This is an appeal from a decision of Kelly J. [reported at 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.)] dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited ("Community") which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver-manager to take possession of the assets of Community; that is, the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver-manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist season and thus obtain a good price for the hotel as a going concern. The hoped-for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981, at $623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for $200,000. The sum of $157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of $42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at $109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of $63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

2 Following the purchase of the hotel by Bayhold at the sheriff's sale, it went into possession and in late 1982 allowed Mr. Rahey (with the approval of Clarkson) to operate the hotel. In the spring of 1983 Bayhold entered into an agreement with Equitas Investment Corp. ("Equitas") to sell the hotel for the sum of $1,000,000 ($50,000 down and the balance secured by two mortgages back to Bayhold).

3 The agreement of purchase and sale provided for the transfer of the real property free from encumbrances but insofar as the chattels were concerned, Bayhold agreed only to transfer its interest. The agreement provided that Bayhold did not warrant the condition or even the existence of the chattels although there was a list of chattels initialled by the parties. The chattels were, of course, located in the hotel and included all the furnishings.

4 The agreement of sale was to close on May 2, 1983. Bayhold was aware that under the Burchell order, Clarkson had a prior charge against the chattels for $63,117.50. Despite repeated requests by Clarkson to Bayhold to purchase the chattels, Bayhold did not respond. Clarkson threatened to remove the chattels. On April 29, 1983, Clarkson engaged a private security firm and the chattels were removed from the hotel. On May 2, 1983, Equitas offered to buy the chattels from Clarkson for about $30,000. The respondent, Mr. Scouler, the chartered accountant with Clarkson who was Clarkson's directing mind in this receivership, refused the offer. He felt the chattels were worth about $150,000. He advised Equitas it would have to purchase the chattels at auction. On May 2, 1983, Equitas advised Bayhold it would not complete the purchase. Bayhold did not re-open the hotel and on November 29, 1983, sold it for $450,000 to a Sydney businessman.

5 Bayhold commenced action against Scouler, Clarkson and its successor firm, the respondent Ernst & Young Inc., claiming damages for breach of duties as receiver-manager up to a maximum amount of $808,339.21 plus prejudgment interest from November 29, 1983 (the date Bayhold sold the hotel) to April 3, 1990 of $519,425.47. The learned trial judge dismissed all the claims, essentially finding that Clarkson was not negligent in the performance of its duties. The appellant Bayhold identified six issues on the appeal; I will deal with each in the order raised by the appellant.

Issue 1

6 The appellant asserts that the respondents Clarkson, Scouler and Ernst & Young are liable for damages to Bayhold for breach of fiduciary duty for failing to apply to the court in April 1981 after Clarkson as receiver-manager had borrowed in excess of $50,000. The appellant asserts that Clarkson was limited, pursuant to the terms of the receivership order, to borrow an amount not exceeding $50,000.

7 It is therefore relevant to look at the terms of the receivership order. It provided for a broad power of management as contained in cl. 3 of the order wherein it is stated:

> 3. THAT The Clarkson Company Limited, be and it is hereby appointed Receiver and Manager of the undertaking; property and assets of each of the Respondents, with authority to manage the business and undertaking of each of the Respondents, and to act at once and until further order of this Court.

Community was one of the respondents named in the receivership order.

8 Specific powers granted the receiver are set forth in cl. 6 of the order:

> 6. THAT the said Receiver and Manager be and it is hereby empowered from time to time to do all or any of the following acts and things until further order of this Court or a judge thereof:
>
> > (a) To carry on and manage the businesses of all of the Respondents, in all phases whatsoever;
> >
> > (b) To enter into negotiations for the sale, conveyance, transfer, assignment, mortgaging or other disposition of the real property and/or shares of the Respondent Companies, owned, legally or beneficially, by any of the Respondents, in such manner and at such price as the Receiver and Manager, in its discretion, may determine, provided that the Receiver and Manager may not enter into any agreement or commitment to sell, convey, transfer, assign, mortgage or otherwise dispose of the real property and/or shares of the Respondent Companies, without prior approval of the Court;
> >
> > (c) To pay such debts of the Respondents, as the Receiver and Manager deems necessary or advisable to properly operate and manage the businesses of the Respondents and all such payments shall be allowed the Receiver and Manager in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents in priority to any other person, company, or corporation, secured or unsecured;
> >
> > (d) For the purpose of carrying out the powers and duties hereunder, to employ, retain, or dismiss such agents, assistants, employees, solicitors and auditors as the Receiver and Manager may consider necessary or desirable for the purpose of preserving and realizing on the said property and assets of the Respondents, and carrying on the businesses and undertakings of the Respondents, and to enter into agreements with any person or corporation respecting the said businesses or properties and that any expenditure which shall be properly made or incurred by the said Receiver and Manager in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents, in priority to any other person, company, or corporation, secured or unsecured;
> >
> > (e) To receive and collect all monies now or hereafter owing to the Respondents;
> >
> > (f) To take such other steps as the Receiver and Manager deems necessary or desirable to preserve and protect the real and personal property of the Respondents, in its custody.

9 The court, pursuant to cl. 7 of the receivership order, authorized the borrowing of up to $50,000 which would be secured against the property and assets of all the respondents, which of course included Community. That clause of the order provided as follows:

> 7. THAT for the purpose of exercising the powers and performing the duties hereunder, the said Receiver and Manager be and it is hereby empowered from time to time to borrow monies not exceeding $50,000.00 by way of revolving credit which may be borrowed and re-borrowed provided that the said limit is not exceeded at any time and that as security

therefor the whole of the said properties and assets of the Respondents, together with all other assets and properties which may hereafter be in the custody or control of the said Receiver and Manager, do stand charged with the payment of the sum or sums so borrowed as aforesaid together with interest thereon in priority to all claims of the Applicant or any other person, secured or unsecured, by which the assets and properties of the Respondents may be encumbered.

10 The receivership was funded by Revenue Canada which advanced funds to **Clarkson** or reimbursed **Clarkson** for moneys **Clarkson** borrowed from the Toronto-Dominion Bank during the period Community was in receivership. By April 1981, **Clarkson** had borrowed in excess of $50,000. The appellant argues this was a breach of the terms of the order and therefore a breach of fiduciary duty that **Clarkson**, as receiver-manager, owed not only to the court but to all the creditors and the debtors. The appellant argues that **Clarkson** was required by law to go back to the court to obtain increased borrowing authority and that **Clarkson's** failure to do so deprived **Bayhold** of an opportunity to make representations to the court that there were other options the receiver-manager could pursue rather than continue with its strategy to keep the hotel open so as to take advantage of the hoped-for increase in occupancy in the tourist season.

11 The premise for this argument is that a receiver-manager must obtain approval of the court before it exceeds the borrowing authorized by the court pursuant to a clause such as cl. 7 of the receiving order and that the failure to do so is a breach of a fiduciary duty that gives rise to the liability of a receiver-manager for unpaid amounts due to creditors of the debtor. In my opinion, that proposition is not valid. The purpose of cl. 7 of the receiving order and like clauses which are common in such orders was to authorize the receiver-manager to borrow up to $50,000 and with respect to such borrowings the receiver-manager would have a charge against the undertaking property and assets of the debtor in priority to other creditors. The only result of a failure to get approval for further borrowings would be that the receiver-manager would have no assurance that the court would retroactively grant the receiver-manager a prior charge against the assets for such excess borrowings. The failure to obtain court approval does not automatically result in the receiver-manager becoming personally liable for the existing contractual obligations of the debtor. In this case, **Clarkson** was being indemnified by Revenue Canada for funds borrowed to operate and manage the hotel business. The receiving order, read as a whole, shows that there was no prohibition against borrowing in excess of $50,000. The receiver-manager was given broad management powers and could borrow up to $50,000 and have a charge against the assets for such an amount. If the receiver-manager chose to borrow more without obtaining court approval, the only repercussion would be that **Clarkson** would not have the comfort of a charge against the assets of the hotel for such excess borrowing.

12 Support for this conclusion is the following statement from *Receiverships* by Frank Bennett (Toronto: Carswell, 1985) where the author states at p. 128:

> The receiver has no authority to borrow more money than has been authorized, including any overdraft position. If the receiver does not obtain a further order for borrowings, he may be prevented from being indemnified out of the assets for expenses incurred unless he can show that such expenses were proper and beneficial to the estate. If the receiver borrows in good faith but for an improper purpose, he will be denied indemnity.
>
> However, the receiver may bring a motion after the event for an order nunc pro tunc, but on such motion, the receiver must demonstrate that the borrowings were properly incurred and that he was justified in the circumstances in exceeding his borrowing limits. It will not be enough to show that the additional expenses were made in good faith and in the ordinary course of business.
>
> If there is no provision in the order authorizing the receiver to borrow moneys, the court may infer such power from the other provisions in the order, particularly the power to carry on the business.

13 Further at p. 216, the author states:

> In the event that the receiver exceeds his borrowing power, or borrows without power to do so, he may be deprived of his right of indemnification out of the assets in receivership to the extent of such amount in excess of his authority. Irrespective of whether the receivership is private or court-appointed such borrowings may be unsecured or at best rank subsequently

> to any prior security unless they can be justified as necessary for the preservation of the property. While each case must be reviewed on an individual basis, it is not enough to show that the further liabilities had been incurred bona fides and in the ordinary course of business. Furthermore, if the debt is incurred on a speculative basis, the receiver will be denied his indemnity.

14 The decision of the Manitoba Court of Appeal in *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.*, *(*sub nom. *Rothburg v. Federal Business Development Bank)* 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 is illustrative that the courts regularly consider whether a receiver should be retroactively indemnified for exceeding the borrowing limits under clauses similar to cl. 7 of the receiving order granted in the case we have under consideration. There are no cases cited by the appellant to support its position that the failure to return to court to have the court authorize borrowing in excess of $50,000 could result in the receiver-manager becoming personally liable for obligations under contracts including the liabilities accruing under mortgages that existed prior to the receiver-manager being appointed.

15 Insofar as the appellant's arguments focus on breaches of perceived duties of receiver-managers, it is important to consider what are the duties of a receiver-manager. The essential duty of a receiver-manager as an officer of the court is to discharge those duties prescribed by the order appointing the receiver-manager. (See *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476.) Bennett, at p. 118, explains the extent of a receiver-manager's duties as follows:

> Notwithstanding that the receiver and manager is an officer of the court, his fiduciary duty to all extends to a standard of care in the running of the business comparable to the 'reasonable care, supervision and control as an ordinary man would give to the business were it his own'. Where he fails to provide such a standard of care, he may be liable for his negligence.

16 That is the standard a receiver-manager's performance must measure up to before liability is imposed. The trial judge found that **Clarkson** was not negligent in the conduct of the receivership. There was ample evidence before the trial judge to support such a finding.

17 In summary, the receiving order gave the receiver-manager broad power of management. Read in the context of the receiving order and the law, cl. 7 did not prohibit **Clarkson** from borrowing in excess of $50,000 while operating the hotel. Therefore, there was no breach of duty giving rise to the liability that the appellant seeks to impose. Accordingly there is, in my opinion, no merit to the first issue raised by the appellant.

Issue 2

18

> Are the respondents liable to **Bayhold** for damages for breach of fiduciary duty for closure of the hotel on November 3, 1981?

19 The clauses in the receivership order relevant to this issue are cls. 3, 6(a), (b), and (f), which have previously been set out. In short, cl. 3 appointed **Clarkson** receiver and manager of the undertaking property and assets of Community with authority to manage the business until further order of the court. Under cls. 6(a) and (b) there were broad and specific powers of management and under 6(f) **Clarkson** could take such steps as it deemed necessary or desirable to preserve and protect the real and personal property of Community. Clause 9 might also be of some relevance in that it provided that the receiver and manager could apply to court from time to time for direction and guidance in the discharge of its duties.

20 It is clear from the order and not uncommon that the receiver-manager could not dispose of major assets without court approval. In this case, the receivership order provided that the receiver-manager could not dispose of the real property or the shares of Community without prior approval of the court. The question raised by the appellant is whether or not the receiver-manager could close the hotel without court approval where it was operating at a loss. The appellant asserts in para. 110 of the factum that the receivership order, para. 6(a), provided that **Clarkson** should

> until further order of this court ... carry on and manage the business of all the Respondents, in all phases whatsoever.

21 Counsel for the appellant argues from this provision that the closure without court approval offended the receivership order and constituted a breach of the receiver-manager's fiduciary duties to **Bayhold**. Accordingly he asserts that the respondents are liable to **Bayhold** for the full amount that was owing on its mortgage as of the date of the foreclosure sale, plus prejudgment interest from that date, for a total claim in excess of $1.3 million.

22 The receivership order does not state what the appellant asserts. Clause 3 provides for **Clarkson's** appointment as receiver-manager of the undertaking, property and assets of each of the respondents with authority to manage the business and undertaking of each of the respondents and to act at once and until further order of this court. **Clarkson** was empowered under cl. 6(a) until further order of the court to carry on and manage the business in all phases. The appellant's argument is that unless a further order of the court was obtained the receiver-manager had an obligation to continue to operate the hotel. The words of cl. 6 granted **Clarkson** the *power* to carry on the business. The clause did not oblige **Clarkson** to do so until further order of the court. There is a major distinction between a power and an obligation; this is the flaw in the appellant's argument. Furthermore, the receiver's general power of management seems to me to entail full scope of management responsibilities including, as provided for in para. 6(f), the right of the receiver-manager to take such steps as it deems necessary or desirable to preserve and protect the real and personal property of Community. The only power given to the receiver-manager in the order that could not be exercised without court approval would be the sale or mortgaging of the real property or shares of the respondent companies, including Community. When the receivership order is read as a whole, there is no limitation placed on the scope of the receiver's powers of management other than if he chooses to sell or mortgage the real property or the shares of the respondent companies. The order does not expressly require that he keep the hotel open or obtain court approval before closing. Does the law impose such a duty on a receiver-manager?

23 The appellant submits that if **Clarkson** had applied to the court in October or November of 1981 for approval of its intention to close the hotel, the court would have terminated the receivership for the hotel and returned the hotel to Community. He asserts that this would have permitted Community to operate the hotel until the most propitious moment for a sale and that in all likelihood an offer in the range of $1,000,000, as eventually was offered by Equitas in April 1983, could have been obtained and **Bayhold's** mortgage would have been paid out. It should be noted that by the fall of 1981, prior to the closure of the hotel, **Bayhold** had already commenced foreclosure proceedings. With respect to the arguments advanced by the appellant, it is a matter of speculation as to what would have happened had **Clarkson** applied to the court for approval to close the hotel. It is quite clear the operation of the hotel was incurring very substantial deficits. It is more likely that the court would have approved of the closing of the hotel rather than return it to Community which had no apparent ability to **finance** the continued operation of the hotel.

24 The appellant relies on certain statements from Bennett on *Receiverships* that **Clarkson** could not have closed the hotel without court approval. At p. 118 Bennett states:

> As a fiduciary to all, the court-appointed receiver must manage and operate the debtor's business as though it were his own. He cannot therefore, without court approval, close the business down or repudiate executory contracts.

25 Bennett does not cite any authority for the statement that the receiver-manager cannot close the business without court approval.

26 At p. 119 of text, Bennett states:

> As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business.

27 Does this statement lead to the conclusion that **Clarkson** should have applied to the court before closing the hotel? Is the statement supported by the authorities? Bennett appears to cite as authority for this proposition the case of *Re Newdigate*

Colliery Ltd.; Newdegate v. The Co., [1912] 1 Ch. 468 (C.A.). However a review of that case does not support such a broad statement. The *Newdigate* case is authority for the following valid proposition (p. 468):

> It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

28 In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims.

29 Again it is important to remind oneself that the duty owed by a receiver-manager is to exercise reasonable care in the management and operation of the business. The trial judge found **Clarkson** was not negligent in deciding to close the hotel. There was no duty specifically imposed on **Clarkson** pursuant to the receivership order to keep the hotel open until such time as it obtained approval of the court to close it. While it may have been prudent to obtain such approval in view of the statements in Bennett, there was no obligation under the receivership order to do so. There is no case law in support of the statement made in Bennett that a receiver-manager cannot close a business without approval of the court.

30 What Bennett was probably referring to is the recognized duty of the receiver-manager, not only to preserve the property of the debtor, but also the goodwill of the debtor's business if there is any. Certainly if a business is operating at a profit or there is goodwill it would be a breach of the receiver-manager's duty, to the debtor at least, to close the business. The receiver-manager under such cir cumstances would require court approval before doing so as on its face it would appear that the receiver-manager would be in breach of the duty to preserve the goodwill. It would be for the receiver-manager to satisfy the court that under all the circumstances a liquidation of the business was reasonable. Whether that duty extends to the creditors I have some doubt. However, the receiver-manager does have a duty to creditors to operate the receivership with reasonable care so as not to unfairly affect the interest of all the persons affected by the receivership; that is, debtor and creditors, and has a duty to the court to act in accordance with the terms of the order and the law.

31 In dealing with the appellant's argument on this issue, it may be useful to consider the *nature* and *purpose* of a receiver-manager's appointment. The remarks of Cozens-Hardy M.R. at p. 472 of the *Newdigate* case, supra, are relevant; he stated:

> The jurisdiction of the Court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency.

32 The point being that while a receiver-manager is empowered to carry on the debtor's business, it is contemplated that eventually there will likely be a liquidation notwithstanding that the receiver-manager has a duty to preserve the property and the goodwill of the business. The trial judge found in this case there was no goodwill at the time when **Clarkson** made its decision to close the hotel. The evidence could lead to no other conclusion. In my opinion, the failure to apply to the court for approval to close the hotel on the facts of this case did not breach any duty **Clarkson** owed to **Bayhold**. Furthermore, the law is clear that if a debtor or creditor feels adversely affected by any action of a receiver-manager the person may apply to the court to protest the action and the complainant must prove the receiver is in breach of his duties. **Bayhold** made no such application but continued with its foreclosure action. I reject the argument by the appellants that this proceeding is **Bayhold's** complaint. The time to apply would have been in November 1981, not years later when this action was commenced.

33 The position of **Bayhold** on the first two grounds of appeal is interesting. On the one hand, **Bayhold** asserts that **Clarkson** should have applied to the court in April 1981 to approve an increase in its borrowing and at that time **Bayhold** argues if such an application had been made it could have made submissions to the court that the hotel should have been sold as early as April

1981 as it was losing money and there was no need to wait for the summer season to show that it could not be viable. Yet despite its argument that the hotel should have been sold in April 1981, it objects to Clarkson having closed the hotel in November of 1981, arguing that the hotel should have been kept open to facilitate a sale as an ongoing concern. It is difficult to reconcile these positions except to say that one argument is needed to support the first ground of appeal and the latter argument the second.

34 In summary, the essence of a receiver's powers is to liquidate the assets. On the other hand, a receiver-manager is vested with the additional power to manage the business, but this does not derogate from his power to realize on the assets. His management duty, if I can call it that, is to act with the care an owner would exercise in the running of his own business subject of course to the terms of the court order appointing him receiver-manager. In this receivership, as in most, the powers to manage are broad. There is nothing in the order that required the receiver-manager to obtain court approval before closing the hotel. Justice Kelly found this was a valid business judgment considering all the circumstances and I agree. The receiver-manager had the power pursuant to cl. 6(f) of the order to preserve the assets; the hotel was losing money, the receivership had turned out to be a financial disaster and closing it to await the foreclosure sale was a reasonable judgment to preserve the property. The receiver-manager did owe a duty to act reasonably in the conduct of the hotel business so as to preserve the goodwill and the property of Community in the interests of not only Community but all the creditors, including the appellant. The fact that Clarkson did not apply for court approval of the closure is not a breach of his duty to preserve the goodwill of Community in view of the finding of the trial judge that there was no goodwill, a fact which the receiver was well aware of at the time of the closure. Furthermore, even if Clarkson had breached its duties, the learned trial judge found as a fact that the closure did not cause any loss to Bayhold. There was evidence to support this conclusion. There is no need to go into detail with respect to this finding, as I have disposed of Issue 2 on the ground there was no breach of any duty owed by Clarkson to Bayhold. Therefore I reject the appellant's argument that on this ground the respondents are liable to Bayhold for $808,339.21 plus prejudgment interest.

Issue 3

35

> Are the respondents liable to Bayhold for damages resulting from the trespass on April 29, 1983, causing loss of the Equitas sale of $1,000,000?

36 This issue is framed by the appellant in such a way that it assumes the trespass and the removal of the chattels caused the loss of the Equitas sale. The only impropriety which surrounded the chattels removal was Clarkson's failure to obtain a recovery order from the court. The hotel had been purchased by Bayhold at the sheriff's sale on January 13, 1982, and Clarkson had agreed to leave the chattels in place rather than remove them for storage. The sale of the realty by the foreclosure order did not include a sale of the chattels. The chattels were still owned by Community and were subject to a first charge in favour of Clarkson for the balance of the preservation expenses and were subject to a second specific charge and a floating charge in favour of Bayhold under the terms of its security document.

37 The appellant's argument is that by removing the chattels the receiver-manager committed a trespass and that this trespass was the cause of Equitas refusing to complete the agreement to acquire the hotel from Bayhold for $1,000,000.

38 The trial judge clearly directed himself to the appropriate question when he rhetorically stated at p. 129 of his decision [p. 145 N.S.R.]:

> Although Clarkson's method of seizing the chattels from Bayhold was improper, is Equitas (sic) correct when it alleges that this action caused a loss to Bayhold, in that it resulted in Equitas properly refusing to perform the agreement of purchase and sale?

39 After dealing with a number of issues raised by Bayhold on this question, the trial judge decided as follows (p. 132 [p. 146 N.S.R.]):

> Before Bayhold can succeed in this aspect of the claim, it must satisfy the Court that the negligent or trespass action of Clarkson was the cause of its failure to complete its contract with Equitas, and that it suffered a measurable loss from this

failure. On the face of it, Bayhold has not satisfied me that the agreement of purchase and sale incorporated a condition that the hotel be a going concern at the time of the closing, nor have they satisfied me that there was a collateral enforceable agreement to this effect. I therefore cannot conclude that the precipitous and inappropriate seizure action initiated by Mr. Scouler on behalf of Clarkson was the cause of a breach of contract. Bayhold was in a position to provide to Equitas all of the apparent requirements of the written agreement.

40 The trial judge, in effect, found that the seizure of the chattels by Clarkson was not the cause of Bayhold's losing the sale to Equitas as there was no requirement in the agreement of sale that the chattels be even in existence let alone in the hotel. The learned trial judge found that Bayhold didn't satisfy him that there was a collateral agree ment (outside the written agreement between the parties) that the hotel would be a going concern on May 2, 1983, the closing date. The trial judge found that Bayhold could comply with the requirements of the written agreement. The evidence is clear that Bayhold did not sue Equitas on the agreement. The trial judge found that the conduct of both Bayhold and Clarkson with respect to events surrounding the proposed sale to Equitas was somewhat tainted. He stated (pp. 131-132 [p. 146 N.S.R.]):

> Neither Bayhold nor Clarkson come to court with very clean hands in the matter of Equitas refusing to complete the sale of the hotel. Clarkson took possession of the chattels without proceeding in the appropriate way with a recovery order, and its agent removed furniture in a clumsy way causing some minor damage to the hotel. The agent also removed furniture and fixtures in which Clarkson had no claim. Bayhold was less than candid with Equitas about the nature and extent of the claim of Clarkson to the chattels, and did not give Equitas notice of the clear warning from Clarkson that it would take action to remove the furniture if some satisfactory arrangement was not made with respect to its claim. As well, Bayhold did not bargain in good faith regarding the retention of the chattels.

41 The appellant asserts that the trial judge erred when he seemed to conclude that Bayhold would have had to sue Equitas before coming against Clarkson. This argument is based on the following statement by the trial judge at p. 132 [p. 147 N.S.R.]:

> Bayhold has not tested the validity of its proposition by a legal action to enforce the agreement or for damages. If Bayhold had brought an action to enforce its agreement by way of specific performance, or an action for damages for the breach of the contract, it would have recovered to the same extent that it now seeks to recover from Clarkson. If it had taken this action and failed on the basis that there was a binding term of the contract that the property be a going concern, then an action against Clarkson might be sustainable. However, I am not satisfied that Bayhold would not have succeeded in its action to enforce the contract against Equitas, and I must therefore conclude that Bayhold cannot succeed on this alternative claim.

42 I tend to agree with Bayhold's assertion that there was no requirement that Bayhold sue Equitas on the agreement before pressing any claim it might have against the receiver-manager for damages arising from the removal of the chattels. However, that does not assist the appellant. The trial judge was not satisfied the removal of the chattels was the cause of Bayhold losing the sale to Equitas. There is evidence to support such a finding as despite the removal of the chattels from the hotel on April 29, 1983, Equitas was prepared to buy the chattels from Clarkson for $30,000 on May 2, 1983. Therefore, the removal per se was not the fact which caused Equitas to refuse to complete. It would appear that the reason this sale fell through was that Bayhold did not own the chattels and Equitas was unable to buy the chattels from Clarkson for a price Equitas was prepared to pay. While technically Clarkson had no right to enter the hotel premises in the possession of Bayhold and remove the chattels without a recovery order, Bayhold was well aware that the chattels were owned by Community and aware of Clarkson's prior secured claim to the chattels. In addition, Clarkson had repeatedly requested a decision from Bayhold as to whether it intended to purchase the chattels and, if not, Clarkson would remove them. The trial judge found that Mr. Scouler mistakenly believed the order of Burchell J., dated January 6, 1983, in which the receiver-manager was granted a prior charge against the hotel and the chattels to the extent of the preservation expenses was sufficient authority from the court to seize the chattels on April 29, 1983. I would note that the order provided as follows:

> AND IT IS FURTHER ORDERED that The Clarkson Company Limited is entitled to the chattels in The Isle Royal Hotel in priority to Bayhold Financial Corporation Limited and Romiss Sales Limited to the extent that the expenses exceed the surplus proceeds of the foreclosure and sale of The Community Hotel Company Limited

43 At most, the trespass was technical. Under the circumstances that existed on or about April 29, 1983, it is likely that **Clarkson** could have obtained from the court a recovery order to remove the chattels from the hotel premises as **Bayhold** had no legal right to retain them as title to the chattels was still vested in Community and **Bayhold** knew its interest in the chattels as mortgagee was subject to the prior charge of **Clarkson** in the amount of $63,117.50. Equitas knew **Bayhold** was not warranting even the existence of the chattels, so Equitas ought to have been alert although not fully informed by **Bayhold** that there was a problem with respect to the transfer of the chattels that were in the hotel. The trial judge's conclusion that the seizure of the chattels was not the cause of **Bayhold** losing the sale to Equitas was based on the trial judge's view that there was no agreement between **Bayhold** and Equitas that the sale of the hotel was to be as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of **Bayhold** under the sale agreement. The terms of the agreement support this conclusion.

44 When one looks at all the facts surrounding this sale to Equitas, the removal of the chattels was certainly not the real cause of Equitas's failure to complete the agreement to purchase the hotel. Apart from the reason identified by the trial judge, **Bayhold** cannot be heard to complain too much about this lost sale being caused by **Clarkson's** removal of the chattels because **Bayhold**, by purporting to sell the chattels to Equitas pursuant to the terms of the agreement, was holding out to Equitas that it owned the chattels, whereas in fact it did not. The chattels were owned by Community and were subject to a first charge to **Clarkson** and then a second charge to **Bayhold**. **Bayhold** had no right to sell the chattels and can hardly be heard to assert that it lost the sale because **Clarkson** removed them from the premises. **Bayhold** really lost the sale because it didn't own the chattels; it didn't have any right to sell them in the first place and Equitas wasn't able to buy them at a price Equitas was prepared to offer to the receiver-manager.

45 There isn't any need to deal with the issue whether the trial judge was in error when he suggested **Bayhold** must first sue Equitas for a breach of contract before claiming damages for trespass.

46 I reject **Bayhold's** claim for damages which it asserts arises as a result of the trespass on April 29, 1983. The sale to Equitas was not lost because of **Clarkson's** technical trespass.

Issue 4

47 The appellant sets out this issue as follows:

> Are the respondents liable to **Bayhold** for mortgage interest owing to **Bayhold** during the term of the receivership until **Bayhold** acquired the hotel at the foreclosure?

48 The short answer is "no"; the receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver-manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:

> I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is un der any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

49 Buckley L.J. in the same case made it abundantly clear that receiver-managers are not personally bound by existing contracts. He stated at pp. 476-477:

> As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all.

50 In support of the argument that the receiver-manager is obliged to pay mortgage interest to **Bayhold**, the appellant relies on certain statements by Bennett, *Receiverships*, and Sir R. Walton and M. Hunter, *Kerr on Receivers and Administrators*, 17th ed., (London: Sweet & Maxwell, 1989), the essence of which is that a receiver-manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver-manager is obliged to preserve (*Kerr*, pp. 31, 207, 219-220; *Halsbury's Law of England*, 4th ed., vol. 39 (London: Butterworths, 1982) (Receiverships) at para. 982; Bennett's *Receiverships* (1985), pp. 119, 110 and 118).

51 The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver-manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver-manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from *Kerr* at pp. 219-220 with emphasis by the appellant as follows:

> The receiver and manager is the agent neither of the company nor of the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, *subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment. Such contracts, unless they are contracts depending on personal relationship, such as contracts of employment, remain valid and subsisting, notwithstanding the appointment of a receiver and manager*. Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. *In this respect, a manager differs from a receiver appointed over the assets without any power to carry on the business*, who is under no obligation and has no power to carry out these contracts, nor to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts. *A manager must not, without leave of the court, disregard the contracts* in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages; *nor must he pick and choose which contracts he will carry out as being most profitable*.

52 The appellant's factum does not highlight the sentence which states that "[a]ny breach [of pre-existing contracts] will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business." This statement in *Kerr on Receivers and Administrators* is consistent with the views expressed by the justices who rendered opinions in the *Newdigate* case.

53 The reasons a receiver-manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver-manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver-manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver-manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver- manager only in the general sense that the receiver-manager must honour them to preserve the goodwill of the business. In Bennett on *Receiverships*, at p. 223, the author states:

> At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not he should complete those contracts.

> In a court-appointed receivership, the *receiver is not bound by existing contracts made by the debtor*. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[Emphasis added.]

54 The statement which I have underlined in Bennett is a contradiction of the following statement made by Bennett at p. 110 of his book on *Receiverships* and upon which the appellant relies: "The receiver will be bound by the terms of existing contracts. However, the receiver may move before the court for an order to breach such contracts." Bennett was merely making a general statement; the footnotes refer the reader to his section on contracts which starts at p. 223 where he makes a more specific statement, which I have quoted, and then goes on to discuss the *Newdigate Colliery* case.

55 That the receiver-manager is not personally liable for breaking pre-existing contracts is clear from the statements of the justices in the *Newdigate Colliery* case. Of course, if the receiver-manager adopts pre-existing contracts he then becomes personally liable for their performance. That is not the situation we have here. With respect to pre-existing contracts, it is the company in receivership that continues to be liable for such contractual commitments if the receiver-manager fails to honour them during the term of the receivership. That is all that the case of *Parsons v. Sovereign Bank of Canada*, supra, stands for.

56 There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:

> The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

57 The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts. The preservation of the goodwill of the hotel, if there was any, did not require payment of mortgage interest as the income from the operations was insufficient to do so. In short, the appellant has read into the case law and the statements in the text books a duty on a receiver-manager that he honour contracts and that if he does not he incurs personal liability for the breaches notwithstanding he was not a party to the contracts. The case law does not support such a proposition and, in fact, it supports the contrary (*Newdigate* case). The appellant had a remedy as a secured creditor which it eventually exercised to foreclose the mortgage and have the real property sold by the sheriff pursuant to court order. In conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

Issue 5

58

Did **Bayhold** have priority over **Clarkson** for monies disbursed by **Clarkson** over $109,608.73?

59 The appellant argues that all receipts from the continuation of the hotel business during the receivership including borrowings from the Toronto-Dominion Bank plus realizations from the liquidation of the assets ought to have been paid to **Bayhold** to pay out the mortgages held by **Bayhold** on Community's property before any receipts were used by **Clarkson** to pay the expenses of the receivership (except to the extent of $109,608.73 found by Burchell J. to have been expenditures by **Clarkson** for preservation of Community assets and therefore having priority over **Bayhold**). The appellant's argument on this issue rests on the assertion that there was an automatic crystallization of **Bayhold's** floating charge on Community's assets and undertaking when, on February 1, 1981, Burchell J., upon the application of Revenue Canada as a creditor of Community, appointed **Clarkson** receiver-manager. The appellant asserts that the "authorities are overwhelmingly" in support of this argument.

60 The learned trial judge found that there was no automatic crystallization and that **Bayhold** would have to have intervened by appointing its own receiver to have crystallized its floating charge. The appellant asserts that the trial judge considered none of the case law in support of their position that the floating charge had crystallized upon the appointment of **Clarkson** as receiver-manager. The appellant cites the following cases [and authorities] in support of the argument:

Bank of Montreal v. Glendale (Atlantic) Ltd. (1977), 20 N.S.R. (2d) 216 (sub nom. *Glendale (Atlantic) Ltd. v. Gentleman*), 1 B.L.R. 279, 76 D.L.R. (3d) 303 (C.A.), at pp. 250-251 [N.S.R.];

Palmer's Company Law, Clive M. Schmitthoff and James H. Thompson, 21st ed. (London: Steven & Sons Limited, 1968) pp. 396-397;

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.), at p. 220 [C.B.R.];

Kerr on Receivers and Administrators, 17th ed., pp. 50-51;

Evans v. Rival Granite Quarries Ltd., [1910] 2 K.B. 979 (C.A.), at p. 1000;

Re Crompton & Co. Ltd.; Player v. Crompton & Co., [1914] 1 Ch. 954;

Bennett, *Receiverships* (1985), p. 48;

Gough, *Company Charges* (London: Butterworths, 1978), pp. 84-86;

Lightman, G. & G. Moss, *The Law of Receivers and Companies* (London: Sweet & Maxwell, 1986), p. 28.

61 I have reviewed the authorities cited by appellant's counsel and would note that the statements referred to in the *Glendale* case are quotations from texts simply describing the nature of a floating charge and are not of great assistance in dealing with the issue before us as the statements do not address the issue whether a holder of such a charge must intervene to crystallize the floating charge. However, the statements do set out a point of view on crystallization. The general statement from *Palmer's Company Law* as referred to in the *Glendale* decision at p. 250 [N.S.R.] reads in part as follows:

> Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it 'crystallizes', and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallize on the appointment of a receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ...

62 In *Irving A. Burton v. Canadian Imperial Bank of Commerce*, supra, the case involved an assignment of book debts. On the facts of that case, anyone would agree that an assignment of book debts made in compliance with the applicable legislation would take priority, with respect to the book debts, over a subsequent assignment in bankruptcy.

63 With respect to the statement in *Kerr on Receivers and Administrators*, 17th ed., at pp. 50-51, the author is referring to situations in which a receiver will be appointed and does not address the issue as to when exactly a floating charge crystallizes and what is the effect of the so-called crystallization.

64 The *Crompton* case, supra, doesn't address the issue raised by the appellant in this case. In *Crompton* the debenture holders applied for and were granted an order appointing a receiver when the company ceased to do business. Here, **Bayhold** never applied for the appointment of a receiver.

65 With respect to the statement on p. 48 in Bennett, *Receiverships*, the author makes a general statement that "if the business ceases or is disposed of as a business, the floating charge automatically crystallizes since the debtor is no longer in business". No authority is cited by the author for this proposition but it is consis tent with the statement from *Palmer* previously quoted.

66 In Gough, *Company Charges* (1978), pp. 84-85, the author states:

> Since a specific charge over trading assets was considered necessarily to bring about the consequence of paralysis or stoppage of the business, it can be seen that the first moment when it might be envisaged, according to the intention of the parties as expressed in the security contract, that the process of crystallization might come about is when the business of the company for some reason or other ceases to operate on a continuing and going basis; in short, when the business stops. The business might stop by virtue of a decision made by the company management (and therefore ultimately membership), or else by virtue of the decision of any company creditor, including the creditor secured by floating charge, to initiate proceedings towards that end. The company is, respectively, either unwilling or unfree to carry on its ordinary business so that, as far as the company management is concerned, it is unwilling or unable any longer to appropriate its property in the ordinary course of business for purposes other than that of the security. Obviously, in either case it is the intention of the parties under the security contract, with the purpose of the floating charge having been served and the disadvantage of a specific charge over trading assets, viz., to cause a paralysis or stoppage of the business, no longer being relevant, that such circumstances constitute the natural time for the conversion of charge from being hitherto floating into a specific security.

67 I agree with the above as a general statement as to the nature, purpose and effect of a floating charge as opposed to a fixed charge.

68 In Lightman & Moss, *The Law of Receivers and Companies* (1986), p. 28, the general statement dealing with the crystallization is as follows:

> A floating charge will crystallize on the appointment of a receiver (whether by the debenture-holder under the debenture or the court) or on the commencement of winding-up (even if the winding-up is merely for the purposes of reconstruction) or on the cessation of business.

69 It is to be noted that this statement is made in the context of a chapter entitled "The Basis of Appointment of Receivers"; the statement must be looked at in that light.

70 The crystallization of a floating charge means that upon the happening of some event or events the charge that had been floating over the assets becomes fixed.

71 To the extent there are conflicting views as to when a floating charge crystallizes and the effect of the same, I am attracted to the reasoning of Berger J. in *R. v. Consolidated Churchill Copper **Corp***., 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C.S.C.) that before the floating charge in favour of a mortgage or debenture holder crystallizes, that is becomes fixed on all the assets and undertakings of the debtor, the holder must intervene by going into possession or by bringing an application for the appointment of a receiver.

72 In that case, Berger J. analyzed the decisions which deal with the subject of automatic crystallization including the decision in *Evans v. Rival Granite Quarries*, supra, and concluded that it was only Buckley L.J. in the *Evans* case who took the view, in obiter, that a floating charge might crystallize without intervention. Berger J. referred to L.C.B. Gower, *Modern Company Law*, 3rd ed. (1969) in which the author stated at p. 421:

> Default alone will not suffice to crystallize the charge, the debenture-holders must intervene to determine the licence to the company to deal with the property, normally by appointing a receiver or by applying to the court to do so.

73 Berger J. went on to state that there has been no judgment rendered in Canada on the issue of automatic crystallization. I agree with the policy enunciated by Berger J. in the following passage from his decision (pp. 41-42 [C.B.R.]):

> But there has been no judgment rendered on the question in Canada. The matter is one of first impression. So policy considerations should be placed on the scales. These considerations weigh heavily against the adoption of the motion of self-generating crystallization. In the case at bar there were numerous acts of default, going back to 1972. Brameda did not, until 14th April 1975, take the position that the floating charge had crystallized. If in truth it had crystallized back in 1972, when Brameda acquired the bank's interest in the debenture, Brameda did not treat the company thereafter as if its licence to carry on business was at an end. Brameda sought to have it both ways: to attain priority over the province's lien without putting Churchill into receivership. This shows the parlous state of affairs which would result if the concept of self-generating crystallization were to be adopted. The requirements for filing by a receiver under the *Companies Act* would be rendered a dead letter. The company would not know where it stood; neither would the company's creditors. How is anyone to know the true state of affairs between the debenture-holder and the company unless there is an unequivocal act of intervention? How can it be said that the default by the company terminated its licence to carry on business when in fact it was allowed by Brameda to carry on business for three years thereafter? If the argument were sound, the debenture-holder would be able to arrange the affairs of the company in such a way as to render it immune from executions. The debenture-holder would have all the advantages of allowing the company to continue in business and all of the advantages of intervening at one and the same time, to the prejudice of all other creditors. This contention was rejected in the *Evans* case: see Vaughan Williams L.J. at pp. 989-990, and Fletcher Moulton L.J. at p. 995.
>
> It is my view that not in the older cases nor in the recent cases nor in the exigencies of policy is there any justification for the adoption of a concept of self-generating crystallization. If there is any practical scope for such a theory it does not extend to a case where the conduct of the debenture-holder is inconsistent with the assertion of any such claim.
>
> This brings me back to the wording of the floating charge in the case at bar. It says that 'such floating charge shall in no way hinder or prevent the company ... until the security hereby constituted shall have become enforceable from ... dealing with the subject matter of such floating charge in the ordinary course of its business.' Condition 6 of the debenture says: 'If the security hereby constituted shall become enforceable the Banks (Brameda) may be instrument in writing ... appoint any person ... to be a receiver ... of the property and assets hereby charged.' The point is that default by the company renders the floating charge enforceable. To that extent, default is a hindrance to the company, i.e., the debenture-holder has the right to intervene when he pleases. But in order to terminate the company's licence to carry on business, the debenture-holder must in fact intervene. This is provided for by the very language of the debenture itself. While the security may become *enforceable* on default, still the debenture-holder must intervene to *enforce* his security before it crystallizes.

74 In the case we have under consideration, the floating charge in favour of the appellant (the pledge agreement dated July 24, 1974) provides for the standard two-step process for the enforcement of the floating charge. Although the appointment of a receiver gave rise to a default just as did the failure to pay moneys due from Community to **Bayhold**, the terms of the pledge agreement (cl. 6 of the debenture) provided: "At any time after the happening of any event by which the security hereby constituted becomes enforceable, the chargee shall have the following rights and powers". There were then listed a number of powers **Bayhold** could exercise, including the power to appoint a receiver.

75 Therefore, although the charges created by the security document became enforceable upon the appointment of **Clarkson**, **Bayhold** would have to have taken proceedings under cl. 6 to appoint a receiver or exercise any of the other powers mentioned before the security would be enforced. **Bayhold** did not exercise its right under the provision of the security document, but allowed the hotel to be operated by **Clarkson** under the receiving order that had been granted. **Bayhold** took no formal steps to enforce the floating charge and therefore applying the decision in the *Consolidated Churchill* case, the charge did not crystallize. That means it did not become fixed, therefore Community's assets and revenues were not attached for the benefit of **Bayhold** other than as an uncrystallized floating charge. **Bayhold** cannot have it both ways; that is, allow the business to be operated by the receiver-manager without intervening itself and then subsequently take the position its floating charge had crystallized upon the appointment of **Clarkson** and that it was therefore entitled to all the money that went into the bank account opened by the receiver-manager in connection with its operation of the hotel. That would create an impossible and inequitable situation for all creditors and receivers.

76 **Bayhold**, as the first mortgagee on the realty and personalty and holder of the first floating charge on the undertaking, could have applied for the appointment of its own receiver if it wished to enforce its floating charge. It chose not to do so for the obvious reason it did not want to take on the task of providing money to run the hotel in the summer of 1981; a task which was so graciously accepted by the Canadian taxpayers.

77 In summary, for the policy reasons enunciated by Berger J. coupled with the fact that the terms of the security document held by the appellant provided separately for, (i) events of default (for example, the appointment of a receiver being in the event of a default), and (ii) enforcement; the appellant, to crystallize its floating charge security, would have had to intervene by application to appoint a receiver of its own or have gone into possession. The appellant did not make any such application to court, nor did it go into possession until after it acquired the hotel at the sheriff's sale. Therefore, I reject the appellant's argument that it was entitled to all revenues that came into the hands of **Clarkson** while operating the hotel.

78 **Bayhold** also argues that because it did not get notice of Revenue Canada's application to the court to appoint **Clarkson** receiver-manager, **Bayhold** is entitled to all moneys received by **Clarkson** during the receivership. The appellant relies on the case of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.). The *Kowal* case does not support the appellant's argument. In the *Kowal* case the Ontario Court of Appeal simply said a receiver-manager could not have a charge against the mortgagee's security for the amounts that the receiver-manager had paid to the mortgagee during the period of the receivership as the payments were not made for the preservation of the property and therefore not for the benefit of all the creditors. In the case we have under consideration, **Clarkson's** expenditures in operating the hotel were for the benefit of all the creditors and **Clarkson** did not get priority over **Bayhold** against the hotel assets except to the extent of the preservation expenses in the amount of $109,608.73. **Bayhold**, by commencing foreclosure proceedings and having the real property sold by the sheriff, realized on its security against the real property. However, the surplus from the sheriff's sale and the realization from the sale of the hotel chattels was insufficient to pay **Clarkson's** "preservation expenses". Other than with respect to the "preservation expenses", the receiver-manager did not subject **Bayhold's** security to recover the receiver-manager's expenditures in operating the hotel; these expenses were paid out of the borrowings from the Toronto-Dominion Bank and advances from Revenue Canada. In summary, the *Kowal* case does not stand for the proposition that all revenues or realizations on the sale of assets during a receivership must be turned over to a creditor with an uncrystallized floating charge against the assets and undertaking of the company in receivership simply because the holder of the floating charge was not given notice of the application to appoint a receiver-manager.

79 In summary in Issue 5, **Bayhold** does not have priority over **Clarkson** for moneys disbursed by **Clarkson** during the receivership.

Issue 6

80 As framed by the appellant: "Is **Clarkson** liable to **Bayhold** for the damage to the building caused by fires and a flood during the receivership?"

81 During receivership there were two fires which caused damage to the boiler room and the Sadat Room (a conference room). **Clarkson** received and kept the fire insurance proceeds of $13,773.07. **Clarkson** did not repair all the damage to the boiler room because it was not necessary for the operation of the hotel.

82 With respect to the flood damage, the following facts are relevant. The hotel had been closed on November 3, 1981, and the heat turned down. On January 13, 1982, **Bayhold** purchased the hotel at the sheriff's sale. Mr. Scouler had undertaken to one of the counsel for **Bayhold** to keep the hotel premises safe and secure. On January 20, 1982, a Ms Bagnell, who was employed by **Clarkson** at the time, before leaving the hotel during a period of cold weather decided it would be prudent to flush some of the toilets to loosen up any ice clogging the pipes as the heat had been turned back. During the night the pipes froze and there was substantial damage done.

83 As **Bayhold** wished to sell the hotel as a going concern, it allowed Mr. Rahey to go into possession and operate the hotel. Mr. Rahey repaired most of the fire and flood damage caused during the receivership. The appellant asserts that Mr. Rahey did so at a cost of $125,000 and that Mr. Rahey was setting this off against Community's outstanding mortgage debt to **Bayhold**. **Bayhold** claims $125,000 from the respondents which it says it owes to Rahey for the work to repair the fire and flood damage. The learned trial judge found that the care of the hotel by **Clarkson** in this period was adequate under the circumstances and that none of the physical damage was caused by the negligence of **Clarkson**. The trial judge also concluded that **Bayhold** had not suffered recoverable damages as a result of the actions even if **Clarkson** had been negligent.

84 With respect to the claim of $125,000 the respondents make the following points in their factum:

> **Bayhold** claims that in 1982-83 Rahey repaired damages sustained by the hotel during the receivership, at a cost of some $125,000.00. **Bayhold** further claims that Rahey is now 'setting-off' these repairs as against his debt to **Bayhold**. It seeks damages in the same amount as against **Clarkson** as a result. **Clarkson** makes the following points in response:
>
> > (a) The learned trial judge found as a matter of fact that **Clarkson** had maintained adequate precautions and performed adequate remedial measures and was not responsible in negligence for any physical damage to the hotel;
> >
> > (b) Little or no evidence was provided with respect to repairs performed by Rahey, or the value of any such repairs;
> >
> > (c) Little or no evidence was provided with respect to any attempt by Mr. Rahey to set-off the amount of any such repairs as against **Bayhold**. Mr. Rahey had not claimed the cost of repairs as against **Bayhold** in the eight years which had elapsed since repairs allegedly took place;
> >
> > (d) Both Alan Feldman and Gordon MacLean testified that Rahey operated the hotel on the basis that he would contribute necessary repairs, pay mortgage interest, and pay most operating expenses and, in return, be entitled to keep all hotel revenue. *By **Bayhold's** own evidence, accordingly, Rahey has no basis to claim the cost of any repairs as against **Bayhold***.

[Emphasis added.]

85 I am satisfied based on the points made by the respondents, as set out above, that the learned trial judge did not commit error when he concluded that **Clarkson** was not responsible to **Bayhold** for the $125,000. The evidence does not support a finding for the appellant on this issue. By **Bayhold's** own evidence the damage was repaired by Rahey pursuant to the agreement they made with him. Based on that agreement alone, Mr. Rahey has no right of recovery against **Bayhold** for any expenditures made to repair the fire and flood damage while he was operating the hotel. Mr. Rahey has not commenced an action in which he has made such a claim. The evidence supports the trial judge's conclusion that **Bayhold** did not suffer recoverable damage as a result of the actions of **Clarkson**.

86 In summary, I would dismiss the appeal with costs to the respondents to be taxed.

Appeal dismissed.

End of Document

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.,*** 2008 BCSC 897

Date: 20080709
Docket: H070700
Registry: Vancouver

Between:

bcIMC Construction Fund Corporation

Petitioner

And

Chandler Homer Street Ventures Ltd.,
Chandler Development Group Inc.,
Mark Chandler,
Cooper Pacific II Mortgage Investment Corporation,
P3 Holdings Inc.,
636455 B.C. Ltd.,
Lower Mainland Steel (1998) Ltd.,
Susan Richards Investments Ltd.
Susan Freeman, and
Theodore Freeman a.k.a. Ted Freeman

Respondents

- *and* -

Docket: H070699
Registry: Vancouver

Between:

bcIMC Specialty Fund Corporation

Petitioner

And

Cook and Katsura Homes Inc.,
Chandler Katsura Developments Inc.,
Mark Chandler,
Chandler Development Group Inc.,
636455 B.C. Ltd.,
BCMP Mortgage Investment Corporation,
Susan Richards Investments Ltd.,
Theodore Freeman a.k.a. Ted Freeman, and
Susan Freeman

Respondents

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (in Chambers)

Counsel for Petitioner in both actions:	D.D. Nugent
Counsel for The Bowra Group Inc., Receiver and Manager of Chandler Homer Street Ventures Ltd. and Cook and Katsura Homes Inc.:	H.M.B. Ferris
Counsel for Farouk Ratansi, Salim Jiwa and Sui Chun Chao-Dietrich:	S.R. Andersen
Counsel for 636455 B.C. Ltd.:	G.J. Gehlen
Counsel for Crestmark Holdings Corp.:	A.H. Brown
Date and Place of Hearing:	March 27, April 14, May 29 and June 9, 2008 Vancouver, B.C.

[1] These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security ("Receiver and Manager"), of all of the assets, undertakings and properties of Chandler Homer Street Ventures Ltd. ("Chandler") and Cook and Katsura Homes Inc. ("Cook"). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: "… manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor".

[2] It was further provided in each of the Orders that:

> … no proceeding or enforcement process in any Court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> … no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph.

[3] Each of the Orders also provided the Receiver and Manager was empowered and authorized but not obligated to do any of the following where the Receiver considered it "necessary or desirable":

> (2)(c) manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the

ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor; …

(k) market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof out of the ordinary course of business …

(ii) with the approval of this Court in respect of any transaction in which the purchase price [exceeds $10,000.00] or the aggregate purchase price exceeds [$10,000.00] …

(m) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; …

(s) take any steps reasonably incidental to the exercise of these powers.

[4] In both Actions, the Receiver and Manager now applies for "Directions" concerning either to disclaim certain contracts of purchase and sale ("Contracts") or to allow it to sell the strata lots involved at current market value free and clear of any obligation of Chandler or Cook that may arise under the Contracts on the bases that the discount contained in the Contracts constitutes payment of a pre-receivership unsecured claim or that the purchase price set out under the Contracts does not represent fair market value as at the date of those Contracts.

BACKGROUND

[5] Action H070699 relates to a 192 unit project in Yaletown ("Vancouver Project"). Action H070700 relates to two residential towers in Richmond ("Richmond Project"), being 9188 Cook Road ("Tower I") and 633 Katsura Road ("Tower II").

[6] The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) Vancouver Project: $59,800,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); $3,500,000.00 (second charge holder); $6,300,000.00 (third charge holder); $20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project; (b) Richmond Project: $25,400,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); and $20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim $30,100,000.00 against the Vancouver Project and $32,300,000.00 against the Richmond Project. Approximately $30,000,000.00 of those amounts are said to be owing to the Respondent, Theodore Freeman a.k.a. Ted Freeman.

[7] The Receiver and Manager estimates that the equity that will be available on Tower I of the Richmond Project will be $3,700,000.00 prior to the application of the debt owing under collateral security. The Receiver and Manager estimates that the equity that may be available on the Vancouver Project is $3,746,000.00 prior to the application of the debt owing under collateral security. Overall, the estimated shortfall to Gibrailt Capital under its *inter alia* charge after applying all equities available would be in the neighbourhood of $3,764,000.00.

[8] There were a number of pre-sales on both the Vancouver Project and on the Richmond Project with those pre-sales occurring prior to the construction of the Projects. Because of escalating construction costs, it became apparent that the total

purchase prices on the pre-sales were insufficient to allow the completion of the two Projects.

[9] After a review of the pre-sales that had been arranged by Chandler and Cook, it was the opinion of the Receiver and Manager that certain Contracts should be disclaimed as the pre-sales for many of the Units were significantly below the current market value at the time of the Contracts, at the time of the appointment of the Receiver and Manager, and presently.

[10] In agreements in place between the Petitioner and Chandler and between the Petitioner and Cook, the Petitioner required that there be a number of firm and binding pre-sale agreements in place and that these agreements achieve a certain minimum price determined by the Petitioner prior to providing construction financing being made available to Chandler and to Cook. Regarding the Vancouver Project, the Petitioner advised that it was prepared to advance funds and to give partial discharges of its security if the sales proposed by Chandler for units met the criteria set out in the charge of the Petitioner. The Mortgages of the Petitioner in place as against the Vancouver Project and the Richmond Project include the following provisions:

> **3.3 PREPAYMENT**
>
> (a) When not in default, the Mortgagor may prepay the Principal Amount, in whole or in part, prior to the Balance Due Date.
>
> (b) Provided that:
>
> (i) The Mortgagor is not in default in the payment of any amount owing to the Mortgagee hereunder;
>
> (ii) The Lands have been subdivided by a strata plan approved by the Mortgagee and filed in the appropriate Land Title Office and separate titles have

been issued for each lot or strata lot ("Strata Lot") created by the said strata plan;

(iii) The Mortgagor has entered into an unconditional bona fide agreement of purchase and sale for a Strata Lot created on the Lands with a purchaser or purchasers who are at arm's length to the Mortgagor and has provided the Mortgagee with a true copy of the agreement of purchase and sale; and

(iv) The Mortgagor has paid to the Mortgagee a partial discharge fee of $75.00 for each Strata Lot discharged from the charge of this Mortgage;

the Mortgagee will grant a partial discharge of this Mortgage from title to the Strata Lots so created upon payment of all interest due and payable to the date of payment and upon payment of 100% of the Net Sale Proceeds (hereinafter defined) for each of the Strata Lots, less Extra Costs (hereinafter defined) paid for by the Purchaser over and above the gross sale price of each of the Strata Lots. "Net Sale Proceeds" means the gross arm's length sale price of an individual Strata Lot less the aggregate of the following:

A. Any net GST included within the gross sale price (i.e., GST payable less rebate to be received by the Mortgagor or a purchaser);

B. Real estate commissions;

C. Reasonable legal fees and disbursements and GST and PST applicable thereto of the Mortgagor's solicitor for acting for the Mortgagor on sales of Strata Lots;

D. Normal closing adjustments between a vendor and a purchase[r] of real estate;

together with the holdback which a purchaser of a strata lot is permitted to retain pursuant to the provisions of the ***Strata Property Act*** provided that this holdback is maintained in trust by the solicitor or notary public acting for the Purchaser or the Mortgagor on his or her undertaking to forward the holdback to the Mortgagor's solicitor once the purchaser authorizes its release, and the Mortgagor irrevocably authorizes and directs its solicitors to forward and remit such holdback(s) when received to the Mortgagee.

> "Extra Costs" refers to items specifically requested and paid for by the purchaser and not included in the gross sale price of a Strata Lot.
>
> (c) The Mortgagor shall not enter into an agreement of purchase and sale at prices less than the pro forma price list approved by the Mortgagee, without the prior approval of the Mortgagee, and the Mortgagee's obligation to provide a partial discharge of the Mortgage is conditional upon the sale prices for Strata Lots being not less than the prices listed in the price list (the "Price List") submitted by the Mortgagor to and approved by the Mortgagee or at such sale prices that the Mortgagee has approved in writing, provided that the sale price of each Strata Lot shall not be less than 95% of the listed price for such Strata Lot shown on the Price List.

[11] The Petitioner takes the position that it is not prepared to grant partial discharges of its Mortgage relating to a number of the Contracts as they do not comply with that Mortgage provision. Partial discharges would be available where provisions of the Mortgage have been met.

[12] The Contracts relating to these pre-sales all contained the same provisions. Those provisions include the following:

> 8. **COMPLETION**
>
> The completion of the purchase and sale of the Strata Lot shall take place on a date (the "**Completion Date**") to be specified by the Vendor which is not less than ten business days after the Vendor or the Vendor's Solicitors notifies the Purchaser or the Purchaser's solicitor that:
>
> (a) the City of Vancouver [or the City of Richmond] has given permission to occupy the Strata Lot; and;
>
> (b) the Strata Plan in respect of the Development has been or is expected to be fully registered in the New Westminster/Vancouver Land Title Office prior to the Completion Date.
>
> 10. **DELAY**
>
> If the Vendor is delayed from completing the Strata Lot, depositing the Strata Plan for the Development in the Land Title Office or in doing

anything hereunder as a result of fire, explosion or accident, howsoever caused, act of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour materials or equipment, flood, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, unforeseen geotechnical conditions, climatic conditions, acts or omissions of third parties, interference of the Purchaser, or any other event beyond the control of the Vendor, then the time within which the Vendor must do anything hereunder, and the Purchaser's Termination Option Date will be extended for a period equivalent to such period of delay.

16. **RISK**

The Strata Lot is to be at the risk of the Vendor to and including the day preceding the Completion Date, and thereafter al the risk of the Purchaser and, in the event of loss or damage to the Strata Lot deemed material by the Vendor and occurring before such time by reason of fire, tempest, lightning, earthquake, flood, act of God or explosion, either party may, at its option, by written notice to the other party cancel this Agreement and thereupon the Purchaser will be entitled to repayment of the Deposit together with all interest accrued thereon and neither the Vendor nor the Purchaser shall have any further obligation hereunder. If neither party elects to cancel this Agreement, the Purchaser shall be entitled to an assignment of insurance proceeds in respect of the material loss or damage to the Strata Lot, if any. All other remedies and claims of the Purchaser in the event of such damage are hereby waived.

25. **ASSIGNMENT BY PURCHASER**

The Purchaser may not assign or list for sale on MLS (Multiple Listing Service) the Purchaser's interest in this Agreement until all Deposits contemplated under this Agreement have been paid in full and thereafter may not list without the prior written consent of the Vendor,. No assignment by the Purchaser shall release the Purchaser from his/her obligations hereunder. This Agreement creates contractual rights only between the Vendor and the Purchaser and does not create an interest in the Strata Lot The Purchaser shall pay the Vendor an administration fee of $2,000 plus GST for any assignment of this Agreement or conveyance of the Strata Lot other than to the Purchaser named herein provided that the Vendor shall waive such fee for an assignment to a Spouse, child or parent of the Purchaser on receipt of evidence of such relationship satisfactory to the Vendor.

26. **LIABILITY OF PURCHASER**

In the event of an assignment in accordance with section 25, the Purchaser will remain fully liable under the Agreement and such

> assignment will not in any way relieve the Purchaser of its obligations under this Agreement.
>
> 28. **CONTRACTUAL RIGHTS ONLY**
>
> This offer and the agreement which results from its acceptance creates contractual rights only and not any interest in land.

MPC INTELLIGENCE INC. REPORT

[13] The Receiver and Manager obtained a February 27, 2008 "Analysis" from MPC Intelligence Inc. ("MPC") relating to both Projects. The "Analysis" for the Vancouver Project and the "Analysis" for the Richmond Project contain the following "Forward":

> The information provided in this pricing summary is intended for use by Bowra Group in the historical market analysis of the H&H development in Vancouver, BC and Garden City development in Richmond. This is not an appraisal. This report was prepared as an opinion of competitive conditions and is a past assessment of the market and the demand for such product. This is not an opinion of the market from a sales and marketing strategy perspective but a narrative of the previous climate and demand for the developments at time of launch.
>
> All information and detail within the report is compiled through public sources or through the developers and property owners associated with each project. The data is deemed to be accurate at the time of assembly and delivery of the report. Every reasonable effort will be made to compile accurate and reliable information and the data contained within the report is deemed to be that. MPC Intelligence assumes no responsibility for inaccuracies provided by the developer, agents or other reporting parties.

[14] The "Analysis" of MPC for the Vancouver Project was as follows:

> … it is obvious that there are a selection of units that have been sold for well below the market value at the time. Determining the market value for a period of time starting almost two years ago is a difficult challenge because prices in the Downtown condo market have risen so quickly. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the

launch to try to earn more money for the developer. This does not mean that the units that were sold initially were under priced, as the overall market can shift quite quickly as was experienced when the Woodward's project sold out at $600/sq ft and instantly increased what all other projects could achieve.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2006 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

[15] The "Analysis" of MPC for the Richmond Project was as follows:

When analyzing the sale prices of the units at Garden City there does not appear to be many units that were sold below market values. Determining the market value for a period of time starting over two years ago is a difficult challenge because prices in the Richmond condo market have rose very quickly from 2005 to 2007. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. The Richmond market is also unlike most of the other markets in the Lower Mainland when it comes to purchaser incentives. The Chinese buyer in this market almost always expects for there to be some sort of incentive or negotiation process to save money. This was seen in the second phase of Garden City with the first 20 buyers at the public grand opening receiving $5,000 off the purchase price along with no GST (4.48% value). This resulted in many of the units having credits of approximately $20,000 to $25,000. This is very typical in the Richmond market and is considered a cost of doing business.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2005 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

[16] It is clear that the two reports are not appraisals. It is the position taken on behalf of counsel for the pre-sale Contract holders that the reports are inadmissible. While I find that the reports are inadmissible for the truth of their contents, I admit them into evidence for the purpose of ascertaining the grounds upon which the Receiver and Manager is of the belief that the market value at the time of the Contracts or the current market value is such that the Receiver and Manager should be in a position to either disclaim the Contracts or to allow the sale of the strata lots involved free and clear of any obligation of Chandler and Cook that may arise under the Contracts.

<u>APPLICATIONS OF THE RECEIVER AND MANAGER</u>

[17] Originally, the Receiver and Manager sought directions to disclaim 17 Contracts relating to the Vancouver Project and 10 Contracts relating to the Richmond Project. The Motion of the Receiver and Manager is now restricted to Strata Lots 12 and 85 of the Vancouver Project and Strata Lots 12, 46, 85, 92 and 95 of the Richmond Project. The Petitioner supports most of the applications of the Receiver and Manager. However, the Petitioner does not support the application of the Receiver and Manager to disclaim the Contract relating to Strata Lot 12 in the Vancouver Project as it is satisfied that the proposed purchase price met the minimum pre-sale criteria set in the agreement reached with Chandler.

(a) <u>Contracts of Siu Chun Chao-Dietrich</u>

[18] Ms. Chao-Dietrich had Contracts relating to Strata Lot 46 in the Richmond Project and Strata Lot 85 in the Vancouver Project. Strata Lot 46 has been complete and ready for occupancy since late 2007. Strata Lot 85 in the Vancouver Project will not be completed until the Fall of 2008.

[19] Ms. Chao-Dietrich is a former employee of Chandler and is a licensed realtor. Ms. Chao-Dietrich states that she was instrumental in arranging for the purchase by Cook of the land that later would be the site of the Richmond Project. By reason of her efforts, Ms. Chao-Dietrich claims to be entitled to a fee of $200,000.00 and that this fee remains unpaid. In a September 20, 2006 agreement with Chandler, Ms. Chao-Dietrich was to receive a further $100,000.00 "… for deferring paying the commission which you earned on July 16, 2007. The owed commission and compensate [sic] payment in total of $300,000.00 shall be discounted from the purchase price." In her March 25, 2008 Affidavit, Ms. Chao-Dietrich states that the purchase price for Strata Lot 46 of the Richmond Project was to be further reduced in order to reflect $34,800.00 in commissions on previous sales in that Project and $6,000.00 to reflect late closing expenses relating to the "…original unit of that she was to have obtained in satisfaction of the amount owing in respect of the commission".

[20] Ms. Chao-Dietrich states that Chandler verbally agreed in March of 2006 that the net purchase price of $349,000.00 for Strata Lot 85 would be made available to her. In this regard, a $100,000.00 "decorating allowance" was provided to Ms. Chao-Dietrich so that the original offer of $449,000.00 with a $5,000.00 deposit became a net offer of

$349,000.00. Though Ms. Chao-Dietrich states that the price was agreed to in March of 2006, the Contract was not signed until July 6, 2007.

[21] It is the position of Ms. Chao-Dietrich that the discount was not a discount for “unpaid services” but, rather, was a price equal to a similar unit on a per square foot basis of a unit in the Vancouver Project sold to “Darren”, another employee of Chandler. It is said that the units sold to “Darren” and to her reflected “employer’s discount” given to employees. In this regard, Ms. Chao-Dietrich notes that the Receiver and Manager has not sought to disclaim the contract relating to that other unit even though that unit is of a comparable size. In a March 3, 2008 letter to the Receiver and Manager, Ms. Chao-Dietrich states: “in order to maintain the value of the Project, giving a decorating allowance instead of discounting off the purchase price seemed to be appropriate at the time”.

[22] It is the position of the Receiver and Manager that the market value for Strata Lot 85 at the time of the Contract was either $399,000.00 (based on the “Contract Analysis” prepared by MPC), or $424,000.00 (based on the comments relating to that unit prepared by a realtor advising the Receiver and Manager).

[23] MPC gave the following “Analysis” relating to the market value of Strata Lot 85 at the time of the Contract:

Gross Selling Price $449,900 Net Selling Price $349,900 Incentives: $100,000

This unit was under priced because the identical unit one floor above (614) sold for $50,000 more when it sold six months previously. The market would have escalated in this time and there should only be a $5,000 discount for being located one floor below.

Estimated Market Value at time of Pre Sale	$429,900
Estimated Selling Discount	$80,000

[24] Regarding Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich states that the purchase price was in the aggregate of $500,800.00 but that “Much of that consideration, however, was paid by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser”. After deductions, the remaining amount owing is stated to be $160,000.00. It is this amount which is shown as the sale price in the Contract. A deposit of $40,000.00 was paid in two instalments: $32,000.00 on September 20, 2006 and $8,000.00 on April 30, 2007. The Richmond Project is now complete. On August 21, 2007, Ms. Chao-Dietrich received a Notice of completion.

[25] While it has not been accepted by the Receiver and Manager, the Receiver and Manager states that it has received an offer on Strata Lot 46 in the amount of $469,200.00.

[26] MPC gave the following “Analysis” relating to the market value of Strata Lot 46 at the time of the Contract:

Gross Selling Price $160,000 Net Selling Price $160,000 Incentives: $0

This unit was severely under priced. An example why would be the unit below (801) selling for $283,620 more 10 months later. Another example is the unit beside it (908) which is the same plan but with a SE instead of SW exposure sold for $378,259 more than it sixteen months previous. It is assumed that unit 901 could have sold for somewhere near what 908 sold for with the increase in the market over the four months being balanced by the fact that the 08 units were more popular and commanded a higher value.

Estimated Market Value at time of Pre Sale	$417,900
Estimated Selling Discount	$257,900

[27] An action for specific performance of the Contract and for damages in the alternative relating to Strata Lot 46 in the Richmond Project was commenced and Certificate of Pending Litigation No. BB0207241 was filed against the Richmond Project

by Ms. Chao-Dietrich on March 7, 2008. Ms. Chao-Dietrich states that those steps were taken on the basis that: "The Receiver has indicated that he will not be completing the Contract." That action was commenced without the "written consent of the Receiver or with leave of this Court". There is no Motion before the Court that Ms. Chao-Dietrich be at liberty to commence or to continue that action.

(b) Contract of Wayne Nikitiuk Assigned to Salim Jiwa and Farouk Ratansi

[28] This Contract relates to Strata Lot 12 in the Vancouver Project. This unit is presently unfinished and is not scheduled to be finished until the Fall of 2008. Originally, Wayne Nikitiuk made an offer of $649,000.00 (excluding GST) and provided a deposit of $64,900.00. Mr. Nikitiuk was given a $32,450.00 "decorating allowance" so that the "net" purchase price reflected in the Contract was $616,550.00 (excluding GST).

[29] By a July 29, 2007 assignment of the Contract between Mr. Nikitiuk and Messrs. Ratansi and Jiwa and with the consent of Chandler, the Contract was assigned to Messrs. Ratansi and Jiwa. The price paid by Messrs. Ratansi and Jiwa for that assignment was $150,900.00 and that sum has been disbursed to Mr. Nikitiuk. It was a term of the consent of Chandler that $2,000.00 of the assignment price was paid by Mr. Nikitiuk to Chandler.

[30] MPC gave the following “analysis” relating to the market value of Strata Lot 12 at the time of the Contract:

> Gross Selling Price $649,000 Net Selling Price $616,500 Incentives: $32,450
>
> This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.
>
> Estimated Market Value at time of Pre Sale $649,000
> Estimated Selling Discount $32,450

[31] The Petitioner does not support the application to disclaim the Contract as the Contract would net $616,550.00 and this price met the minimum pre-sale criteria set by the Petitioner. In seeking to disclaim the Contract, the Receiver and Manager is of the view that the current market value of Strata Lot 12 is $730,000.00.

(c) Contracts of Crestmark Holdings Corp.

[32] Applying pursuant to Rules 47 and 50 of the ***Rules of Court*** and the inherent jurisdiction of the Court, Crestmark Holdings Corp. (“Crestmark”) seeks an order that it be at liberty to commence an action against Chandler, Cook, and the Receiver and Manager so that it may seek an order for specific performance, a Certificate of Pending Litigation and related relief in relation to August 10, 2007 Contracts relating to Strata Lots 12, 85, 92, and 95 in the Richmond Project.

[33] In July of 2007, Chandler contacted Edward Wong & Associates Realty Inc. (“Wong”) requesting that Wong submit a marketing proposal for the unsold units in Tower I and Tower II in the Richmond Project. On July 18, 2007, Wong signed an Exclusive Listing Agreement relating to the Richmond Project (“Listing Agreement”). 37 units in Tower I and 50 units in Tower II were unsold at the time of the Listing

Agreement. The term of the Listing Agreement was to end on November 30, 2008 but Chandler had the right to terminate the Listing Agreement after December 15, 2007 if Wong had not sold 20 units by that time.

[34] In accordance with the agreement in place, the Petitioner advised Chandler that it was prepared to give partial discharges of its security providing sales of the Units met the criteria set out in the Mortgage including that the gross sale price of any units was not less than 95% of the list sale price approved by the Petitioner for each phase of the construction of each phase of the Richmond Project. The list prices relating to the Strata Lots in issue were as follows: (a) Strata Lot 12 ($534,900.00); (b) Strata Lot 85 ($379,900.00); (c) Strata Lot 92 ($384,900.00); and (d) Strata Lot 95 ($498,900.00).

[35] Chandler and Wong agreed to an amendment of the Listing Agreement which saw potential purchasers being offered a price discount of up to 10% off the then list price and a bonus of up to $250,000.00 to Wong. As at August 8, 2007, offers on 28 units had been received at prices discounted from between 6% to 10% and six units remained unsold. It is stated by Wong that all sales contracts showed the full list price with reductions recorded in the form of payment of cash or credit towards the purchase price on closing so that there would be no jeopardy to the pricing on the remaining unsold units.

[36] In August, 2007, Chandler is stated to have requested that Wong purchase some units so that the goal of meeting the financial commitments set by the Petitioner could be met. It is stated that, as an additional incentive for Wong to purchase. A Mr. Aguirre on behalf of Chandler offered a 50% interest in his entitlement to purchase a unit in Tower II.

[37] On August 10, 2007, Wong agreed through his company (Crestmark) to purchase four units with a 15% discount from the list price. Contracts were executed to reflect the following:

> (a) Strata Lot 12 – gross sale price of $498,800.00 with a “decoration allowance” of $74,820.00 ($423,980.00 net) with a deposit of $5,000.00;
>
> (b) Strata Lot 85 – gross sale price of $418,800.00 with a “decoration allowance” of $62,820.00 ($356,180.00 net) with a deposit of $5,000.00;
>
> (c) Strata Lot 92 – gross sale price of $421,800.00 with a “decoration allowance” of $63,270.00 ($358,530.00 net) with a deposit of $5,000.00; and
>
> (d) Strata Lot 95 – gross sale price of $513,800.00 with a “decoration allowance” of $77,070.00 ($436,730.00 net) with a deposit of $5,000.00.

[38] In a February 12, 2008 letter to counsel for the Receiver and Manager, counsel for Crestmark stated:

> When construction of the Development was completed and our client received notice to close the purchase of the Units, [the] … developer agreed to extend the closing date to November 30, 2007 “or within 5 business days after the Vendor has paid the commission bonus to Edward Wong & Associates Realty Inc. in an amount of $250,000.00 plus G.S.T. whichever occurs later”. The bonus has not been paid, however our client is ready, willing and able to complete the purchase of the Units forthwith.

[39] On August 22, 2007, Notices of Completion relating to Strata Lots 12, 85, 92 and 95 were issued. At that time, Wong asked for payment of his bonus under the amended Listing Agreement but was advised that, due to cash flow problems, the bonus could only be paid after the sale of all units in Tower I had been completed.

[40] On October 11, 2007, a further addendum to the Listing Agreement was signed providing the following:

> (a) "The Completion Date is to be extended to Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + GST whichever occurs later."
>
> (b) "Upon closing, the Purchaser may elect to apply $62,500 + GST, being part commission … due to Edward Wong & Asso. Realty Inc. ('EWA') towards the purchase price provided EWA authorizes to do so."

[41] Crestmark states that it has now agreed to waive as a condition of closing its entitlement to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots and that it is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95. In this regard, Edward Wong in his April 29, 2008 Affidavit states:

> I agree to cause both of those companies [Wong and Crestmark] to sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum. …. While my preferred completion date is June 30, 2008, Crestmark is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95 at any time. In my opinion, taking into account the value to … [Cook] of the services I have already caused … [Wong] to perform, it would be extremely unfair to allow the receiver to disclaim or refuse to close on the sales of Crestmark's 4 units.

[42] In the circumstances, Crestmark requests that the Court lift the stay contained in paragraphs 6 and 7 of the November 28, 2007 Order to allow it to commence an action for specific performance relating to Strata Lots 12, 85, 92 and 95.

[43] The Petitioner supports the application of the Receiver and Manager to disclaim the proposed sale of Strata Lots 12, 85, 92 and 95 to Crestmark as those sales are said

not to meet the minimum pre-sale requirements set by the Petitioner. The Petitioner also states that: "Even if the sales are not disclaimed, … [the Petitioner] will not be issuing partial discharges for them."

[44] The MPC "Analysis" relating to the market value of Strata Lots 12, 85, 92 and 95 at the time of the Contracts was as follows:

Strata Lot 12 Gross Selling Price $649,000 Net Selling Price $616,500 Incentives: $32,450

This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	$649,000
Estimated Selling Discount	$32,450

Strata Lot 85 Gross Selling Price $418,800 Net Selling Price $355,980 Incentives: $62,820

This unit was under priced because the unit below it (1506) sold for only $5,875 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 – 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$419,900
Estimated Selling Discount	$63,920

Strata Lot 95 Gross Selling Price $513,800 Net Selling Price $436,730 Incentives: $77,070

This unit was under priced because the unit below it (1601) sold for $72,070 more than it four months before. It is assumed that 1701 should have been able to sell at a premium to 1601.

Estimated Market Value at time of Pre Sale	$519,900
Estimated Selling Discount	$83,170

Strata Lot 92 Gross Selling Price $421,800 Net Selling Price $358,530 Incentives: $63,270

This unit was under priced because the unit two levels below it (1506) sold for only $8,426 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 – 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$425,900
Estimated Selling Discount	$67,370

[45] While these offers have not been accepted by the Receiver and Manager as yet, the Receiver and Manager has now received offers as follows: (a) Strata Lot 12 ($519,200.00); and (b) Strata Lot 95 ($504,200.00).

SHOULD CONTRACT HOLDERS HAVE BEEN GIVEN NOTICE OF THE APPLICATION TO APPOINT THE RECEIVER AND MANAGER?

[46] It is the submission of Crestmark that, because the proposed purchasers under the Contracts were not parties to this action and were not served or given notice of the application by the Petitioner to appoint the Receiver and Manager, the November 28, 2007 Order is not binding on them and does not affect any interest in the Property held by them. In this regard, Crestmark relies on the decisions in ***Lochson Holdings Ltd. v. Eaton Mechanical Inc.*** (1984), 55 B.C.L.R. 54 (B.C.C.A.) and ***Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.*** (2006), 25 C.B.R. (5^{th}) 199 (B.C.C.A.).

[47] In ***Lochson***, *supra*, the issue was whether Lochson as the holder of the first and second mortgages against property should be bound by an order allowing the borrowing powers of a receiver to have priority over the interest of Lochson when that order was granted to a subsequent charge holder. The Court concluded that, subject to three exceptions not applicable here, a prior charge holder must have notice of or consent to any application purporting to grant priority to the borrowing powers of a Receiver. Of similar effect Is the decision in ***Terra Nova***, *supra*, where the Court dealt with the priority of the proposed remuneration of a receiver and concluded that, because a prior charge holder had no notice of the application to appoint a receiver and manager with borrowing powers of $5,000.00, it was not bound by the priority given in that order (at para. 14).

[48] I am satisfied that the decisions in ***Lochson*** and ***Terra Nova***, both *supra*, have no application to the position of Crestmark. First, Crestmark is not a secured creditor. Second, Crestmark only takes whatever interest it may have from Chandler.

[49] Assuming Crestmark is an unsecured creditor, there was no obligation to join unsecured creditors as parties or to provide them with notice of an application to appoint a receiver and manager. Once appointed, one of the duties of a receiver and manager is to ascertain what creditors have claims, the amount of those claims, and the priority of those claims. That duty is fulfilled after and not before the appointment. The secured creditor applying to appoint a receiver and manager will not have knowledge of the identity of all unsecured creditors or of the amounts owing. It would be impossible for all unsecured creditors to be given notice of an application for the appointment of a receiver and manager.

[50] Assuming Crestmark has an equitable interest, that interest is by way of an assignment of the equity of redemption that was retained by Chandler or Cook when those entities mortgaged their interest in the two Projects in favour of the Petitioner. The foreclosure proceedings seek declarations that, if a certain amount is not paid to redeem the charges against the two Projects, the interest of Chandler or Cook will be foreclosed as will the interest of any parties claiming under them. As potential purchasers of an interest that Chandler and/or Cook might have in the two Projects, Crestmark would be in a position to apply to approve the sale of a particular part of the property if it could be shown that their offer represented fair market value at the time their application was made. Alternatively, Crestmark could request that the Receiver and Manager apply to Court to have their offer approved or could place its offer before

the Court if the Receiver and Manager applied to Court to approve an offer which, in the view of the Receiver and Manager, represented fair market value at the time the application was made.

[51] Whether Crestmark is an unsecured creditor or is a creditor claiming an interest in land, it was only after the appointment of the Receiver and Manager that the Receiver and Manager would know for certain what Contracts were in place. There was no obligation on the Petitioner, on Chandler, or on Cook to notify Crestmark or any other holders of Contracts that an application was being made to appoint a Receiver and Manager. It was not necessary to join Crestmark or any other holders of Contracts as parties to these proceedings. The preliminary position taken by Crestmark is rejected.

[52] Quite properly, the Receiver and Manager has notified the holders of the Contract that applications would be made to either disclaim the Contracts or allow the Receiver and Manager to sell the Strata Lots at the current market value free of any obligation of Chandler and Cook that might arise under the Contracts so that the holders of the Contracts would be bound by any Order made. Holders of Contracts were entitled to no other notice.

CAN THE RECEIVER AND MANAGER DISCLAIM CONTRACTS?

[53] I have concluded that the Receiver and Manager has the power to disclaim these Contracts. In this regard, the learned author of ***Bennett on Receiverships***, 2nd Ed. (Toronto – Carswell) states:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership.

> However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. (at p. 341)
>
> In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages. (at p. 342)

[54] There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the company. In ***New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*** (2005), 39 B.C.L.R. (4th) 327 (B.C.C.A.), the issue was whether the receiver and manager was entitled to disclaim "executory contracts" and apply to approve a better offer. Braidwood J.A. with Oppal J.A. concurring stated:

> In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:
>
>> The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159

> (N.S.C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

(at para. 16)

In another leading case, *Bayhold Financial Corp. v. Clarkson* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or realizing upon the Assets or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> * * *
>
> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets ....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order.

(at paras. 19-21)

[55] In the ***Bayhold Financial Corp.*** decision referred to, the Court dealt with a court appointed receiver and manager and the question of whether there was personal liability for breaching contracts entered into by the company prior to receivership. On

behalf of the Court, Hallett J.A. referred to the decision in ***Re Newdigate v. The Company***, [1912] 1 Ch. 468 (C.A.) and stated:

> … The *Newdigate* case is authority for the following valid proposition (p. 468):
>
> > It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.
>
> In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

[56] On the question of whether there was an obligation on the receiver and manager to honour contracts which were in existence prior to the receivership, Hallett J.A. stated:

> There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:
>
> > The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force.

> The inference is that as between the company and the appellants the contracts continued to subsist.
>
> [Emphasis added.]

The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts.

(at paras. 55-6)

[57] In ***The Matter of the Receivership of Pope & Talbot Ltd.*** (Vancouver Registry: S077839), Brenner C.J.S.C. in oral reasons for judgment in chambers on May 29, 2008 stated:

The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.

The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.

This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005, BCCA 154. That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:

> Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the

> assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.

In Braidwood J.A.'s opinion the foregoing clause determined the issue.

(at paras. 17-8)

[58] I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

[59] Ms. Chao-Dietrich and Messrs. Ratansi and Jiwa submit that the content of the Order appointing the Receiver is determinative of the powers available to the Receiver and Manager and that paragraph 2(c) of the Order only granted the Receiver and Manager the power to "… cease to perform any contracts of the Debtor". They submit that no performance was required under their Contracts until completion dates came into effect and that the completion dates for the purchase of Strata Lot 85 by Ms. Chao-Dietrich and the purchase of Strata Lot 12 by Mr. Jiwa and Mr. Ratansi in the Vancouver

Project has not been set because the units remain unfinished. Regarding the completion date for Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich submits that the completion date was September 14, 2007, that she was ready willing and able at that time to complete the purchase, a caveat was filed when Chandler did not complete the sale, and an action seeking specific performance was commenced. In the absence of a power given to disclaim, it is the submission that the remedy that will be available for anticipatory breach of contract is both a specific performance and/or a mandatory injunction and only in the alternative, for damages.

[60] While I am satisfied that the power available to the Receiver and Manager to cease to perform any Contracts is sufficient to allow the Receiver and Manager to apply to the Court to be at liberty to disclaim the Contracts, I also note that the submissions of Ms. Chao-Dietrich and Mr. Ratansi and Mr. Jiwa ignore a number of powers given to this Receiver and Manager including the power to "… cease to carry on all or any part other [sic – of the] business" of Chandler or Cook. The business of these two companies was to create, enter into contracts to sell, and to sell condominium units. The refusal to proceed to complete Contracts is included within the power given to the Receiver and Manager to cease part of the business of Chandler and Cook. The power to "cease to perform any contracts" includes the ability to advise Contract holders that the Receiver and Manager will not proceed to complete the sales contemplated by the Contracts. The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager

to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application.

[61] I also note that paragraph 2(m) of the Orders appointing this Receiver and Manager is identical to the paragraph referred by the Chief Justice in ***Pope & Talbot Ltd.***, *supra* and that it was this paragraph which was relied upon by the Chief Justice to conclude that the receiver there was in a position to disclaim an existing contract and proceed with an application to approve a different sale. In the circumstances, I am satisfied that the powers granted to this Receiver and Manager are sufficient to allow the Receiver and Manager to disclaim the Contracts.

[62] The holders of the Contract also submit that the Receiver and Manager must maintain the goodwill of Chandler and Cook for their benefit. That submission cannot be maintained in view of the decision in ***Bayhold Financial Corp.***, supra. Additionally, there is no goodwill to maintain here. First, it is clear that there will be a massive shortfall to one of the secured creditors even after both Projects have been completed and sold. Second, the unsecured debt is in excess of $30,000,000.00. Third, I anticipate that these companies were incorporated solely for the purpose of developing these two Projects so that the corporate entities will be abandoned by the shareholders once the Projects have been completed and the Units within the Projects sold.

DO THE CONTRACT HOLDERS HAVE AN EQUITABLE INTEREST?

[63] Paragraph 28 of the Contracts is specific. Any offer made and the agreement which results from the acceptance of the offer by Chandler and/or Cook creates: "… contractual rights only and not any interest in land." A similar provision was considered

by Myers J. in ***Romfo et al v. 1216393 Ontario Inc.***, [2006] B.C.J. (Q.L.) No. 2897 (B.C.S.C.) where the clause in issue stated that the purchaser "… acknowledges and agrees that the Purchaser: (a) will not have any claim or interest in the Strata Lot, the Development or the Property until the Purchaser becomes the registered owner of the Strata Lot, and (b) the Purchaser does not now have and will not have at any time hereafter notwithstanding any default of the Vendor, any right to register this Offer or the Agreement, or any part of or right contained in this Offer to the Agreement against the Strata Lot, the Development or the Property in the Land Title Office." The effect of this provision was not determined because the plaintiffs had argued that the developer was estopped from reliance on the clause and Myers J. was of the view that estoppel issues should not be dealt with on a Rule 18A application.

[64] The contract in ***Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.*** (2007), 61 R.P.R. (4th) 277 (B.C.S.C.) contained this provision: "This offer and the agreement which results from its acceptance create contractual rights only and not any interest in land." In deciding that the certificates of pending litigation should not be discharged, Goepel J. made reference to that provision and concluded:

> The defendants submit that paragraph 2.1 of the Contracts that states the Contracts do not create "any interest in land" precludes such a claim. With respect, I disagree. At this stage the issue is not whether the plaintiffs can prove an interest in land; the issue is whether they are claiming such an interest. The Statement of Claim makes such a claim. That is all that is required to file a CPL.

[65] While it would have been preferable for the clause used in ***Romfo***, *supra*, to have been incorporated into these Contracts to more fully set out when and only when an equitable interest is created, I see no reason not to enforce paragraph 18 of these

Contracts wherein the holders of the Contract forego any interest in land. If the Contract holders claim an equitable interest, should I ignore this clear provision in their Contracts? I have concluded that I should give effect to paragraph 28 in the Contract. The provision is clear and the Contract holders agreed to that provision when they signed the Contract. It is not submitted that Chandler or Cook is estopped from reliance on that paragraph.

[66] On the assumption that I am incorrect in arriving at the conclusion that paragraph 28 determines the issue of whether they have any equitable interest, I will now consider the submissions made by the Contract holders. It is submitted on behalf of the holders of the Contracts that they have an equitable interest in the Property and the Strata Lots so that the Receiver and Manager should not be in a position to disclaim the Contracts. On this question, the Contract holders rely on the decision in ***CareVest Capital Inc. v. CB Development 2000 Ltd.***, [2007] B.C.J. (Q.L.) No. 1698 (B.C.S.C.).

[67] ***CareVest*** dealt with the fact that the prices available on 32 pre-sold units would not be sufficient to discharge the mortgages against the property. The holders of the pre-sale contracts took the position that the contracts created an equitable charge which was entitled to priority over the registered mortgage. While dismissing the application for a direction that the receiver and manager be permitted to disclaim the contracts, Pitfield J. ordered that the receiver and manager could sell each of the units but then hold in trust for CareVest and any purchasers under pre-sale contracts the excess of the sale price payable pending determination of: "… priority and/or entitlement thereto as between the pre-sale contract buyer and CareVest".

[68] On the issue of whether the pre-sale buyers had an unregistered equitable charge, Pitfield J. stated:

> I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.
> (at para. 16)

[69] The Contract holders also submit that the following statement of the learned author in ***The Law of Vendor and Purchaser***, 3rd Ed. (Toronto: Thomson Canada Limited, 2007) applies:

> Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that *instanter* a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion. But it is then said that although the vendor becomes a constructive trustee, he does so *sub modo* only: (1) he is not a mere dormant trustee; (2) he is a trustee having a personal and substantial interest in the property: he has a right to protect and an active right to assert that interest if anything is done in derogation of it; (3) his right to protect his own interest is paramount and overriding, and until he is bound to convey he retains for certain purposes his old dominion over the estate.
>
> Further, the purchaser's status as equitable owner is contingent upon the contract being specifically enforceable.
>
> It is clear, then, that the precise position in which the parties stand with respect to each other is *in fieri*, until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que trust* relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser. (at pp. 1-12 and 1-13) (footnotes omitted)

[70] However, the status of a potential purchaser as having an equitable interest is contingent upon the contract being specifically enforceable: ***Buchanan v. Oliver Plumbing & Heating Ltd.***, [1959] O.R. 238 (C.A.); ***Cornwall v. Henson***, [1899] 2 Ch. 710 at p. 714; ***Howard v. Miller*** (1914), 7 W.W.R. 627 at p. 631 (P.C.) (B.C.); and ***Central Trust & Safe Deposit Co. v. Snider***, [1916] 1 A.C. 266 (P.C.) (Ont.) at p. 272. A purchaser has an equitable interest in land only as long as he or she would be entitled to specific performance of the agreement: ***DiGuilo v. Boland*** (1958), 13 D.L.R. (2d) 510 (Ont. C.A.); ***Howard***, *supra*, at pp. 79-80; ***Kimniak v. Anderson***, [1929] 2 D.L.R. 904 (Ont. C.A.); ***Freevale Ltd. v. Metrostore (Holdings) Ltd. et al***, [1984] 1 All E.R. 495 (Ch. D); and ***St. James (Rural Municipality) v. Bailey*** (1957), 21 W.W.R. 1 (Man. C.A.).

[71] In ***St. James***, the Court dealt with a request for a declaration that the defendants had no right, title or interest in property so that the plaintiff was entitled to a declaration that the defendants were trespassing upon the property. Regarding the question of whether a sale of property produced an equitable interest in the proposed purchaser, Adamson C.J.M. stated:

> When a binding agreement for sale of lands is entered into, the immediate effect of the contract is that the purchaser acquires an equitable estate in the land": *Remedies of Vendors & Purchasers, McCaul*, 2nd ed., p. 1; *Rose v. Watson* (1864) 10 HL Cas 672, 33 LJ Ch 385; *McKillop v. Alexander* (1912) 1 W.W.R. 871, 45 S.C.R. 551; *Thorn's Canadian Torrens System*, p. 129. (at para. 18)

[72] A similar statement was made by Montague J.A.:

> I am of the opinion that in the light of all the circumstances in the instant case the defendants have acquired an equitable interest in the lands of such a nature that an action for trespass by the plaintiffs cannot succeed.

> The appeal therefore should be allowed and the action of the plaintiff dismissed with costs to the defendant Bailey.. (at para. 71)

[73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In ***CareVest***, *supra*, Pitfield J. stated in this regard:

> It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.
>
> As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

[74] The question which then arises is whether the holders of the Contracts have an equitable interest and, if so, whether the Receiver and Manager should still be provided with the Direction sought that it can disclaim the Contracts.

<u>DISCLAIMING CONTRACTS RELATING TO THE VANCOUVER PROJECT</u>

[75] Regarding the Contracts of Ms. Chao-Dietrich (Strata Lot 46) and Salim Jiwa and Farouk Ratansi (Strata Lot 12) relating to the Vancouver Project, construction is not

complete and stratification has not occurred. A purchaser is not entitled to specific performance until the time for the completion of the contract has arrived and all conditions precedent have been met. For the Vancouver Project, this would include a filing in the Land Title Office to subdivide the existing property into the Strata Lots which will constitute the Strata Plan.

[76] Until a proper subdivision plan is registered, no interest in land is created: ***Nesrallah v. Pagonis*** (1982), 38 B.C.L.R. 112 (B.C.S.C.) where Taylor J. concluded that the right to create a leasehold interest arose only when a duly approved subdivision plan had been registered and that no interest in land was created prior to such a registration (at para. 14). Similarly, a contingent option granted prior to a strata corporation coming into existence was found to be unenforceable: ***Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*** (2007), 74 B.C.L.R. (4th) 89 (B.C.S.C.).

[77] As well, I am satisfied that it is not possible to imply a covenant or obligation on the part of Chandler to seek and obtain subdivision approval for the Vancouver Project: ***International Paper Industries Ltd. v. Top Line Industries Inc.*** (1996), 20 B.C.L.R. (3d) 41 (B.C.C.A.), being a decision involving whether a lease granted prior to subdivision approval was enforceable or not.

[78] Because construction is not complete and because stratification has not taken place, Ms. Chao-Dietrich (Strata Lot 46) and Messrs. Jiwa and Ratansi (Strata Lot 12) have no equitable interest in the Vancouver Project. There is considerable construction to be undertaken by the Receiver and Manager to complete the Vancouver Project even before the preparation and filing of the documents which will be required before the subdivision plan and the Strata Plan can be registered in the Land Title Office. The

property which is the subject matter of the Contracts does not yet exist. In order for it to exist, further funds must be borrowed by the Receiver and Manager, and those funds must be expended. The Receiver and Manager must "pick up" where Chandler left off. I am bound by the decisions in ***New Skeena*** and ***Pope & Talbot***, both *supra*, so that the Receiver and Manager is in a position to disclaim the Contracts even if I could conclude that the holders of these Contracts had an equitable interest in the Contract or in the interest in land created by the Contract.

[79] Even if I could conclude that Ms. Chao-Dietrich and Messrs. Jiwa and Ratansi had an equitable interest in the Vancouver Project and the Strata Lots which will eventually be created, I could not conclude that the Receiver and Manager should not be given the power to disclaim the Contracts relating to Strata Lots 85 and 12 in the Vancouver Project.

[80] In coming to this conclusion, I rely on the following related to Strata Lot 85: (a) the $100,000.00 discount made available to Ms. Chao-Dietrich would amount to now preferring Ms. Chao-Dietrich in priority to other unsecured creditors of Chandler as she would be entitled to a fee for services rendered by a reduction of the purchase price agreed to on July 6, 2007; (b) there appears to be at least some evidence that the net selling price at July 6, 2007 was significantly less than the net selling price of $349,900.00 that was to be made available to Ms. Chao-Dietrich as the net selling price acceptable to the Petitioner was significantly higher than the price made available to Ms. Chao-Dietrich; and (c) I can find no obligation on the Petitioner to provide a partial discharge of its security in order to accommodate the contemplated sale to Ms. Chao-Dietrich.

[81] For Ms. Chao-Dietrich and all other holders of Contracts, the notice set out in the Disclosure Statement was clear:

> The Developer will cause and each Lender will agree to provide the partial discharge of the Construction Security in respect of any Strata Lot and its undivided interest in the Common Property sold hereunder within a reasonable period after completion of the purchase and sale thereof provided a certain minimum purchase price is obtained and upon receipt of the net purchase price (after deduction of real estate commission and usual closing costs).

[82] As well, holders of Contracts signed after the security of the Petitioner was registered had notice that partial discharges would only be provided in accordance with the net sale prices established in accordance with the provisions of the security. Additionally, now that the security of the Petitioner is in default, I am satisfied that there is no obligation on the Petitioner to provide partial discharges even if the net sale prices agreed to between Chandler and/or Cook and the Petitioner were being met.

[83] I provide the Direction to the Receiver and Manager that it can disclaim the Contract relating to Strata Lot 85 or, alternatively, to offer for sale that Strata Lot at current market value free and clear of any obligation of Chandler that might arise under the Contract with Ms. Chao-Dietrich.

[84] Regarding the Contract relating to Strata Lot 12, I cannot be satisfied that the price at the time of the Contract was so much lower than the then current market value so that the Receiver and Manager is correct in concluding that this is a Contract which should be disclaimed. However, I am satisfied that the current market value of Strata Lot 12 is such that the Receiver and Manager should be at liberty to offer that Strata Lot for sale free and clear of any obligation of Chandler that might arise under the Contract

as I am satisfied that the purchase price set out under the Contract does not reflect the current market value of Strata Lot 12.

[85] In this regard, I take into account not only the view of the Receiver and Manager that the current market value is $730,000.00 but also the view of Messrs. Jiwa and Ratansi that the current market value or, at least the market value as at July 29, 2007, is far in excess of the original Contract amount of $649,000.00. In the July 29, 2007 assignment of the Contract, it was the view of Messrs. Ratansi and Jiwa that the value was $767,450.00 made up of the original offer of $649,000.00 plus the $150,900.00 that they paid to Mr. Nikitiuk for the assignment. In view of the current market value, I am satisfied that the Receiver and Manager would be subject to criticism from the creditors having security against the Vancouver Project if it proceeded to complete the sale at $649,000.00.

[86] Whether or not I am correct in coming to the conclusion that Messrs. Jiwa and Ratansi do not have an equitable interest because an action for specific performance is not available to them, I provide the Direction that the Receiver and Manager will be permitted to sell Strata Lot 12 at current market value free and clear of any obligation of Chandler or Cook that might arise under the Contract originally with Mr. Nikitiuk. However, any offer on Strata Lot 12 which is accepted by the Receiver and Manager shall only be accepted subject to Court approval. Notice of any application to approve a sale shall be provided to Messrs. Jiwa and Ratansi.

DISCLAIMING CONTRACTS RELATING TO THE RICHMOND PROJECT

[87] The question which then arises is whether the Receiver and Manager should be allowed to disclaim the Contracts relating to the Richmond Project. Regarding the Contract of Ms. Chao-Dietrich relating to Strata Lot 46, I am satisfied that it is in order for the Receiver and Manager to disclaim the Contract. First, the considerable discount of $340,800.00 that was made available to Ms. Chao-Dietrich for what was described as payments: "… by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser" would create a significant preference to Ms. Chao-Dietrich if the Contract was allowed to stand. Second, the "analysis" of MPC even though flawed allows me to conclude that a similar unit in the floor below Strata Lot 46 sold for $283,620.00. Third, the proposed price to Ms. Chao-Dietrich is well below the net sale price agreed to between the Petitioner and Chandler which I take to be an indication of the market value at the time. Fourth, the inability to provide a discharge of the security against Strata Lot 46. All of those factors allow me to conclude that the Receiver and Manager is not acting arbitrarily in the exercise of its discretion to request a Direction that it be at liberty to disclaim this Contract. I provide that Direction to the Receiver and Manager. If Ms. Chao-Dietrich does not volunteer to remove the Certificate of Pending Litigation filed against Strata Lot 46 in the Richmond Project, then I will hear any application on behalf of the Receiver and Manager that the Certificate of Pending Litigation be discharged from title.

[88] Regarding the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95, I am satisfied that Crestmark does not have an equitable interest in those Strata Lots as the Contracts are not specifically enforceable. Even if I could be satisfied that

Crestmark had an equitable interest, I would be satisfied that the Direction should be given to the Receiver and Manager that those Contracts be disclaimed.

[89] The doctrine of specific performance continues to apply where a deadline has passed even in the presence of a "time is of the essence clause" where the conduct of the parties has waived the requirement to close by the given deadline and a closing date has been extended. In this regard, see ***Cheema v. Chan***, [2004] B.C.J. (Q.L.) No. 2222 (B.C.S.C.).

[90] Once a deadline for closing has been extended by the conduct of the parties even in the presence of a "time is of the essence" clause, the deadline must be reset with reasonable notice of the new deadline before a party can rely upon the failure to close by that date as a ground for treating the contract as being at an end or for permitting an action for specific performance. For time to be of the essence again, the person wanting a new date must specify a reasonable new completion date in such a manner that the other person would realize that he or she is now bound by the new date: ***Ambassador Industries v. Kastens***, [2001] B.C.J. (Q.L.) No. 825 (B.C.S.C.); ***Norfolk v. Aikens*** (1989), 41 B.C.L.R. (2d) 145 (B.C.C.A.); and ***Abramowich v. Azima Developments Ltd.*** (1993), 86 B.C.L.R. (2d) 129 (B.C.C.A.).

[91] Under the Crestmark Contracts, the original completion dates were to be not less than ten business days after Crestmark had been notified that the City of Richmond had given permission to occupy the Strata Lot and the Strata Plan was fully registered in the Land Title Office. That date would have been sometime in August or September of 2007. While the dates for completion set out in the Contracts may well have already expired, Crestmark and Chandler agreed in the October 11, 2007 Addendum that the

completion date was to be extended to: "… Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + G.S.T. whichever occurs later." November 30, 2007 has passed and the sale of Strata Lots 12, 85, 92 and 95 were not completed. To date, the amount of $250,000.00 has not been paid. It is more than probable that the $250,000.00 will never be paid.

[92] While Mr. Wong states that he has agreed to "sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver [a waiver of the condition to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots] and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum ….", there was nothing in evidence which would allow me to conclude that there has been an addendum executed by Crestmark amending the completion date agreed upon, there is nothing executed by Crestmark making time of the essence again, and there is nothing in evidence executed on behalf of Chandler which either changes the completion date to make time of the essence again or accepts an addendum to the Contract to provide for a completion date other than in accordance with the October 11, 2007 Addendum.

[93] While I recognize that it would not be necessary for the Receiver and Manager to sign a further addendum accepting reasonable notice from Crestmark of the new date for completion, I am satisfied that it would be necessary for the Receiver and Manager to sign a further addendum relating to these Strata Lots to amend the purchase price so that the "decoration" allowances of $74,820.00 (Strata Lot 12), $62,820.00 (Strata Lot

85), $63,270.00 (Strata Lot 92), and $77,070.00 (Strata Lot 95) are removed so that the price to be paid does not reflect decoration allowances totalling $277,980.00 which were added to provide Crestmark with its “bonus”. If these decoration allowances are not removed, then the unsecured amount said to be payable to either Wong or Crestmark would be available as a preference if the four sales were to complete.

[94] I can find no contractual obligation requiring the Receiver and Manager to execute a further Addendum. Specific performance is not available to Crestmark. Accordingly, it is clear that an equitable interest is not available because there are further steps to be taken before it could be said that an equitable interest exists.

[95] There is another reason why specific performance would not be available. There is nothing about these Strata Lots which would allow me to conclude that they are of a unique character and of particular value to Crestmark: ***Behnke v. Beede Shipping Co. Ltd.***, [1927] 1 K.B. 649. It is clear that specific performance will only be generally available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available: ***Semelhago v. Paramadevan***, [1996] 2 S.C.R. 415 where Sopinka J. on behalf of the majority stated:

> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:
>
> > Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

[96] I cannot conclude that the Strata Lots are of an unique character and of particular value to Crestmark. Even if I could conclude that Crestmark had an equitable interest, I would also conclude that it was appropriate for the Receiver and Manager to disclaim the Contracts relating to these four Strata Lots. The four August 10, 2007 Contracts provide for “decoration” allowances totalling $277,980.00. Unless Crestmark and the Receiver and Manager are prepared to execute a further Addendum removing those decoration allowances, the significant reductions from the “gross sale price” agreed to and the significant reduction from the “minimum pre-sale requirements set by the Petitioner” allows me to conclude that, if the Contracts are not disclaimed, Crestmark and Wong will receive significant preferences not otherwise available to other unsecured creditors of Chandler or Cook. Assuming that Crestmark has an equitable interest in the four Strata Lots, equity would require that I not approve any sales which would incorporate such significant preferences. The “analysis” performed by MPC and the minimum pre-sale requirement set by the Petitioner allow me to conclude that the Contracts were at prices not in accordance with fair market value at the time of the Contracts.

[97] Accordingly, I provide the Direction to the Receiver and Manager that it can disclaim the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95 of the Richmond Project or alternatively, offer for sale those Strata Lots at current market value free and clear of any obligation of Chandler that might arise under the Contracts with Crestmark.

THE APPLICATION OF CRESTMARK

[98] The application is that Crestmark be at liberty to commence an action against Chandler, Cook and the Receiver Manager for specific performance. The application of Crestmark pursuant to Rules 47 and 50 of the Rules of Court and the inherent jurisdiction of the Court is dismissed to the extent that the order sought relates to an action claiming specific performance. Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. Accordingly, there can be no action against the Receiver and Manager for specific performance. Regarding the proposed action against Chandler or Cook, Crestmark will be at liberty to commence an action claiming damages against either or both of those companies. However, Crestmark will not be at liberty to commence an action against either Chandler or Cook for specific performance. Crestmark has not met the onus of establishing a reasonable cause of action is disclosed.

COSTS

[99] The Receiver and Manager will be at liberty to speak to the question of costs against Crestmark Holdings Corp., Farouk Ratansi, Salim Jiwa, and Sui Chun Chao-Dietrich.

"The Honourable Mr. Justice Burnyeat"

October 16, 2008 – ***Revised Judgment***

Please be advised that the attached Reasons for Judgment of Mr. Justice G.D. Burnyeat dated July 9, 2008 have been edited.

- On the front page, the first docket number should read: ***H070700*** instead of ***H070699.***

- Also on the front page, the second docket number should read: ***H070699*** instead of ***H070700***.

- The Respondents in action H070700 have been amended to include:

"…
Susan Richards Investments Ltd.,
…….***and***
……"

- The Petitioner in action H070699 has been amended to read:

"bcIMC ***Specialty*** Fund Corporation"

- The Respondents in action H070699 has a word added:

"… Freeman ***and*** …"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***CareVest Capital Inc. v. CB Development 2000 Ltd.,*** 2007 BCSC 1146

Date: 20070614
Docket: H070290
Registry: Vancouver

Between:

CareVest Capital Inc.

Petitioner

And:

**CB Development 2000 Ltd., Carrera Ventures Ltd.,
CB Development Ltd., 526018 B.C. Ltd.,
330158 British Columbia Ltd., Craig Lochhead,
Grayden Roland Hayward, also known as Grayden Hayward,
Stanley Edward Greenfield, also known as Stanley Greenfield,
The Occupiers of Strata Lots 29, 49 and 118 of the Riverbend Property,
Riverbend Mortgage Investment Corporation,
Traditional Garage Doors Inc., Port Coquitlam Building Supplies Ltd.,
Glen Chychrum, Anne Chychrum, Estate of Michael Chychrum,
Laura Kennelly-Mohr, Brent Kennelly-Mohr, Renee Cook,
Janet Cook, Stephen Bulat, Jaime Dy, Bernardita Dy,
Sunita Chand, Gangadharan Narayanan, Uma M. Seetharaman,
Melanie Betz, Peter Betz, Donna E. MacDonald, Bao Lam,
Thao Lam, Colleen Leduc-Ledezma, Cedigheh Ceyedsadr,
Ann Rodgers, Johnny Bautista, Rosario Bautista,
Mehrdad Ershad, Vesaleh Verdiyeva, Yeqing Qiu,
Superintendent of Real Estate, Challenge Concrete Pumping Ltd.,
Rempel Bros. Concrete Ltd., TD & J Enterprises Ltd., Thornhill Electric Ltd.,
All Prospective Purchasers of the Strata Lots in Phase 3**

Respondents

Before: The Honourable Mr. Justice Pitfield

Oral Reasons for Judgment

In Chambers
June 14, 2007

Counsel for the Petitioner:	G. Thompson
Counsel for the Receiver/Manager:	H.M.B. Ferris
Counsel for the Respondents, L. Kennelly-Mohr, B. Kennelly-Mohr, R. Cook, J. Cook, S. Bulat, J. Dy, B. Dy, S. Chand, G. Narayanan, U.M. Seetharaman, M. Betz and P. Betz:	S.D. Coblin
Counsel for the Respondents, D.E. MacDonald, B. Lam, T. Lam, C. Leduc-Ledezma, V. Vikash, R. Vikash, J. Bautista, R. Bautista, R. Lau, K. Kong, O. Obi, W. Moses, M. Ershad, V. Verdiyeva, C. Ceyedsadr, A. Jensen and D. Jensen:	D.W. Donohoe
Counsel for the Respondents, CD Development 2000 Ltd., Carrera Ventures Ltd., CB Development Ltd, 526018 BC Ltd., 330158 British Columbia Ltd., C. Lochhead and Grayden Roland Hayward:	D.J. Taylor
Counsel for the Superintendent of Real Estate:	R. Fernyhough
Counsel for Port Coquitlam Building Supplies Ltd.:	J. Norton
Place of Trial/Hearing:	Vancouver, B.C.

[1] **THE COURT:** CB Development 2000 Ltd., the developer of a residential strata property project known as Riverbend located in Coquitlam, is in serious financial difficulty. The situation is complicated by the fact that the 32 units in Phase 3 of the project were presold. The mortgages are in default and the aggregate selling price of the units under the presale contracts will not be sufficient to discharge the mortgages.

[2] The fact is that significant cost overruns have been experienced on the project. Building and development costs were originally financed by proceeds from

a first mortgage in favour of MCAP Financial Corporation. That mortgage is in default. The total of principal and interest owing at this date approximates $4,423,000. CareVest Capital Inc. has provided additional financing on the security of a second mortgage, collateral security and several guarantees.

[3] The aggregate of the debts owing to CareVest is approximately $8,525,000 at today's date. Other debts on the project approximate $3,848,000. The cost of completing the project not including the cost of landscaping and the cost of some detached garages and certain other costs is estimated at $3,200,000. Existing trade payables approximate $600,000. Some of the trades have filed liens against the property in phase 3 and against strata lots in other phases of the project. If you add up the numbers, the total of the secured and unsecured liabilities and the cost to complete, approximates $20,596,000.

[4] The developer marketed the units on a "sale before building" or presale basis. The total price of all units under contract for sale approximates $11,936,000. There are some holdbacks and goods and services tax recoverable to a total of $135,000, such that revenue will total $12,071,000. The economic reality is that costs will exceed revenue by approximately $8,525,000. The ultimate question is who will bear the loss: the presale purchasers, CareVest, or both. The situation for all concerned is regrettable, to say the least, and one can only have sympathy for all involved in this rather disastrous project.

[5] CareVest recognizes that it will incur some loss. By way of petition filed May 28, 2007, it sought relief in the form of an order permitting the sale of the units with

vacant possession, conduct of the sale and the appointment of a receiver/manager of the rents and profits of the Riverbend property. If that relief should be granted, additional funding would be provided by CareVest to complete construction and the units would be sold at market, free and clear of encumbrances without regard for the developer's obligations under the presale contracts. CareVest anticipates that if that course were followed, its loss would be reduced from approximately $5,022,000 to $2,629,000.

[6] If CareVest is granted the relief it seeks, the presale buyers will be denied the acquisition of their units at presale contract prices. Some are first-time buyers. In addition to losing their units and their intended homes, the purchasers would lose the benefit of market appreciation in the value of the units. The estimate of that loss on average, as I appreciate the evidence, approximates $80,000 per unit.

[7] In support of the relief it claims, CareVest points to the fact that it is the registered holder of mortgage security and therefore entitled to realize upon its security by way of the relief sought in the petition, or by foreclosure without regard for the presale contracts. CareVest says the only remedy available to the purchasers is a claim against the developer for damages.

[8] The holders of the presale contracts say that the purchase contracts to which they are party create an equitable charge which, while not registered, is entitled to priority over the registered charge in favour of CareVest. In sum, if CareVest prevails, the presale buyers will be without remedy because of the financial insolvency of the developer, but the loss incurred by CareVest will be reduced by

approximately $2.4 million. Conversely, if the presale contracts are enforced, the purchasers will get their units upon payment of the presale contract price and CareVest's loss will be increased by $2.4 million.

[9] Against this background I turn to the application presently before the court. On May 28, 2007, CareVest obtained an *ex parte* or without-notice order appointing The Bowra Group Inc. as receiver to take possession of the property in order that it could be preserved, protected and controlled. At that date the receiver was limited by the order to borrowing $100,000 for the purpose of funding the exercise of its powers and its duties. The receiver was directed to investigate available courses of action which it has done.

[10] By its present notice of motion filed June 7, 2007, the receiver applies for an order adding terms to the receivership order, a direction that the receiver be authorized to borrow $3,800,000 to rank subsequent to the MCAP mortgage but in priority to all other charges, and a direction that the receiver disclaim the presale contracts of purchase and sale entered into by the developer in respect of strata lots 88 through 119 in Phase 3.

[11] Seventeen of 32 holders of purchase contracts oppose the receiver's application, saying that the receiver should be directed to borrow the sum of $3,800,000, which it estimates to be the amount required to complete construction to the point where sales can proceed, such borrowing to rank in priority to all registered or unregistered charges except the MCAP charge, and then directed to sell the

strata lots upon completion of construction on the terms, including price, specified in the presale agreements.

[12] For the reasons that follow, I conclude that the appropriate order in these circumstances is the following:

1. Except to the extent any of the additional clauses requested by the receiver are inconsistent with the terms of this order, the application to add the additional terms is granted.

2. The receiver shall be and is hereby authorized to borrow the sum of $3,800,000 on the security of a mortgage that will rank subsequent to the MCAP Financial Corporation mortgage, but in priority to all other registered or unregistered charges against the property of any nature and kind whatsoever.

3. The application for a direction that the receiver be permitted to disclaim contracts of purchase and sale in respect of units 88 through 119 is dismissed.

4. The receiver is authorized and directed to sell each of the units at market value free and clear of any obligation of the developer, CB Development 2000 Ltd., that may arise under any contract of purchase and sale pertaining to any strata lot.

5. The receiver shall hold in trust for CareVest and any purchaser under a presale contract, the excess of the sale price payable to the receiver upon the sale of any strata lot without deduction of selling costs or vendor and purchaser closing adjustments over the purchase price stipulated in the presale contract pertaining to the strata lot, such funds to be held pending determination of priority and/or entitlement thereto as between the presale contract buyer and CareVest.

[13] It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property,

particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.

[14] As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.

[15] I conclude that the breach of the presale contracts by the developer entitles the presale buyers to damages but not to specific performance. Regrettably, the fact that damages, if awarded, may not be recovered from an insolvent developer cannot affect that result. Insolvency, the reasons for it, and the financial results flowing from it are independent of any concerns affecting the specific performance of land sale and construction contracts which affect the secured creditors.

[16] I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the

registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.

[17] Some of those circumstances are these and in stating these circumstances I am not to be taken as making any findings of facts whatsoever that may affect or enter into a determination of priority or entitlement. I recite the circumstances solely to outline the background and to explain my thought process.

[18] On May 26, 2004, at a time when there were no presale contracts in place, CareVest committed to providing second mortgage interim financing of up to $4 million on this project. The evidence suggests that CareVest was aware of the plan for presale and stipulated that it should be provided with copies of presale contracts. CareVest agreed to provide a partial discharge of its mortgage on the completion of the sale of any strata lot, provided that the proceeds from the presale were paid in full to the mortgagee.

[19] On February 4, 2005, at which point in time there still had been no presales, CareVest agreed to increase funding from $4.2 million to $5,070,000 to assist with cost overruns, among other things. It asked for and received additional collateral security at that time. The presale and partial discharge terms remained in place.

[20] On October 14, 2005, by which time on the evidence as I appreciate it, 20 of the units were subject to presale contracts, CareVest agreed to another amendment that increased the loan amount from $4,364,000 to $4,874,000. The presale and partial discharge obligations were not modified.

[21] On March 28, 2006, by which time the remaining 12 units had become subject to presale contracts, a further change was made to increase the actual amount borrowed to $5,070,000.

[22] On August 29, 2006, there was a further amendment to increase the maximum loan amount to $5,570,000.

[23] On November 29, 2006, there was a further increase by approximately $1,300,000 to a maximum of $6,870,000. To that date there was no change in the presale or partial discharge requirements.

[24] On March 15, 2007, and I may misstate this, but it appears that CareVest committed to lend another $5 million and possibly as much as $10 million to fund the cost to complete, but the terms of the loan were modified so as to provide that the units were sold at market value. The discharge provision was modified so that CareVest was not obliged to provide a discharge except that the unit had been sold at market value.

[25] On April 27, 2007, the developer advised the holders of all presale contracts that it had repudiated those contracts. The deposits, which amounted to $5,000 to $10,000 in respect of most units, were returned. No juristic reason for the repudiation was advanced on this application.

[26] It follows that from what I have said at least from March 28th, 2006, when all units had been made the subject of presales CareVest was prepared to lend on the original partial discharge term, but that term was altered in March 2007 when

CareVest insisted upon the amendment of the prior lending agreements. The amendment left the developer, of course, with no alternative but to repudiate the contracts to which it was party.

[27] In my opinion, the relationship between the developer and CareVest, and the role of CareVest in the evolution of the developer's breach of contract that was induced by, or that resulted from, the amendments to the terms of the loan or loans may warrant investigation by counsel for the presale purchasers with a view to establishing an equitable or legal claim that would entitle them to a portion of the proceeds derived from the sale of the unit which they had agreed to buy.

[28] It is for that reason that I have declined to permit the receiver-manager to disclaim any of the presale contracts so as not to prejudice the buyers' ability to endeavour to establish the existence of an equitable charge against the project that ranks ahead of the registered CareVest charge, in whole or in part, or to claim damages.

[29] Because the measure of the damages may approximate the difference between the presale contract price and the receiver's selling price, the term that I have stipulated that provides for the safekeeping of certain funds, and the determination of the issue of the existence and extent of a purchaser's priority as against CareVest is, in my opinion, appropriate.

[30] Ms. Ferris, what is the receiver's position with respect to costs?

[31] MS. FERRIS: First of all, My Lord, I wonder if I could ask Your Lordship, subject of course to your availability, but that you will be seized of this matter.

[32] THE COURT: I will be seized subject to my availability.

[33] MS. FERRIS: Thank you, My Lord. And the receiver would seek costs in the normal course.

[34] THE COURT: Just costs in the normal course? All right. Does anybody have representations in respected of that? Yes.

[35] MR. COBLIN: Your Honour, if you just give me two seconds to just confirm with Mr. Donohoe in this matter.

[36] THE COURT: Well, I do not expect that this is the end of the matter in any way, shape or form. I think what I will do since there are people here and I can imagine that there will be some consternation about the result, I think the matter of costs can be addressed on a subsequent occasion in the absence of agreement between counsel, or among counsel.

[37] MR. THOMPSON: My Lord, just one issue. I think it is probably dealt with in your reasons, but just for clarification. In the initial order we sought appointing a receiver there was $100,000 in borrowings. I take it that is subsumed in your reasons, that the receiver/manager will have priority for its borrowings?

[38] THE COURT: Yes, certainly. And if the terms of the order require modification in order to accommodate the spirit and intent of them, then I am happy

to receive submissions in relation to those concerns unless, of course, counsel cannot agree. But my intention is that the $3.8 million will be the borrowing on the property. Are you saying it should be $3.9 million?

[39] MR. THOMPSON: I think it may need to be $3.9 million to cover those costs which went towards the preservation and protection of the property for all parties.

[40] THE COURT: Well, the order with respect to the $100,000 will remain as it was. I have not varied that order, and what the receiver has been authorized to do is to borrow $3.8 million to complete on terms which will rank behind MCAP and in priority to everyone else. I am not making any modification in that regard to the $100,000 loan.

[41] MR. DONOHOE: My Lord, I believe there was a provision in the motion filed by the receiver-manager seeking a stay of the pending actions by the presale buyers against CB Development 2000 Ltd. And we ask for clarification that there is to be no stay of proceedings imposed given Your Lordship's reasons about the need for investigation on the part of the presale buyers.

[42] THE COURT: Well, in the notice of motion there were three requests, and I have dealt with the three of them, and none of them includes a stay.

[43] MR. COBLIN: Sorry, My Lord, I think in your reasons you said you were going to grant all of the amendments that were inconsistent with your reasons. One of the amendments deals with a stay, and as I heard your reasons, I think you said it is that the purchasers should be left with the remedies of damages against CB

Development, and it sounded to me that the stay provisions would be inconsistent with that order. So I just wanted clarification with respect to that. I believe it is --

[44] THE COURT: Well, I think probably the manner in which to proceed is this. My intention is that obviously paragraphs 2, 3, 4 and 5 of my order should be respected and effected. Counsel should be able to determine among themselves what changes to the terms requested by the receiver-manager must be made to achieve that result.

"The Honourable Mr. Justice Pitfield"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***CareVest Capital Inc. v. Chychrun,*** 2008 BCSC 1138

Date: 20080822
Docket: H070290
Registry: Vancouver

Between:

CareVest Capital Inc.

Plaintiff

And

Glen Chychrun, Anne Chychrun, Estate of Michael Chychrun, Laura Kennelly-Mohr, Brent Kennelly-Mohr, Renee Cook, Janet Cook, Stephen Bulat, Jaime Dy, Bernardita Dy, Sunita Chand, Gangadharan Narayanan, Uma M. Seetharaman, Melanie Betz, Peter Betz, Donna E. MacDonald,Boa Lam, Thao Lam, Colleen Leduc-Ledezma, Cedigheh Ceyedsadr, Ann Rodgers, Johnny Bautista, Rosario Bautista, Mehrdad Ershad, Vesaleh Verdiyeva, Yeqing Qiu, Vinnell Vikash, Reema Vikash, Ricky Lau, Kathleen Kong, Amber Carreiro, Ya Ping Dong, Xu Hu, Xio Jie Sun, Tracy Clayton, Allan Jensen, Darcie Jensen, Paraschiva Carmen Kamner, Osita Obi, Wendy Moses, Cecilia Mijares, Agapito Mijares, Betsy Garin, Dante Garin, Luke Hassan, Henrike Stephen, Anthony Stephen, Imran Rajan, Zahra Rajan, Phat Vinh Vi, Jason Waller, Ruby Wong, Ross Dolan, Carlee Grant

Defendants

Before: The Honourable Madam Justice Garson

Reasons for Judgment

Counsel for the Plaintiff	B.W. Dixon
Counsel for Defendant, Glen Chychrun et al.	D.W. Donohoe
Counsel for the Defendant, Laura Kennelly-Mohr et al.	S.D. Coblin
Appearing in person	C. Ceyedsadr
Date and Place of Hearing:	July 10, 11 and 14, 2008 Vancouver, B.C.

[1] In this foreclosure action CareVest Capital Inc. (“CareVest”) applies for a declaration that its security ranks in priority to any unregistered equitable interest the defendants may have acquired under their cancelled pre-sale contracts.

[2] The defendants who oppose the application had all entered into agreements to purchase strata titled units in the property that is the subject of this foreclosure action. They say that the plaintiff’s conduct in requiring the developer to cancel their contracts and to resell their units at a higher price constitutes equitable fraud and consequently the plaintiff lender does not have the priority it claims.

BACKGROUND

[3] The primary lender for the Riverbend development was MCAP Financial Corporation. It took security as first mortgagee. Its mortgage is not at issue in these proceedings.

[4] The mortgage that is the subject of this foreclosure action is a mortgage entered into between the developer and the plaintiff on June 30, 2004, in the amount of $4,200,000 (the “First Riverbend Mortgage”) registered as a second mortgage at the New Westminster Land Title Office on June 30, 2004. The First Riverbend Mortgage secures both principal and interest accruing thereafter at 15% per annum to the date of repayment (on the sale of the units).

[5] By February, 2005, the developer was seeking financing for cost overruns and CareVest agreed to extend the term of the June 30, 2004, mortgage and to increase the loan. The plaintiff registered a mortgage modification agreement (the

"First Modification") in the Land Title Office on March 1, 2005, increasing the principal amount of the mortgage to $5,070,000.

[6] The defendants have been described as pre-sale purchasers. They entered into purchase contracts with the developer on various dates from April 6, 2005, to January 15, 2006.

[7] Prior to April 6, 2005, the developer had repaid $156,033.40 to the plaintiff (see Exhibit T to the affidavit of J. Plasteras of May 20, 2008).

[8] The First Riverbend Mortgage secures a running account, as can be seen from the register of mortgage documents (Exhibit "C" to the Plasteras affidavit #4). Under the ***Land Title (Transfer Forms)*** Regulation, B.C. Reg. 53/90, being a regulation to the ***Land Title Act***, R.S.B.C. 1996, c. 250, a running account is defined as follows:

> **14** If the *mortgage form* states that *this mortgage* secures a current or running account, the *lender* may, on one or more occasions, advance and readvance all or part of the *principal amount* and *this mortgage*
>
> (a) will be security for payment of the *principal amount* as advanced and readvanced and for all other money payable to the *lender* under *this mortgage*,
>
> (b) will not be considered to have been redeemed only because
>
> (i) the advances and readvances made to the *borrower* have been repaid, or
>
> (ii) the accounts of the *borrower* with the *lender* cease to be in debit, and
>
> (c) remains effective security for further advances and readvances until the *borrower* has received a discharge of *this mortgage*.

[9] The mortgage document indicated that CareVest filed Standard Mortgage Terms, registered as MT930036. Articles 28 and 29 of those terms read as follows:

> 28. That the mortgage, assignment and charge hereby created shall be effective whether or not the whole or any portion of the moneys hereby intended to be secured or any part thereof shall be advanced before or after or on the date of the execution of this Mortgage and all such sums together with all fees and expenses of the Lender shall be deemed to be secured by this Mortgage from the date of registration hereof notwithstanding the date the same may be advanced or incurred.
>
> 29. That until this Mortgage has been discharge as hereinbefore provided, this Mortgage and the charges hereby created shall be and remain valid and continuing security and shall cover and secure the payment of any and all indebtedness and liability, present and future, direct or indirect, absolute or contingent of the Borrower to the Lender, including, without limitation, obligations of the Borrower to indemnify or pay the Lender in respect of any Cash-Equivalent Instruments. This Mortgage shall be deemed to secure, inter alia, the repayment to the Lender of the full face amount of all Cash-Equivalent Instruments from the date hereof notwithstanding that at the time of realisation hereunder, the Lender has not been called on to pay any moneys thereunder. This Mortgage is made to secure a running account, inter alia, and shall not be redeemed by reason only that advances secured hereunder are repaid. Any such payment shall be deemed not to be a cancellation pro-tanto of this Mortgage and any subsequent advance or re-advance by the Lender to the Borrower shall be secured hereby to the same extent as if such advance or re-advance had been made on the granting of this Mortgage.

[10] At the request of the developer, CareVest made several further advances. On March 15, 2007, the plaintiff agreed to loan a further $5 million to the developer as the plaintiff's second mortgage to the developer (the third mortgage against the property). By May 10, 2007, the developer was indebted to CareVest in the amount of $8,049,885.90.

[11] On May 28, 2007, CareVest commenced these foreclosure proceedings and the Court appointed a receiver-manager.

[12] The most recent report of the receiver-manager, dated May 22, 2008, indicates that the total estimated net recovery to creditors is $4.3 million. Any re-payment of the First Riverbend Mortgage, and of the receiver-manager's borrowings and expenses for completion of phase 3 will come from that $4.3 million. The plaintiff says that the principal outstanding on the First Riverbend Mortgage was never less than $4.3 million at any time after March 2, 2005, which pre-dates any of the purchase contracts, and therefore it has priority to the net proceeds of the receivership.

[13] The issue with the pre-sale purchasers arose as follows. On May 26, 2004, the plaintiff issued a commitment letter to the developer, to which the developer agreed. In that letter, the plaintiff and the developer agreed to a minimum gross sale price for each strata lot in phase 3. The letter set out the exact prices for which the plaintiff would provide a partial discharge of its mortgage security for each strata lot.

[14] On March 15, 2007, the plaintiff issued a new commitment letter, to which the developer agreed, that changed the partial discharge terms. The letter required each lot to be sold at "fair market value … as determined by CareVest."

[15] What this meant was that because the market value of the lots had appreciated between the time that the defendants entered into their agreements and the time that the developer ran into financial problems, CareVest determined that the

only way it could minimize its losses would be for the developer to cancel the agreements and re-sell the lots at the then higher market value.

[16] On May 7, 2007, the developer announced that it was unable to fulfil its contractual obligations to the pre-sale purchasers and that it would return all deposit monies placed with it by the pre-sale purchasers. Those deposit monies were returned to all the purchasers, including the defendants.

[17] The financial difficulties of the developer are set out in Mr. Justice Pitfield's reasons in an earlier application in this action (***CareVest Capital Inc. v. CB Development 2000 Ltd. et al.***, 2007 BCSC 1146), from which I quote:

> [2] The fact is that significant cost overruns have been experienced on the project. Building and development costs were originally financed by proceeds from a first mortgage in favour of MCAP Financial Corporation. That mortgage is in default. The total of principal and interest owing at this date approximates $4,423,000. CareVest Capital Inc. has provided additional financing on the security of a second mortgage, collateral security and several guarantees.
>
> [3] The aggregate of the debts owing to CareVest is approximately $8,525,000 at today's date. Other debts on the project approximate $3,848,000. The cost of completing the project not including the cost of landscaping and the cost of some detached garages and certain other costs is estimated at $3,200,000. Existing trade payables approximate $600,000. Some of the trades have filed liens against the property in phase 3 and against strata lots in other phases of the project. If you add up the numbers, the total of the secured and unsecured liabilities and the cost to complete, approximates $20,596,000.
>
> [4] The developer marketed the units on a "sale before building" or presale basis. The total price of all units under contract for sale approximates $11,936,000. There are some holdbacks and goods and services tax recoverable to a total of $135,000, such that revenue will total $12,071,000. The economic reality is that costs will exceed revenue by approximately $8,525,000. The ultimate question is who will bear the loss: the presale purchasers, CareVest, or both. The

situation for all concerned is regrettable, to say the least, and one can only have sympathy for all involved in this rather disastrous project.

[5] CareVest recognizes that it will incur some loss. By way of petition filed May 28, 2007, it sought relief in the form of an order permitting the sale of the units with vacant possession, conduct of the sale and the appointment of a receiver/manager of the rents and profits of the Riverbend property. If that relief should be granted, additional funding would be provided by CareVest to complete construction and the units would be sold at market, free and clear of encumbrances without regard for the developer's obligations under the presale contracts. CareVest anticipates that if that course were followed, its loss would be reduced from approximately $5,022,000 to $2,629,000.

[6] If CareVest is granted the relief it seeks, the presale buyers will be denied the acquisition of their units at presale contract prices. Some are first-time buyers. In addition to losing their units and their intended homes, the purchasers would lose the benefit of market appreciation in the value of the units. The estimate of that loss on average, as I appreciate the evidence, approximates $80,000 per unit.

[18] On June 14, 2007, Mr. Justice Pitfield made the following order:

[12] For the reasons that follow, I conclude that the appropriate order in these circumstances is the following:

1. Except to the extent any of the additional clauses requested by the receiver are inconsistent with the terms of this order, the application to add the additional terms is granted.

2. The receiver shall be and is hereby authorized to borrow the sum of $3,800,000 on the security of a mortgage that will rank subsequent to the MCAP Financial Corporation mortgage, but in priority to all other registered or unregistered charges against the property of any nature and kind whatsoever.

3. The application for a direction that the receiver be permitted to disclaim contracts of purchase and sale in respect of units 88 through 119 is dismissed.

4. The receiver is authorized and directed to sell each of the units at market value free and clear of any obligation of the developer, CB Development 2000 Ltd., that may arise

under any contract of purchase and sale pertaining to any strata lot.

5. The receiver shall hold in trust for CareVest and any purchaser under a presale contract, the excess of the sale price payable to the receiver upon the sale of any strata lot without deduction of selling costs or vendor and purchaser closing adjustments over the purchase price stipulated in the presale contract pertaining to the strata lot, such funds to be held pending determination of priority and/or entitlement thereto as between the presale contract buyer and CareVest.

[19] In order #5, Mr. Justice Pitfield ordered the receiver-manager to create a fund (the "Fund"). The Fund is comprised of the proceeds of sale reflecting the increase between the pre-sale purchase contract price and the actual sale price. The subject matter of this application is the disposition of the Fund. In making his order of June 14, Mr. Justice Pitfield said:

> [16] I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.

POSITION OF THE DEFENDANTS

[20] The defendants state the issues as follows:

(1) whether or not the Fund was created in lieu of the pre-sale purchasers' equitable interest in the development as at the date of the court order; and

(2) whether or not, as at the date of the Court's order, the pre-sale purchasers' equitable interest in the development went in priority to the plaintiff's first mortgage and second mortgage in whole or in part.

[21] Implied in the statement of these issues is a third issue: if the answer to the second issue is yes, then what is the value of that equitable interest?

[22] The defendants say that the Fund stands separate and apart from the monies available for the foreclosure and receivership and is not subject to any costs or expenses incurred by the receiver-manager. The defendants say the Fund cannot be subject to the expenses of the foreclosure because no such expenses existed on the date the Fund was created, and the purpose of the Fund was to preserve competing property interests as at June 14, 2007. The defendants contend that to make the Fund available to compensate the plaintiff for the cost to complete the project defeats the entire purpose of its creation. The defendants argue that upon entering into their respective pre-sale contracts, each pre-sale purchaser acquired an unregistered equitable interest in their strata lots. The defendants argue that Mr. Justice Pitfield did not determine that the pre-sale contracts were incapable of specific performance as is contended by the plaintiff.

[23] The defendants rely on s. 29(2) of the ***Land Title Act***, R.S.B.C. 1996, c. 250, which provides as follows:

> **29** (1) For the purposes of this section, "registered owner" includes a person who has made an application for registration and becomes a registered owner as a result of that application.
>
> (2) Except in the case of fraud in which he or she has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
>
> > (a) a transfer of land, or
> >
> > (b) a charge on land, or a transfer or assignment or subcharge of the charge,

> is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than
>
> (c) an interest, the registration of which is pending,
>
> (d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or
>
> (e) the title of a person against which the indefeasible title is void under section 23 (4).

[24] The defendants contend that the fraud referred to in s. 29(2) is not limited to deceit; they argue that equitable fraud is sufficient. They say that the plaintiff acted towards the pre-sale purchasers in a way that constitutes fraud within the meaning of s. 29(2) of the ***Land Title Act***. The conduct of the plaintiff that they refer to as constituting s. 29(2) fraud is the July 20, 2006, letter sent to the developer asking whether "… any of the sales on units not started could be collapsed or alternatively can the prices on existing sales for units not yet started be increased to reflect current market value." After July 28, 2006, CareVest began taking an active role in controlling the project, according to the defendants. The defendants contend that the plaintiff essentially forced the developer to break the contracts, but at the same time tried to create an appearance of distance between it and the developer. The defendants say that the plaintiff was an active participant in the development and implementation of a plan to increase their secured position which required the pre-sale contracts to be cancelled. The defendants say this conduct is equitable fraud and invokes the fraud exception in s. 29(2) of the ***Land Title Act*** and, therefore, the pre-sale purchasers are entitled to a declaration that their interests rank in priority to the interests of the plaintiff from and after registration of the First Modification and

that no further advances or readvances can be tacked to that security. The defendants further say that had this matter been determined on June 14, 2007, the pre-sale purchasers would have succeeded in their position that their interests rank in priority to the plaintiff's registered interest, in whole or in part. They say the pre-sale purchasers are therefore entitled to payment out of their proportionate share of the fund.

[25] As I understand the calculations of the defendants they say that as at June 14, 2007, the anticipated revenue was $12.7 million. CareVest was secured to $3.9 million and MCAP, the first mortgagee, was secured to $4.4 million, for a total of $8.3 million. The receiver-manager then estimated the cost to complete at $3.8 million, which leaves a surplus of $600,000 that could be paid to the defendants.

[26] The actual completed cost was $6.9 million. The defendants say they should not have to bear the burden of the actual cost to complete because they were prepared to purchase their units as is on June 14, 2007. On that date the units were not completed. The receiver-manager's report of June 5, 2007, includes, at p. 5, the total cost to complete the project, which illustrates that the units were incomplete.

[27] It is not clear to me if the defendants were offering to conclude their contracts on an "as is" basis with some discount representing the portion of the unit uncompleted. I assume that is so.

[28] Mr. Donohoe, for the 22 Chychrun defendants, asserts that the "game plan" of the plaintiff to arrange for the collapsing of the pre-sale contracts arose from

discussions between the plaintiff and the developer at a site meeting on September 14, 2006. He says the defendants were “tricked” by CareVest and that is not the sort of conduct that should be condoned by this Court. He alleges a number of breaches of the disclosure requirement contained in the ***Real Estate Development Marketing Act***, S.B.C. 2004, c. 41 and its predecessor statute, the ***Real Estate Act***, R.S.B.C. 1996, c. 397. They claim that the failure to disclose induced the defendants to assume that there was little or no risk to entering the pre-sale contracts. If the plaintiff had disclosed the information, the defendants likely would not have entered the pre-sale contracts. These defendants argue that the plaintiff should be equitably estopped from obtaining the assistance of the Court to enforce its security interest when it has breached a statutory duty to disclose. He says that the conduct of the plaintiff in breach of these statutes is relevant to the argument that its conduct constitutes equitable fraud under s. 29 of the ***Land Title Act***. He acknowledges that this same conduct may constitute a cause of action in tort and that the tort claim is not before me; his statement of defence pleading these allegations having been struck out by Mr. Justice Pitfield.

[29] In oral reasons released January 25, 2008, Mr. Justice Pitfield said, at paras. 16 and 18:

> [16] The question of whether wrongs have been independently committed by virtue of any of the dealings between the buyers, the developer, and the lender are properly the subject matter of a separate cause of action which should be advanced by counterclaim.
>
> …
>
> [18] For the reasons I stated, the claims are properly the subject matter of independent causes of action which, as the plaintiff

> acknowledges, may be pursued by counterclaim. They do not properly comprise a defence to the foreclosure proceeding.

[30] Mr. Donohoe defends his reliance on this conduct, the particulars of which were struck out in a statement of defence, on the basis that this same conduct also constitutes equitable fraud under s. 29 of the ***Land Title Act***. Mr. Donohoe submits that the Fund was to be preserved as a separate fund outside of the security being granted to the receiver-manager for payment of its fees and expenses and was not to be used as a backup financial resource to pay the expenses of completion of the construction of the houses. Mr. Donohoe furthers submits that Mr. Justice Pitfield did not make a binding and final determination that there was never at any earlier date any possibility of the defendants succeeding in their claims for specific performance. Mr. Donohoe says it would be contradictory for the Court to say on the one hand, as Mr. Justice Pitfield did, that he was recognizing the potential equitable interest of the defendants which could only be based on specific performance, and then say on the other hand that specific performance was not possible.

ANALYSIS

[31] On June 14, 2007, it was not possible for Mr. Justice Pitfield to determine if the net proceeds of the receivership would be greater than the sum of the advances made under the First Riverbend Mortgage before the pre-sale contracts were entered into. He could also not determine in a summary proceeding if there was a basis in fact for the claims of equitable fraud. The parties have since conducted examinations for discovery and have brought to my attention the circumstances which the defendants say is equitable fraud. However, it is not necessary for me to

decide any of the issues raised in defence by the defendants because the net proceeds of the receivership are insufficient to cover the principal and accrued interest.

[32] The First Riverbend Mortgage balance outstanding as at April 6, 2005, the date just before the first defendant pre-sale contract, was $4,913,966. This sum is calculated from the exhibits to the fourth affidavit of Jill Plasteras (Exhibits “R” and “T”) as follows:

Total advances made before April 6, 2005	$5,070,000
- minus repayments to that date	(156,033)
Balance outstanding	**$4,913,966** plus interest

[33] As noted above, the mortgage bears interest at 15% per annum on the running account. Plaintiff’s counsel advised the Court that the accrued interest is about $500,000 to July 24, 2007, plus a per diem amount thereafter.

[34] The May 22, 2008, receiver-manager’s Report to the Court estimates the total potential recovery (including the $2,103,370 held in trust in the Fund) at $4,297,695. It is readily apparent that the total potential recovery does not exceed, or even come close to, the balance outstanding on the First Riverbend Mortgage before any of the pre-sale purchase contracts were entered into.

[35] It is for this reason, and the fact that the mortgage secures a running account that it is unnecessary to consider the defendants arguments as set out above because they cannot succeed, owing to the poor recovery. Mr. Justice Pitfield did

not determine that the Fund belonged to the purchasers. He merely ordered that it be segregated and secured so that the defendants could argue later about the entitlement and priority to the Fund. As it turns out, as I have said, there are insufficient funds to enable the defendants to establish any priority to the fund at all. Mr. Justice Pitfield did not create a fund for a damage claim the defendants may have against the plaintiff. If the recovery had been greater than the amount outstanding plus accrued interest that was advanced prior to the defendants' agreements, it may have been necessary to consider the question of the claims to an unregistered equitable interest, but it was not.

[36] Consequently the plaintiff is entitled to the declarations it seeks as follows:

(a) the interest of the plaintiff under the First Riverbend Mortgage, as defined in the statement of claim filed October 9, 2007, are declared to rank in priority to any unregistered equitable interest of the defendants that may have been acquired by virtue of entry by the defendants into contracts of purchase and sale with the developer to the extent of the amount of loan advanced made by the plaintiff to the developer before the various dates on which the defendants and the developer entered into such contracts of purchase and sale; and

(b) the Receivership Order pronounced by Mr. Justice Pitfield on June 14, 2007, as amended by an Order pronounced August 15, 2007, be further amended by deleting para. 32 (the paragraph segregating the Fund that is the subject of this application) in its entirety.

[37] The defendants' applications for orders declaring the equitable interests to rank in priority to the plaintiff's, and for further consequential orders, are dismissed.

[38] Costs will follow the event.

"N. GARSON, J."

In the Court of Appeal of Alberta

Citation: Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc., 2009 ABCA 148

Date: 20090423
Docket: 0703-0210-AC
Registry: Edmonton

Between:

Castledowns Law Office Management Ltd.

Respondent
(Plaintiff/Defendant by Counterclaim)

\- and -

FastTrack Technologies Inc.

Appellant
(Defendant/Plaintiff by Counterclaim

\- and -

1131102 Alberta Ltd.

Not a Party to the Appeal
(Defendant/Plaintiff by Counterclaim)

\- and -

Mike Kozicki, Sylvia Kozicki, Century 21 Royal Real Estate Ltd. and Anthony Holinski

Not a Party to the Appeal
(Defendants by Counterclaim)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice O'Brien
Dissenting Memorandum of Judgment of The Honourable Mr. Justice Slatter

Appeal from the Decision by
The Honourable Mr. Justice J.J. Gill
Dated the 13th day of June, 2007
Filed on the 16th day of July, 2007
(2007 ABQB 404, Docket 0603-14617)

Memorandum of Judgment

Conrad J.A. (for the Majority):

I. Introduction

[1] The vendor in this dispute, 1131102 Alberta Ltd. (Vendor),[1] owned a commercial building in Edmonton which it decided to sell. To accomplish this end, it entered into two conditional sales agreements with two different purchasers – FastTrack Technologies Inc. (FastTrack) and Castledowns Law Office Management Ltd. (Castledowns). The agreement with Castledowns (Castledowns agreement) was a second agreement, referred to as a "back-up agreement," made after the agreement with FastTrack (FastTrack agreement), and was conditional on "satisfactory confirmation" that the FastTrack agreement had been terminated.

[2] The Vendor took steps to terminate the FastTrack agreement and FastTrack objected immediately and threatened to sue. The parties then met and negotiated what they described as an addendum to their original agreement. The Vendor, now intending to sell the property to FastTrack, did not give Castledowns written notice that the condition had been satisfied. On the condition date set out in the Castledowns agreement the Vendor advised Castledowns their agreement would not be going ahead because FastTrack was unable to confirm termination of the first agreement.

[3] Castledowns sued and was eventually successful in convincing a justice of the Court of Queen's Bench to grant an order for specific performance. FastTrack appeals that order. While FastTrack has several grounds of appeal, the main issue is whether the trial judge erred in his interpretation and application of the condition in the Vendor's agreement with Castledowns requiring "satisfactory confirmation of termination."

II. Decision

[4] I would allow the appeal. The trial judge erred in law by failing to consider the proper meaning to be attributed to the words "satisfactory confirmation of termination" found in the seller's conditions of the Castledowns agreement. This failure led him to interpret the condition as merely requiring legal termination of the private sales agreement with FastTrack when more was required. The words "satisfactory" and "confirmation", found in the seller's condition, indicate the Vendor was entitled to be satisfied any purported termination had been verified or corroborated by FastTrack. The Vendor wanted to know it no longer had any possible obligations under the first agreement before it became obligated under the second.

[5] Furthermore, the trial judge's decision cannot be upheld when the correct test is applied. Neither the letter of September 7, 2006 from the Vendor's lawyer, nor the subsequent

[1] Not a party to the appeal.

communications and negotiations between the Vendor and FastTrack, amounted to “satisfactory confirmation” by FastTrack that the agreement of August 30th had been terminated. In all of the communications between the Vendor and FastTrack, after the Vendor’s initial attempt to terminate the FastTrack agreement on September 7, 2006, FastTrack made clear that it was not prepared to accept that the parties’ original agreement had been, or should be, terminated. The condition not being satisfied, there was no further obligation to Castledowns. The Castledowns agreement terminated, therefore, on September 15th when the Vendor failed to give written notice that the condition had been either waived or satisfied.

[6] Thus, the order for specific performance cannot stand. I would allow the appeal, vacate the order for specific performance and declare that the Castledowns agreement ended on September 15, 2006. FastTrack seeks an order enforcing its agreement and conveying the property to it. This issue is not before the court. The formal judgment role discloses that FastTrack and the Vendor entered into a “stand still” agreement prior to trial concerning litigation over the FastTrack agreement. In any event, we are not in a position, on this record, to do more.

III. Background

[7] The Vendor owned a parcel of commercial property at 7708-104 Street in Edmonton, Alberta, known as the Vienna Building. Sometime between August 18 and August 21, 2006, Loren Yaremchuk, the Vendor’s owner and chief officer, advertised the property for sale in the *Edmonton Journal*. Shortly thereafter, on August 23, 2006, the Vendor entered into a commercial listing agreement with Century 21, with a listing price of $1,688,000 and an effective date of August 25, 2006. Century 21 agreed that it would not seek commissions if the property was sold to a buyer which had contacted the Vendor as a result of the earlier newspaper advertisement.

[8] FastTrack’s designated officer, Mr. Kourizin, is a university professor. He described FastTrack as a spin-off company from the University of Alberta that was engaged in contract work and production development, and was seeking premises near the university. When Kourizin saw the ad in *The Edmonton Journal*, he entered into negotiations with Yaremchuk, which eventually led to FastTrack’s entering into an agreement on August 30, 2006 to purchase the property for $1,625,000 with an initial deposit of $10,000. The FastTrack agreement was prepared on a standard real-estate contract form designed for residential homes, and the agreement was subject to the following seller’s conditions:

> 8.2 The Seller’s Conditions are:
>
> (a) Obtaining Seller’s Lawyer Approval regarding this Offer,
>
> before 9 p.m. on September 15, 2006 (the “Seller Condition Day”).

> 8.3 Unless otherwise agreed in writing, the Buyer's Conditions are for the sole benefit of the Buyer and the Seller's Conditions are for the sole benefit of the Seller.
>
> 8.4 The Buyer and the Seller may unilaterally waive or satisfy their Conditions by giving Notice to the other party (the "Notice") on or before the stated Condition Day.
>
> 8.5 Provided that the Buyer or the Seller, as the case may be, uses reasonable efforts to satisfy the Condition(s), if the Notice has not been given on or before the stated Condition Day, then this Contract is ended.

[9] The agreement also contained a number of buyer's conditions relating to financing, property inspection, contractor inspection, environmental assessment, lawyer approval and satisfaction with licence requirements, all which had to be completed before September 22, 2006, with the exception of the inspection which did not have to be completed until October 22, 2006. Clause 2.1 of the agreement provided that "[t]he Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith."

[10] Soon after this agreement was reached, Century 21 contacted the Vendor to say it had found several other interested buyers for the property. Century 21 arranged an open house where the Vendor could meet with these prospective buyers and, on September 2, 2006, several offers were presented, including one from Castledowns. Yaremchuk chose to negotiate with Castledowns, even though he had not yet sought his lawyer's approval with respect to the FastTrack agreement, and he did not tell Castledowns about the existence of the FastTrack agreement until negotiations were almost complete.

[11] The parties eventually negotiated a sale price of $1,724,250 and then a representative from Castledowns, Holinski, inserted a handwritten condition into clause 4.2 making the agreement subject to "Vendor confirmation of termination of contract dated Aug. 30, 2006." The Vendor's realtor, Mike Kozicki, crossed this condition out and inserted the words: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006." The Vendor told Castledowns he would try to get out of the FastTrack agreement because he was not convinced FastTrack was serious, or able to complete the deal.

[12] The seller's conditions in the Castledowns agreement, found in clauses 4.2 and 4.3, were different and more elaborate than those contained in the FastTrack agreement. Overall, they were more beneficial to the seller. They read:

> 4.2 **Seller's Conditions**: The obligations of the Seller described in this

> Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and excusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 15 day of September 2006, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the Initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.
>
> > - ~~Vendor confirmation of termination of contract dated Aug. 30, 2006~~. [crossed out]
> >
> > **Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30 2006**
>
> 4.3 Subject to clauses 4.1 and 4.2, the Buyer and the Seller may give written notice to the other party on or before the stated Condition Day advising that a Condition will not be waived, has not been satisfied and will not be satisfied on or before the Condition Day. If that notice is given, then this contract is ended upon the giving of that notice. (emphasis added)

[13] Castledowns gave its own realtor a deposit cheque for $100,000, which was due within 24 hours of the removal of the seller's conditions. That cheque was not forwarded to the Vendor, its lawyer, or its realtor on September 15, 2006 or at any time thereafter. The Castledowns agreement also contained clause 2.1, which provided that the parties would "... act cooperatively, reasonably, diligently and in good faith."

[14] After negotiating the Castledowns agreement, the Vendor sent both agreements to his lawyer, Mr. Engleking, for review. Engleking expressed concerns about the size of the deposit, and the length of time for removal of the purchaser's condition, in the FastTrack agreement. The Vendor instructed Engelking to terminate the FastTrack agreement and return the deposit. On September 7, 2006, Engelking wrote to FastTrack's counsel, Mr. Caruk, advising that his client was not prepared to remove "the 'subject to condition' in the Seller's favour." He returned the $10,000 deposit and stated that his client considered the transaction at an end.

[15] On September 8, Caruk e-mailed FastTrack about the purported termination. FastTrack's response was forceful and immediate; it instructed Caruk to challenge the purported cancellation.

Caruk then wrote to Engleking on September 11, 2006 and expressed in unequivocal terms his client's displeasure and its intention to enforce the agreement through the courts. He wrote:

> We have received your correspondence of September 7th, 2006. Needless to say we are not impressed and neither is our client.
>
> Your attempt to cancel our clients contract arbitrarily is unacceptable. Any clause purporting to make an offer subject to lawyer's approval does not extend to the substance of the deal. If there are terms regarding procedure, especially here where the form of the contract may not be particularly appropriate for a commercial transaction, that need to be addressed then we can modify same for the benefit of both out clients.
>
> Otherwise, if your justification for not removing the seller's "subject to" condition is other than a matter of price, kindly advise as to what possible changes may be required. If it is solely a matter of price then your client has a problem.
>
> Following execution of the subject contract, we are advised by our client that your client verbally advised our client that notwithstanding that your client had apparently received other higher offers respecting this property, that your client was proceeding with this transaction notwithstanding same. Based upon those representations my client has proceeded to obtain financing and incur costs associated with this transaction.
>
> Let us be clear. Our client wishes to proceed with this transaction, there is a signed contract wherein any irregularities can be resolved without cancellation of the deal and utilizing the subject to lawyer's approval clause to cancel the contract as you have is not proper.
>
> **We have delivered a Caveat to protect our client's interest in this property. Be further advised that other than completing this transaction out client will be seeking damages for this non-completion and compensation for the amounts expended by our clients with regard to this matter already with respect to this matter. Time is a consideration as well since our client has a "subject to financing" deadline of September 15th, 2006.**
>
> **May we please hear from you immediately.** (emphasis added)

[16] Upon learning of FastTrack's reaction, Yaremchuk immediately met with FastTrack, without either his lawyer or his realtor, to try to resolve the issues surrounding the purported termination.

The parties negotiated changes to their original agreement which they incorporated into an "Addendum" to that agreement (Addendum). The changes included a slightly higher price, a higher deposit, a rent-free lease back to the Vendor for one year, a different closing date and consideration of the GST, and it expressly removed the condition that the transaction was subject to approval by the Seller's lawyer. The Addendum was dated September 12, 2006.

[17] Meanwhile, Castledowns was concerned that it had not received written notice that the condition had been either waived or satisfied. On September 14, 2006, Castledowns' representative, Holinski, called Engelking and was advised that a letter had been written to FastTrack purporting to terminate the FastTrack agreement and returning the deposit. Engleking did not, however, confirm in writing that the seller's condition had been met, nor did he confirm that there had been a satisfactory confirmation of termination. The next day, September 15, 2006, after speaking with his client, Engelking sent a letter to Castledowns' realtor stating that his client "is unable to confirm termination of the private purchase contract dated August 30, 2006, and consequently the back up offer from Castledowns Law Office cannot be satisfied and our client considers that offer to be at an end."

[18] Castledowns' lawyer wrote back, on September 18, 2006, advising that it was filing a caveat to protect its rights and it was filing a statement of claim. On October 13th, approximately one month later, Castledowns wrote to the Vendor waiving the buyer's conditions. Even though it was taking the position the Castledowns agreement was still alive, Castledowns did not forward the $100,000 deposit to either the Vendor, his solicitor, or his realtor.

[19] The Vendor refused to complete the Castledowns agreement and on November 21, 2006, Castledowns sued the vendor, *inter alia*, for specific performance. It also sued FastTrack for tortious conspiracy, and inducing breach of contract, damages, and removal of its Caveat No. 062453925, registered on October 7, 2006, to protect its agreement for purchase.

[20] For its part, the Vendor counterclaimed for a declaration removing Castledowns' caveat from its property, for damages for slander of title, interest and costs. FastTrack defended and counter-claimed for interference with contractual relations, wrongful filing of caveats, exemplary and other damage and costs. Century 21 and its realtors were included in the counterclaim. All of the actions were eventually consolidated and set down for trial on an expedited basis. The court was advised there was a standstill agreement between FastTrack and the Vendor.

[21] The trial judge granted Castledowns' claim for specific performance, directed discharge of FastTrack's caveat, and dismissed all the other claims. FastTrack now appeals the order granting specific performance and discharging its caveat.

IV. The Trial Judgment

[22] The trial judge concluded that the FastTrack agreement had terminated when the Vendor wrote to FastTrack on September 7, 2006, saying the condition would not be waived and the agreement was at an end. In the alternative, he found that the FastTrack agreement terminated when the parties agreed to the Addendum on September 12th because the negotiation of the Addendum amounted to a counteroffer which terminated the first agreement. In either event, and without attempting to interpret the meaning of the words "satisfactory confirmation of termination..." as those words appeared in the handwritten condition in the Castledowns agreement, the trial judge held that the purported termination of the FastTrack agreement amounted to "satisfactory confirmation of termination." He appears to have equated "satisfactory confirmation of termination" with simple "termination". In addition, the trial judge held that once the Vendor terminated, it was obliged to act reasonably and in good faith and give notice that the agreement had been terminated. It could not, therefore, rely on its own default in giving notice to thwart the condition. Finally, and in the alternative, the trial judge held that written notice was not required and that Engleking gave effective notice orally, on the Vendor's behalf, when he spoke to Castledowns' representative on September 14th: *Castledowns Law Office Management Ltd, v. 1131102 Alberta Ltd.*, 2007 ABQB 404, 159 A.C.W.S. (3d) 452.

[23] The trial judge also considered whether it mattered that neither the Vendor, its realtor, nor its lawyer had ever received Castledowns' deposit of $100,000 as required by the Castledowns agreement, had it been in force. He concluded this was not fatal to Castledowns' claim. He also found both FastTrack and Castledowns had acted in good faith and that neither was guilty of tortious conduct towards the other. In the end, the trial judge granted Castledowns' application for specific performance, discharged FastTrack's caveat and dismissed all of the remaining claims and counterclaims.

V. Grounds of Appeal

[24] FastTrack advances four grounds of appeal. It submits the trial judge erred by:

(a) incorrectly interpreting the condition precedent in Castledowns agreement;

(b) incorrectly holding the respondent was not obligated to pay its deposit;

(c) incorrectly finding that specific performance was an appropriate remedy in the circumstances; and

(d) incorrectly interpreting real estate practice by allowing verbal variation or confirmation of a written contract.

VI. Analysis

A. Issue One – Did the trial judge err by incorrectly interpreting and applying the condition precedent in the Castledowns agreement?

[25] FastTrack submits the contract expired for lack of notice and that the trial judge misinterpreted and misapplied the seller's condition in the Castledowns agreement by failing to give meaning to the words "satisfactory confirmation of termination of [the] private purchase contract dated Aug 30, 2006". FastTrack suggests that had the trial judge properly considered these words, he would have been forced to conclude that the condition was never met.

[26] I agree with those propositions. This was an application by Castledowns for specific performance. To demonstrate that it had a right to this remedy, Castledowns had to prove it had an enforceable agreement for sale and that FastTrack did not have a valid caveat protecting its prior agreement.

[27] Clause 4.2 of the Seller's Condition in the Castledowns agreement provided that the seller's condition was for the sole and exclusive benefit of the seller. It also provided that "...These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the 15 day of September, 2006, (the Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then the Contract will be ended" in which case the deposit, if it has been received, will have to be returned. The Vendor's written notice on the 15th does not confirm that the conditions were either satisfied or waived. To the contrary, the Vendor wrote on September 15, 2006 that the condition could not be satisfied and his client considered the contract at an end. As a result, the contract was at an end unless the trial judge was correct in determining that the condition was met and that the Vendor was prohibited from relying on the lack of notice, or alternatively, oral notice was sufficient and satisfied by a telephone conversation with the Vendor's lawyer advising that a termination letter had been sent.

[28] Prior to addressing the trial judge's findings regarding notice, it is necessary to examine whether the trial judge correctly interpreted the seller's condition in the Castledowns agreement. The trial judge was obliged to look at the words of the condition to discover how it could be satisfied. As the Supreme Court noted in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 54:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[29] The trial judge did not do this here. Instead, he confined his analysis of the seller's condition to the issue of whether the Vendor had to give written notice before the condition could be removed and the Castledowns agreement could come into effect (see decision paras. 73 and following). He never offered any interpretation of the words "satisfactory confirmation" and simply equated

"satisfactory confirmation of termination" with legal termination, which takes no cognizance of the words used and ignores the intention those words indicate. The trial judge simply assumed that if the FastTrack agreement was terminated in a legal sense then the condition was met. His failure to analyse the wording of the agreement is an error that does not attract deference: *Partec Lavalin Inc. v. Meyer*, 2001 ABCA 145, 281 A.R. 339 at para. 11; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 at para. 14.

[30] Had the trial judge interpreted the words of the seller's hand-written condition he would have been forced to consider the effect of the words "satisfactory" and "confirmation" on the seller's condition, and examine the whole of the agreement in the surrounding circumstances to arrive at the proper intention for inserting this seller's condition.

[31] Turning first to the words used, the usual meaning of the word "satisfactory" is: "sufficient for the needs of the case, adequate" (*Online Oxford English Dictionary*). The use of this word in a conditional sales contract, however, gives rise to the question: Sufficient or adequate to whom? The British Columbia Court of Appeal dealt with this issue in *Griffin v. Martens*, [1988] B.C.J. No. 828, 27 B.C.L.R. (2d) 152 in the context of a conditional agreement to purchase. In that case, the agreement was made "subject to the purchaser being able to arrange satisfactory financing." The court confirmed that the clause was inserted for the benefit of the purchaser. In assessing the meaning of "satisfactory financing" in that context the court opined at 154:

> What is meant by "satisfactory financing"? There are four rational alternatives:
>
> 1. "satisfactory to a reasonable person making the purchase about whom nothing else is known";
>
> 2. "satisfactory to a reasonable person in the objective circumstances of the purchaser";
>
> 3. "satisfactory to a reasonable person with all the subjective but reasonable standards of the particular purchaser"; and
>
> 4. "satisfactory to the particular purchaser with all his quirks and prejudices, but acting honestly".

[32] The court ruled out the first alternative because it did not give sufficient meaning to the word satisfactory in the context of the interim agreement. It also ruled out the fourth alternative because such a meaning could have been better expressed by using the words "financing satisfactory to him", meaning the purchaser, and that such an interpretation would turn the agreement into an option. The court went on to conclude:

> The second and third meanings both combine subjective and objective standards. They are very similar in effect. I favour the third meaning as best expressing the actual intention of the parties by giving the most accurate interpretation to the words they chose to express their intention. The third meaning gives "satisfactory" a full and subjective significance but, at the same time, retains the commitment of the purchaser to use his best efforts, on a similar combined standard to obtain financing.

[33] The handwritten condition in the Castledowns agreement does not say specifically who must be satisfied that termination has been confirmed. The remainder of clause 4.2, however, is of assistance – in particular, the words: "These conditions are inserted for the sole and excusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller." In my view, these sentences make clear that it is the Vendor who must be satisfied that termination has been successfully confirmed, or, at the very least, applying the third category in *Griffin*, "a reasonable person with all the subjective but reasonable standards of the particular purchaser".

[34] The trial judge was also obliged to consider the parties' use of the word "confirmation". Having regard to the circumstances in which the condition was drafted, I am satisfied the parties simply intended "confirmation" to have its ordinary, non-ecclesiastical, meaning. According to the *Online Oxford English Dictionary,* that meaning includes:

> The action of making firm or sure; strengthening, settling, establishing (of institutions, opinions etc.).
> ...
> The action of confirming, corroborating, or verifying; verification, proof...
> A confirmatory statement or circumstance;

[35] As with the word "satisfactory", the parties' use of the word "confirmation" in a conditional sales contract requires the court to consider the question: Confirmed by whom or to whom? In my view, the agreement is sufficiently ambiguous on this point to require consideration of the general circumstances that brought it into being. Both parties knew this was a second conditional sales agreement with respect to the Vienna Building. Castledowns' principal, Holinski, inserted the condition: "Vendor confirmation of termination of contract dated Aug. 30, 2006." This condition was not enough to satisfy the Vendor's agent, the realtor Kozicki, and he crossed it out and replaced it with the words: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006."

[36] Viewing this contract in the circumstances here, I am satisfied that the logical and reasonable purpose behind this handwritten seller's condition contained in the Castledowns agreement was to ensure the Vendor did not become liable under two agreements. This is supported by the change made to the wording of the agreement by the Vendor's agent, Kozicki. In these circumstances, with a "back-up" agreement, the Vendor would want to ensure that it was out of one contract before being

liable on another, and that it would not be facing the expense and inconvenience of a legal challenge if and/or when it attempted to terminate the FastTrack agreement. The way to achieve this purpose was to provide that the Vendor would have confirmation of termination from FastTrack before the Castledowns agreement could come into effect. This confirmation did not have to be in writing. If FastTrack had accepted the return of its deposit, without complaint, this might have sufficed. However, the Vendor, acting reasonably, had to be satisfied that its purported termination would not be challenged.

[37] In summary, I conclude that the condition in the Castledowns agreement required the Vendor, or in the alternative, a reasonable person with all the subjective but reasonable standards of the Vendor, be satisfied that FastTrack had made "sure," "ratified," "corroborated," or "verified" that the purported termination was accepted without challenge.

[38] It remains to be asked whether the test was met in this case.When FastTrack heard about Engelking's September 7th letter purporting to terminate the agreement, it objected immediately and instructed its lawyer to challenge the cancellation. Counsel's response was unequivocal. In FastTrack's view, the Vendor had been expected to use reasonable efforts to satisfy the condition and take the agreement to his lawyer for advise without going out soliciting other offers. He wrote to the Vendor saying that FastTrack was prepared to sue to enforce its rights, and that it would proceed immediately to file a caveat. Although counsel did say FastTrack was willing to negotiate minor matters, he made it clear that FastTrack was not about to abandon the August 30th agreement. In my view, this response to the purported termination could not have been interpreted as satisfactory ratification, corroboration, or verification by FastTrack that the FastTrack agreement had been terminated – applying any of the possible standards discussed by the British Columbia Court of Appeal in *Griffin*.

[39] I would add that even if confirmation of termination could come from some other source, such as the Vendor's lawyer, this is not a case where FastTrack's proposed litigation was an idle threat. Here the Vendor was obliged to use reasonable efforts to secure its lawyer's approval of the FastTrack agreement. It did not forward the FastTrack agreement to its lawyer, however, until after it entertained other offers, and had negotiated a back-up agreement with Castledowns on more favourable terms. Only then did it go to its lawyer. The Vendor's principal, Yaremchuk, even testified that he had assured Castledowns he would try to terminate the FastTrack agreement. It is arguable, therefore, that in seeking lawyer's approval, only after it had a higher offer in hand, the Vendor was in breach of the contractual duty to using reasonable efforts to satisfy the condition precedent.

[40] What about FastTrack's subsequent behaviour? Did the negotiation of the Addendum amount to satisfactory confirmation of termination? Parties to a contract are entitled to vary their obligations, through re-negotiation, without terminating the contract. While I acknowledge there may be

situations where re-negotiation is so extensive as to amount to the execution of a new agreement,[2] whether the parties intended to rescind or vary must be determined in light of all of the circumstances of the case.

[41] In my view, it is not possible to conclude from the evidence that the parties intended to rescind the first agreement. Here the parties went into negotiations over the Addendum without their lawyers, and under threat of being sued. FastTrack had already stated that it was not prepared to accept termination of the original agreement and that it was only prepared to negotiate minor changes. The parties negotiated changes and put them into an Addendum to the original agreement, rather than execute a new agreement. There is nothing in the Addendum indicating it was intended to replace the original agreement. To the contrary, the parties expressly stated their intention that the Addendum "shall form a part of the original agreement entered into by the parties dated August 30, 2006." Given these facts, neither the Vendor, nor a reasonable person with all the subjective but reasonable standards of the Vendor, would have understood that the re-negotiations amounted to FastTrack's confirmation that the August 30, 2006 agreement had been rescinded. Moreover, even if it were a new agreement, it was negotiated under threat of lawsuit and all the evidence points to the fact that FastTrack was never going to relieve the Vendor from its obligations arising from the first agreement. At best, therefore, this was a settlement of those obligations, not confirmation that they did not exist. In other words, the condition that there be satisfactory confirmation of termination of the FastTrack agreement was never met.

[42] The final question is whether the handwritten condition in the Castledowns agreement was met, nonetheless, because the Vendor failed in its duty to use reasonable efforts to satisfy the condition. First, this condition is not akin to a condition where a purchaser must take reasonable steps to obtain a licence or a mortgage. In my view, the condition did not require the Vendor to cancel the FastTrack agreement as that would be akin to an agreement to interfere with contractual relations of another or to induce a breach of contract. In light of the trial judge's finding that Castledowns and FastTrack conducted themselves appropriately, and in good faith, this surely cannot be the proper interpretation. The only way the Vendor could make reasonable efforts to satisfy the condition in the Castledowns agreement was by taking legitimate steps to try and terminate the FastTrack agreement, which the trial judge found it did. Furthermore, while there may be occasions when a party is obliged to take legal steps to satisfy a condition, this does not include embarking on "difficult or uncertain litigation" (*Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072, 85 D.L.R. (3d) 19 at 28) such as the threatened litigation here. I am satisfied, therefore, that the Vendor was not obliged to defend the threatened lawsuit by FastTrack to comply with its duty to use reasonable efforts to satisfy the condition in the Castledowns agreement.

---

[2] The distinction between variation and rescission was discussed by Rowbotham J. (as she then was) in *Garner v. W.R. Kirk Holdings Ltd.*, 2000 ABQB 1, 256 A.R. 139 (Q.B.).

[43] In conclusion, I am satisfied that the condition in the Castledowns agreement was never satisfied nor waived. As a result, there was no obligation to give notice and the trial judge erred in concluding that the Vendor could not rely on the terms of the Seller's Condition that terminated the contract where no notice was given. And although not necessary to my decision, I find that he also erred when he concluded that an oral notice would suffice. First, no oral notice of satisfactory termination was given here. Second, the trial judge was not entitled to overrule clause 4.2 of the FastTrack agreement by substituting the "oral" for "written" notice. Nor was an estoppel in this regard either pleaded or established. The Castledowns agreement expired on September 15, 2006, because the condition had been neither satisfied nor waived. There was no basis, therefore, upon which the trial judge could grant an order for specific performance.

[44] Finally, even if the trial judge was correct, and all that was required to satisfy the condition precedent was the legal termination of the FastTrack agreement, the FastTrack agreement was never terminated. Engleking's letter of September 7, 2006 did not terminate the FastTrack agreement because the agreement did not contain a mechanism for unilateral termination before the Condition Day. Here the parties agreed that the FastTrack agreement would be conditional upon the Vendor obtaining lawyer approval (clause 8.2), and they also agreed that if this approval was not obtained prior to the Condition Day – September 15, 2006 at 9:00 p.m. – the contract would end (clause 8.5). But this time-line could only be shortened, unilaterally, by the Vendor giving notice that the condition had been waived or satisfied prior to the Condition Day (clause 8.5). Thus, the Vendor did not have the right in this agreement to terminate the agreement early by giving notice that the condition had not been met. The contract could not end for lack of waiver or satisfaction until September 15, 2006, and, by September 12, 2006, the Vendor had waived the condition when it entered into the Addendum.

[45] Similarly, the FastTrack agreement did not terminate when the parties negotiated the Addendum. Parties to a contract are entitled to vary the terms of their agreement without rescinding the old agreement and entering into a new one. Whether such re-negotiation results in a new agreement is a matter of fact and is largely a question of the parties' intent – as measured objectively through the eyes of a reasonable person.[3] I have already found that the negotiation of the Addendum did not amount to satisfactory confirmation of termination, and implicit in that finding is the conclusion that the parties did not intend their negotiations to result in the termination of the underlying agreement. For the reasons set out above, therefore, I am satisfied that a reasonable person would conclude the parties did not intend to rescind their original agreement and enter into a new one when they negotiated the Addendum.

B. The Remaining Grounds of Appeal

[3] The test for determining contractual intention is described by Lord Wilberforce in *Reardon Smith Line v. Hansen - Tangen,* [1976] All E.R. 570 at 574.

[46] Given my conclusion above, there is no need to discuss the remaining grounds of appeal. Having said this, I express one small concern about the trial judge's reasoning when he found that Castledowns was not required to pay the deposit because the Vendor had failed to "trigger" the obligation. If Castledowns was truly of the view that the condition had been satisfied, it would have been required to forward the deposit. The conduct of Castledowns was inconsistent in advancing the position that the condition had been met, while at the same time withholding the deposit which was never paid to either the Vendor or its real estate agent.

[47] I would add one further note regarding FastTrack's status on this appeal. Counsel for the appellant advised the court that the Vendor chose not to participate in the appeal. The trial judge noted at the outset of his judgment that the action involved competing claims for specific performance. Clearly, both FastTrack and Castledowns were challenging the agreements entered into by the opposite party. No issue of status was raised either at trial or on the appeal. The decision of the Vendor not to participate in the appeal does not affect FastTrack's entitlement to seek relief as it may be entitled to – including restoration of its caveat.

VII. Conclusion

[48] The appeal is allowed and the order for specific performance is overturned. The matter is returned to the Court of Queen's Bench for the resolution of any outstanding issues that flow from this result.

Appeal heard on January 29, 2009

Memorandum filed at Edmonton, Alberta
this 23rd day of April, 2009

(as authorized) Conrad J.A.

I concur:

O'Brien J.A.

Slatter J.A. (dissenting):

[49] The issue on this appeal is which of two competing purchasers of a commercial building are entitled to take title to that building. The trial judge concluded that the respondent had a binding contract to purchase the building, and was entitled to the property: ***Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd.***, 2007 ABQB 404, 79 Alta. L.R. (4th) 109.

Facts

[50] The vendor numbered company was interested in selling its building known as the Vienna Building. After some negotiations, the vendor and the appellant FastTrack entered into an interim agreement of purchase and sale on August 30, 2006. The agreement was typed up on a pre-printed form designed for use in purchasing and selling residential properties. Some of the key provisions are as follows:

> 2.1 The Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith.
>
> . . .
>
> 8.1 The Buyer's Conditions are:
>
> (a) Financing Condition . . .
> (b) Property Inspection Condition . . .
> (c) Contractor Inspection . . .
> (d) Environmental Assessment . . .
> (e) Zoning and Building Usage . . .
> (f) Additional Buyer's Condition:
> a) Buyer being satisfied with all business license requirements:
> b) *Buyer obtaining lawyer approval regarding this Offer and all Buyer's conditions*,
> Before 9 p.m. on the Buyer Condition Day.
>
> 8.2 The Seller's Conditions are:
> (a) *Obtaining Seller's Lawyer Approval regarding this offer.*
> Before 9 p.m. on September 15, 2006
> (the "Seller Condition Day")
>
> 8.3 Unless otherwise agreed in writing, the Buyer's Conditions are for the sole benefit of the Buyer and the Seller's Conditions are for the sole benefit of the Seller.

> 8.4 The Buyer and the Seller may unilaterally waive or satisfy their Conditions by giving a Notice to the other party (the "Notice") on or before the stated Condition Day.
>
> 8.5 Provided that the Buyer or the Seller, as the case may be, uses *reasonable efforts* to satisfy the Condition(s), if the Notice has not been given on or before the stated Condition Day, then this Contract is ended. (emphasis added)

[51] It came to the attention of other potential buyers, including the respondent Castledowns Law Office Management, that the Vienna building was on the market. A realtor arranged for a meeting on September 2, 2006 at which all the potential purchasers could present their offers privately to the vendor.

[52] Castledowns presented its offer to the vendor. Late in the meeting Castledowns was advised of the pending agreement with FastTrack. Castledowns was disappointed with this news, but was prepared to make a "backup" offer on more favourable terms than the FastTrack offer. The vendor entered into an agreement with the respondent Castledowns on September 2, 2006. Again a preprinted form was used, this one designed for the purchase and sale of commercial properties, some of the key provisions being:

> 2.1 The Buyer and the Seller agree to act cooperatively, reasonably, diligently and in good faith.
>
> . . .
>
> **4. Conditions**
>
> 4.1 Buyer's Conditions: The obligations of the Buyer described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Buyer. The satisfaction or waiver of these conditions will be determined in the sole discretion of the Buyer. The Buyer agrees to use reasonable efforts to satisfy these condition. These conditions may only be satisfied or waived by the Buyer giving written notice (the "Buyer's Notice") to the Seller on or before 5 p.m. on the *15* day of *October 2006*, (the "Buyer's Condition Day"). If the Buyer fails to give the Buyer's Notice to the Seller on or before the Buyer's Condition Day, then this Contract will be ended and the initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively. . . .
>
> (a) Financing Condition . . .
>
> (b) Due Diligence Conditions:

(i) acceptable physical viewing/inspection of the Property;
(ii) acceptable review of legal title for the Property and any Unattached Goods;
(iii) acceptable review of any Permitted Encumbrances;
(iv) acceptable review of Accepted Tenancies;
(v) acceptable review of financial records and statements respecting the Property and any operating agreements that the Buyer is to assume;
(vi) acceptable review of all engineering, mechanical, electrical, plumbing, roof, heating, ventilation, construction or similar reports, studies, assessments, plans, drawings, specifications, correspondence or work orders;
(vii) acceptable review of all environmental reports;
(viii) acceptable review of all real property reports; and
(ix) acceptable review of the following additional agreements/documents/materials: ________________________
(x) The Buyer may also, at its expense, retain its own consultants to conduct such inspections, reviews and tests and to produce such observations, reports or assessments regarding the Property. . . .
(xi) acceptable appraisal, acceptable design of office layout

(c) Additional Buyer's Conditions:
- *review of rents rolls; financial statements for the property for the last 2 years.*
- *satisfactory property inspection;*

(d) subject to approval of all partner[s] September 6, 2006 at 5:00 p.m.

4.2 Seller's Conditions: The obligations of the Seller described in this Contract are subject to the satisfaction or waiver of the following conditions precedent, if any. These conditions are inserted for the sole and exclusive benefit and advantage of the Seller. The satisfaction or waiver of these Conditions will be determined in the sole discretion of the Seller. The Seller agrees to use reasonable efforts to satisfy these conditions. These conditions may only be satisfied or waived by the Seller giving written notice (the "Seller's Notice") to the Buyer on or before 5 p.m. on the *15* day of *September 2006*, (the "Seller's Condition Day"). If the Seller fails to give the Seller's Notice to the Buyer on or before the Seller's Condition Day, then this Contract will be ended and the initial Deposit plus any earned interest will be returned to the Buyer and all agreements, documents, materials and written information exchanged between the parties will be returned to the Buyer and the Seller respectively.

- ~~*Vendor confirmation of terminations of contract dated Aug. 30, 2006.*~~
- *Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006.*

The provisions shown in italics were handwritten onto the pre-printed form.

[53] Anthony Holinski, an officer of Castledowns, wrote in the original condition: "Vendor confirmation of termination of contract dated Aug. 30, 2006". Mike Kozicki, the vendor's realtor, crossed out those words and inserted: "Subject to satisfactory confirmation of termination of private purchase contract dated Aug. 30, 2006". None of the witnesses had a clear recollection of discussing the significance, if any, of the change in wording.

[54] Both FastTrack and the vendor had stipulated that their agreement was "subject to lawyer's approval". The vendor sent both the FastTrack and Castledowns contracts to its lawyer, who expressed some concern about the size of the deposit and the long condition removal date in the FastTrack contract. On the instructions of the vendor, the vendor's lawyer wrote to FastTrack's lawyer on September 7, 2006 as follows:

> That contract is subject to approval by the Seller's lawyer on or before 9:00 p.m. on September 15, 2006. We have discussed the matter with our client and based upon our discussions and the information provided to him our client is not prepared to remove the "subject to condition" in the Seller's favour. Accordingly we enclose herewith our firm's trust cheque in the amount of $10,000.00 payable to your firm representing the refund of your client's deposit. Our client considers this transaction at an end.

The day before the letter was sent, the vendor's realtor advised Castledowns' realtor that the FastTrack agreement was not going ahead, and that the deposit had been returned. This information was passed on to Castledowns.

[55] FastTrack's lawyer meanwhile reported to his client, and replied to the vendor on September 11, 2006:

> We have received your correspondence of September 7th, 2006. Needless to say we are not impressed and neither is our client.
>
> Your attempt to cancel our clients contract arbitrarily is unacceptable. Any clause purporting to make an offer subject to lawyer's approval does not extend to the substance of the deal. If there are terms regarding procedure, especially here where the form of contract may not be particularly appropriate for a commercial transaction, that need to be addressed then we can modify same for the benefit of both our clients.

> Otherwise, if your justification for not removing the seller's "subject to" condition is other than a matter of price, kindly advise as to what possible changes may be required. If it is solely a matter of price then your client has a problem.
>
> Following execution of the subject contract, we are advised by our client that your client verbally advised our client that notwithstanding that your client had apparently received other higher offers respecting this property, that your client was proceeding with this transaction notwithstanding same. Based upon those representations my client has proceeded to obtain financing and incur costs associated with this transaction.
>
> Let us be clear. Our client wishes to proceed with this transaction, there is a signed contract wherein any irregularities can be resolved without cancellation of the deal and utilizing the subject to lawyer's approval clause to cancel the contract as you have is not proper.
>
> We have delivered a Caveat to protect our client's interest in this property. Be further advised that other than completing this transaction our client will be seeking damages for this non-completion and compensation for the amounts expended by our clients with regard to this matter already with respect to this matter. Time is a consideration as well since our client has a "subject to financing" deadline of September 15th, 2006.
>
> May we please hear from you immediately.

[56] Further discussions and negotiations ensued between the vendor and FastTrack. On September 12, 2006, without the assistance of either their lawyers or realtors, they signed a document entitled "Addendum & Additional Terms to the Agreement entered into by the parties by agreement dated August 30, 2006". In this document the vendor removed the condition in the original FastTrack agreement that it was "subject to lawyer's approval". The price and other terms of the sale were made more favourable to the vendor. The Addendum stated that it would "either amend or replace the terms contained in the original agreement", and that it would form a part of the original agreement.

[57] On September 14, 2006, the vendor's lawyer confirmed to Mr. Holinski of Castledowns that the letter of September 7 had been sent terminating the FastTrack agreement. But on instructions from the vendor, the vendor's lawyer wrote to Castledowns on September 15, 2006 stating that the vendor was "unable to confirm termination of the private purchase contract" with FastTrack, and that the offer with Castledowns was therefore at an end.

[58] This litigation followed. The trial judge found that the FastTrack agreement had been terminated when the "lawyer's approval" condition failed. He found at paras. 61, 63 that the non-approval was "based on bona fide reasons":

> The Vendor clearly had a frank discussion with his lawyer who raised some legitimate substantive concerns and did not approve the First Agreement. The Vendor acted on that advice as he was entitled to do.

Whether FastTrack agreed or not was irrelevant, because the termination letter was clear. Alternatively, he found that the first FastTrack agreement was terminated by the Addendum Agreement, which was effectively a counteroffer.

[59] The trial judge concluded that the "satisfactory termination" condition in the Castledowns agreement had been satisfied:

> [86] By any reasonable interpretation of clause 4.2 the condition precedent to the Second Agreement (i.e. subject to "satisfactory confirmation of termination") was satisfied when the First Agreement was terminated by the Vendor instructing his lawyer to send the September 7, 2006 letter. How can the Vendor now assert in good faith that this was not a satisfactory termination of the First Agreement?

Given the covenant to act in good faith, and the requirement to take reasonable steps to fulfill the conditions, the vendor could not rely on its failure to send a written notice confirming the satisfaction of the condition. Since the vendor would not accept that the condition had been satisfied, Castledowns was not required to pay the deposit, as it was ready, willing and able to close the transaction at all times.

[60] The trial judge found that the Castledowns agreement was binding. Since the vendor was prepared to transfer title as directed by the court, the trial judge granted an order for specific performance notwithstanding the objections of FastTrack. This appeal resulted. A stay was denied: ***Castledowns Law Office Management Ltd. v. 1131102 Alberta Ltd.***, 2007 ABCA 262. The property was subsequently conveyed to Castledowns.

Standard of Review

[61] The standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 at paras. 8, 10, 25. Findings of credibility and of good faith are a part of the fact finding process, and are subject to the same standard of review.

[62] The interpretation and application of contract principles to a settled set of facts is a question of law reviewed for correctness: ***Diegel v. Diegel,*** 2008 ABCA 389 at para. 20; ***Alberta Importers and Distributors (1993) Inc. v. Phoenix Marble Ltd.***, 2008 ABCA 177, 88 Alta. L.R. (4th) 225, 432

A.R. 173 at para. 9; ***McDonald Crawford v. Morrow***, 2004 ABCA 150, 348 A.R. 118 at paras. 5 and 43. However, when the court has to make fact findings in order to determine the essential terms of a contract, those findings warrant deference absent palpable and overriding error: ***Double N Earthmovers v. Edmonton (City)***, 2005 ABCA 104, 363 A.R. 201 at para. 16, aff'd, [2007] 1 S.C.R. 116, 2007 SCC 3; ***Jiro Enterprises Ltd. v. Spencer***, 2008 ABCA 87 at para. 10. A trial judge's determination of the factual matrix surrounding the contract in light of the evidence as a whole (including if appropriate extrinsic evidence) is a matter of fact, although the determination may be influenced by legal concepts: ***Diegel*** at para. 20; ***Jiro Enterprises*** at para. 10; ***Double N Earthmovers*** at para. 16.

[63] The remedy of specific performance, like all equitable remedies, is discretionary: ***Wewaykum Indian Band v. Canada***, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 107. Accordingly, a judge's decision to grant specific performance is insulated from appellate review in the absence of palpable and overriding error, unless based on an error in principle or of law: ***Jiro Enterprises*** at para. 9; ***Hennig v. Canadian Rocky Mountain Properties Inc.***, 2005 ABCA 223, 45 Alta. L.R. (4th) 204 at para. 13.

<u>Issues on Appeal</u>

[64] The appellant FastTrack mounts several overlapping attacks on the decision of the trial judge:

(a) It argues that the condition precedent in the FastTrack agreement never failed, because:

(i) A “subject to lawyer’s approval” clause cannot be invoked unless “valid reasons” exist, solicitor-client privilege is effectively waived, and those reasons are communicated to the other contracting party when the clause is invoked.

(ii) A lawyer’s disapproval under a “subject to lawyer’s approval” clause must be based on “legal” considerations, and not business considerations such as price.

(iii) The termination letter sent by the vendor to FastTrack was, despite its unequivocal wording, merely designed to test the resolve of FastTrack, and it was not really intended to terminate the FastTrack contract.

Since the FastTrack agreement was first in time, if it was not terminated it prevails over the Castledowns agreement.

(b) It argues that the condition precedent in the Castledowns agreement was never met, because there was never a “satisfactory confirmation” that the FastTrack agreement had been terminated, because:

(i) Any termination was never acknowledged or acquiesced in by FastTrack, which meant there was no “satisfactory confirmation” of termination.

(ii) Whether there was “satisfactory confirmation” was a purely subjective matter, depending exclusively on the state of mind of the vendor. Whether the FastTrack contract was actually terminated in law is irrelevant.

(iii) An “entirely subjective” condition precedent turns the agreement into a mere option or a bare offer. Since the “satisfactory confirmation” condition was purely subjective, the Castledowns agreement was not really an agreement at all, but a mere offer that could be withdrawn by the vendor at any time.

(iv) Even if the condition precedent was satisfied in fact, the vendor never sent written confirmation of that, as required by the agreement.

(c) In any event, Castledowns cannot succeed because it never tendered the deposit required under its agreement.

(d) Even if the Castledowns agreement was valid and enforceable, the trial judge erred in granting the discretionary equitable remedy of specific performance.

Conditions Precedent

[65] The presence of conditions precedent does not prevent creation of a binding agreement. The performance of the provisions of that agreement are not due unless and until the conditions are fulfilled, but that in no way negates or dilutes the force of the obligations imposed by the contract, in particular, the obligation of the vendor to sell and the obligation of the purchaser to buy. These obligations are merely in suspense pending the occurrence of the event constituting the condition precedent: ***Dynamic Transport Ltd. v. O.K. Detailing Ltd.***, [1978] 2 S.C.R. 1072 at p. 1082. It follows that both FastTrack and Castledowns had binding agreements with the vendor that were in suspense pending compliance with the conditions.

[66] If the conditions fail, the contract is at an end. This does not prevent the parties from thereafter renegotiating the arrangement, such as by effectively waiving the conditions precedent. Whether this amounts to a whole new contract, or a revival of the previous contract, will not in most cases make any difference. However, where intervening rights have arisen, as when a “backup” offer has been signed, the renegotiation cannot revive the earlier contract to the detriment of the intervening rights. This would be the result through the ordinary principles of equity, but an attempt

to revive the earlier contract to the detriment of the intervening rights would also violate the "good faith" clause in the backup agreement.

[67] Some authorities hold that a "true" condition precedent cannot be waived. Other cases discuss whether the contracting parties have a duty to act reasonably or diligently to have the conditions met. Neither of those issues need to be discussed here. Both contracts specifically provide that the conditions can be waived. They both have "good faith and diligence" and "reasonable efforts" clauses. Of course what amounts to good faith, diligence, and reasonable efforts will vary depending on the nature of the condition.

[68] Subject to what is said in the next section of these reasons, the original FastTrack agreement clearly terminated when the letter of September 7 was sent indicating that the lawyer's approval was not forthcoming. That letter was unequivocal. It is not open to the vendor to now assert this letter was merely a bluff. The subsequent negotiation and execution of the Addendum Agreement could not operate to revive the original FastTrack agreement to the detriment of Castledowns.

[69] Conditions precedent have sometimes been divided into categories depending on the extent to which compliance with the condition is within the subjective control of the contracting party: ***Mark 7 Development Ltd. v. Peace Holdings Ltd.*** (1991), 53 B.C.L.R. (2d) 217 at p. 224 (C.A.), leave to appeal refused [1991] 3 S.C.R. ix, adopting the reasoning in ***Wiebe v. Bobsien***, [1986] 4 W.W.R. 270, 64 B.C.L.R. 295 at paras. 15-6 (C.A., Lambert, J.A. dissenting). It has sometimes been suggested that a completely subjective condition negates the contract. For example in ***Murray McDermid Holdings Ltd. v. Thater*** (1982), 42 B.C.L.R. 119 it was held that a condition "subject to President's approval" was so subjective that it defeated the entire contract. It is difficult to see why that would be so in principle. The law as stated in ***Dynamic Transport*** is that the contract is in a state of suspension until the conditions are met, but when they are met the contract is binding. If the President in fact gives his approval, how can it be suggested that there is no contract? Many organizations have internal approval processes that must be followed. For example, a contract with a municipality may have to be subject to the approval of its executive committee. In this case the Castledowns contract was "subject to partners' approval". Since that approval was almost immediately forthcoming, on what basis can it be argued that the very presence of the condition prevented there ever being a contract? The existence of a subjectively based condition does not prevent the formation of a contract, although the subjective nature of the condition will be relevant to what amounts to good faith, diligence, and reasonable efforts in satisfying the condition.

[70] Attempting to identify conditions precedent that are "wholly subjective" would create great uncertainty. The contracts here contain many conditions that are incapable of definitive objective analysis. Some examples are "Buyer's approval of a property inspection", "Buyer being satisfied with all business license requirements", "new mortgage loan on terms acceptable to the buyer", and "acceptable review of financial records". The "subject to lawyer's approval" clauses are not the only ones that invoke the discretion of a third party. Others include "subject to partners' approval", "acceptable appraisal", and "approval of a satisfactory inspection done by a qualified contractor".

It is unhelpful to try to divide these conditions into those that are "fully subjective" (and so prevent the very formation of a contract) and those that are conditions that merely suspend the duty to perform.

[71] In any event, whether a document is a contract subject to conditions precedent or merely an option depends on the proper construction of its terms: see, for example, ***Black Gavin & Co. Ltd. v. Cheung*** (1980), 20 B.C.L.R. 21; ***Tau Holdings Ltd. v. Alderbridge Development Corp.*** (1991), 60 B.C.L.R. (2d) 161 (C.A.) at para. 13. In this case both the FastTrack and Castledowns contracts contain clauses reading "This Contract is intended to create binding legal obligations", "The Buyer offers to buy the Property . . . according to the terms of this Contract", and "The Seller accepts the Buyer's offer and agrees to sell . . . according to the terms of this Contract". This wording is inconsistent with the agreements being mere unenforceable options pending satisfaction of the conditions precedent.

[72] To enhance certainty, contracts often provide that fulfillment of the conditions must be communicated in a formal written manner. However, at least in a contract containing a good faith and diligence clause, a party cannot defeat the contract simply by refusing to send the necessary confirmation. For example, if the contract is "subject to development permit", and the permit is obtained, the contracting party cannot in good faith attempt to defeat the contract simply by refusing to send the letter confirming fulfillment of the condition. The good faith clause extends to confirming fulfillment of the conditions. The vendor cannot escape its obligations merely because it did not confirm termination of the FastTrack agreement in writing.

<u>The Role of the Lawyer</u>

[73] Should a "subject to lawyer's approval" clause be given any special interpretation? It is argued by FastTrack that the lawyer's role in approving the contract is somehow constrained, even though there are no limiting words in the written contract. It is suggested the lawyer can only withhold approval based on "legal" considerations. Firstly, such an interpretation would be inconsistent with the principles of contractual construction. Secondly, it would introduce great uncertainty into real estate practice, as the distinction between "legal" considerations and economic and business considerations is often unclear. Are a small deposit and a lengthy condition period a legitimate concern of a lawyer? But thirdly, and most importantly, it would be inconsistent with the role that lawyers play in the affairs of their clients.

[74] Absent words limiting the lawyer's discretion, the ordinary principles of contractual interpretation prevent the insertion of such words. This is not, for example, a case where the condition is "subject to lawyer's approval of title", or "subject to lawyer's approval of lease document". In ***Megill Stephenson Co. v. Woo*** (1989), 59 D.L.R. (4th) 146 at p. 150, 58 Man. R. (2d) 302 (C.A.) the Court held with respect to a similar clause:

> But I conclude that there is no binding contract because the entire transaction was made subject to the approval of Mr. Woo's solicitor, and in that respect, I wholly endorse the similar conclusion reached by the learned trial judge. Allen made it clear that there would be no agreement until it was reviewed by the lawyer Mercier. Solicitor's approval meant more than a review of the wording to ensure that all things were properly in place. It meant that there could be no deal without the concurrence of the lawyer, and consequently Woo was free to accept an intervening offer before the intended meeting at Mercier's office.

On their ordinary meaning, the words of the approval power are unlimited, except by the express "good faith" clause in the contract.

[75] The appellant argues it is implied that the lawyer must exercise the power given to him on "reasonable grounds" or based on "legal considerations". Relying on ***Rahall v. Tait***, 2006 ABQB 587, 62 Alta. L.R. (4th) 19 it also argues that the lawyer must give "valid" grounds for not approving the contract, and that the vendor must waive solicitor-client privilege so that the lawyer's rationale can be examined. These arguments overlook the fundamental principles underlying the solicitor and client relationship.

[76] The relationship between the lawyer and the client has been studiously protected by the courts. The courts are prepared to recognize a unique privilege over communications respecting legal advice between the solicitor and client. That privilege is so entrenched, there are virtually no exceptions to it: ***Canada (Privacy Commissioner) v. Blood Tribe Department of Health***, [2008] 2 S.C.R. 574, 2008 SCC 44 at paras. 9-10.

[77] The law also recognizes that clients may go to lawyers with their most important, intimate, and momentous problems. As Cory, J., concurring, observed in ***MacDonald Estate v. Martin***, [1990] 3 S.C.R. 1235 at p. 1266:

> . . . a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. . . .

Clients routinely consult their lawyers not only about legal matters, but about business matters, family matters, and personal issues. As an immediate example, a lawyer with a busy real estate practice may have as much knowledge as anybody in the community as to property values, and whether the business terms of the sale of land are commercially reasonable. The boundary between "purely legal" issues and other matters on which lawyers are routinely consulted is impossible to define. When a contracting party stipulates for its lawyer's approval, it should be presumed to encompass wide ranging advice on what is in the client's best interests. If nothing else, it follows that if any limits are to be placed on a clause that a contract is "subject to lawyer's approval", those limitations must be set out in the contract. The parol evidence rule effectively requires that anyway.

[78] The law recognizes that a lawyer cannot have split loyalties. As the Court said in ***R. v. Neil***, 2002 SCC 70, [2002] 3 S.C.R. 631 at para. 12:

> . . . the defining principle -- the duty of loyalty -- is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained: . . . Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies . . .

The lawyer's duty is to his or her client in both litigious and non-litigious matters. The lawyer owes no duty to protect the interests of the opposing client: ***Baypark Investments Inc. v. Royal Bank of Canada*** (2002), 57 O.R. (3d) 528 at para. 33; ***Ross v. Caunters***, [1979] 3 All E.R. 580 (Ch.D.) at p. 599; ***Abacus Cities Ltd. (Trustee of) v. Bank of Montreal*** (1986), 48 Alta. L.R. (2d) 247, 74 A.R. 53. Any such duty would put the lawyer in an impossible position when giving advice to the client. When a lawyer exercises a power to approve a contract, the lawyer must do so entirely with the lawyer's client's best interests in mind.

[79] In this legal context it is entirely artificial to think that the lawyer would exercise the power to approve the contract contrary to the wishes or best interests of the client. The following scenarios might be imagined:

(a) The client says to the lawyer: "I had my doubts about this contract, but I signed it because I knew it was subject to your approval, and I was quite sure you wouldn't approve it."

(b) The client says to the lawyer: "I signed this contract, but I'm really having second thoughts about it. Here are my concerns; do you agree?"

(c) The client says to the lawyer: "I signed this contract, but my [spouse, accountant, associates] point out that I overlooked an important [personal, tax, business] consequence of the deal. I don't want you to approve it."

(d) The client says to the lawyer: "Look at this fantastic contract I negotiated!!"

Because of solicitor-client privilege the other contracting party will not know which scenario has unfolded. In all of them (even the last one) the diligent lawyer will discuss the pros and cons of the contract with the client, and go through any concerns of the client. If at the end of the meeting the client has been satisfied, the lawyer will undoubtedly grant the necessary approval. However, if at the end of the meeting the client is unwilling to proceed with the contract (even though the client may initially have been enthusiastic) the lawyer has no alternative but to withhold approval. That is exactly why the lawyer's approval was contracted for, and that is exactly what the parties must be taken to have intended. Absent express wording to the contrary, any other interpretation is inconsistent with the role of lawyers.

[80] A similar clause was considered in ***Chung v. Jim***, [1984] B.C.J. No. 1353 (Q.L.), where the Court held:

> [18] The clause itself, of course, is the place to start when considering what the rights of the parties were arising out of this agreement, and the clause in my view was one, and I find was one which was put in at the request of the Defendants. It was put in so that they would have an opportunity to consult their solicitor. *The wording, it seems to me, is clear that they sought and obtained by this wording the right to take advice with respect to the interim agreement, and if their solicitor did not approve it then this would be their way out of the agreement. They reserved unto themselves, it seems to me, that right.* The limitation which was put on it was that they had until the 10th of April to do something in this regard.
>
> [19] . . . [The solicitor] acted reasonably and with great despatch, it seems to me, to deal with the question of searching and the suggestions which he put forward to the Defendants as to how this agreement might be made into an acceptable agreement insofar as the Defendants were concerned.
>
> [20] But does that mean that the Defendants were obliged to go out then and renegotiate with the Plaintiffs the agreement to find out whether or not the Plaintiffs would accept the suggestions of their solicitor, Mr. Yoke Lam? I can find in the agreement no such requirement.
>
> [21] The simple test is whether or not their lawyer approved the agreement. He did not approve it as it was drawn and that, therefore, put them in the position where they were not obliged to complete. [emphasis added]

In this case the vendor also reserved unto itself the right to take and act on its lawyer's advice, and it cannot object to the purchaser's reliance on the same right.

[81] The British Columbia Supreme Court in ***Jung v. GNR Property Management Inc.***, 2006 BCSC 1692, 60 B.C.L.R. (4th) 217 at para. 44 held that a "subject to lawyer's approval" clause turned the contract into a mere unenforceable option. This is, however, one of the line of cases that holds that a subjective condition precedent prevents the formation of a contract. As discussed *supra*, para. 69, these cases do not appear to reflect the law on the subject.

[82] It is not accurate to describe the effect of a "subject to lawyer's approval" condition as functionally turning the contract into a mere option. A binding contract exists but its performance

is suspended: ***Dynamic Transport***. It is true that the presence of any condition precedent means that no performance is due until the condition is satisfied or waived. The more subjectively based the condition, the more it may look like an "option", but it is still a binding agreement subject to the condition being met or waived. If the parties sign a contract containing a "subject to lawyer's approval" clause, they must accept that, while they have an "agreement in principle", the party stipulating for that clause wishes to have a sober second thought after consulting its closest adviser. There is nothing inherently unfair or commercially unreasonable about that, especially where (as in this case) both the vendor and FastTrack stipulated for such a clause. There are many good reasons why one or both parties might want to "lock-in" the terms of the deal before taking the contract to their lawyer or other advisors.

[83] It is true that the generic "good faith" clause applies to the "subject to lawyer's approval" clause. That only means, in this context, that the client may be obliged to take the contract to the lawyer and instruct the lawyer to review it: ***Dartington Properties Ltd. v. Harris***, [1979] B.C.J. No. 729 at para. 10 (C.A.) (QL). The good faith clause does not mean that the client has to try to talk the lawyer into approving the contract. The whole point of the clause is that the lawyer will give the client advice, not the other way around.

[84] The proper approach to clauses of this type is set out in ***Gordon Leaseholds Ltd. v. Metzger***, [1967] 1 O.R. 580 at p. 585-6, 61 D.L.R. (2d) 562:

> Not infrequently the performance of a contract may depend upon the opinion or approval of a third person in respect to particular matters which may arise, or are to be performed, in the course of the contract.
>
> Ordinarily, the purpose of making the opinion of a specified person an ingredient in the existence of a right, makes the opinion of that person and not the opinion of a Court, the criterion for determining whether the facts give rise to the right. In such cases the question for the Court is not whether in its opinion the facts which give rise to the right exist, but whether the specified person has formed the opinion. If he has, it is implicit that the opinion must be honestly held, even though it may be unreasonable: *Caney v. Leith*, [1937] 2 All E.R. 532, where the English authorities are reviewed (see particularly p. 538).

Where the clause is unrestricted in its scope, a lawyer who declines to give his approval because the contract is not in his or her client's best interest is acting in good faith.

[85] In conclusion, the "subject to lawyer's approval" clause in the FastTrack agreement is legally enforceable. The vendor's lawyer's discretion to approve the contract was not limited, and could be exercised on any basis that impacted on the vendor's best interests. The letter from the vendor's lawyer of September 7 had the legal effect of terminating the FastTrack contract.

<u>"Subject to Satisfactory Confirmation of Termination"</u>

[86] Once the FastTrack contract was terminated by failure of the condition precedent respecting lawyer's approval, the backup contract made by Castledowns came into play. It too was subject to a condition precedent, relating to the "satisfactory confirmation" that the FastTrack agreement had been terminated.

[87] The appellant FastTrack argues that the condition precedent "satisfactory confirmation of termination of private purchase contract" meant that the termination had to be satisfactory to FastTrack. The premise is that the vendor was primarily concerned with avoiding any litigation over the contract, and would not proceed with the Castledowns backup agreement unless FastTrack acknowledged that its prior agreement had been terminated. In other words, what the vendor wanted by inserting this clause was that FastTrack would acknowledge or acquiesce in any termination. The respondent argues that the covenant to act "cooperatively, reasonably, diligently and in good faith" colours the meaning of "satisfactory confirmation", and that the vendor had to act reasonably in determining if the condition had been satisfied. The condition did not intend to give FastTrack an effective veto over the Castledowns agreement.

[88] The premise that the vendor did not want to get into a lawsuit over the two contracts depends on this interpretation being both (a) the common intention of the parties at the time they signed the agreement, and (b) the intention of the parties derived from the plain wording of the agreement. The common intention of the parties must be derived from the wording, as the parol evidence rule precludes either party from interjecting its personal expectations if they are inconsistent with the plain wording: ***Innovative Insurance Corp. v. E.P.A. Ultimate Concepts Inc.***, 2007 ABCA 358, 417 A.R. 273 at para. 5. As the Court made clear in ***Gainers Inc. v. Pocklington Financial Corp.,*** 2000 ABCA 151, 81 Alta. L.R. (3d) 17 at para. 20:

> The intent of the parties is to be determined from the words which they put in their written contract; their subjective intent is irrelevant: *Eli Lily & Co. v. Novopharm* [1998] 2 S.C.R. 129, 166, 161 D.L.R. (4th) 1, 27. Subjective intent cannot even be used to interpret the written words, if they are clear: id. at pp. 27-29 (D.L.R.).

No one party can foist its secret intentions on the other unless the wording of the contract supports that. But once the proper interpretation of the condition precedent in the contract is determined, parol evidence can be used to determine if the condition was met: ***Guaranty Properties Ltd. v. Edmonton (City)***, 2000 ABCA 215, 85 Alta. L.R. (3d) 61 at para. 23.

[89] It should first be noted that FastTrack's standing to raise this argument is not obvious. FastTrack is not a party to the contract containing this condition precedent. Under the normal third-party beneficiary rule, FastTrack is not in a position to attempt to enforce the condition precedent, as there is no indication that Castledowns and the vendor intended to confer benefits under the contract on FastTrack: ***Landex Investments Co. v. John Volken Foundation***, 2008 ABCA 333, 440 A.R. 368 at para. 9. The vendor has not appeared on the appeal, and was content to convey the property to Castledowns after the trial decision was rendered. In the circumstances, it does not easily

lie in the mouth of FastTrack to interpose its interests and expectations into the Castledowns agreement.

[90] Even if some evidence of the conduct and intention of the vendor was allowed, it certainly cannot be said that the conduct of the vendor was focused on avoiding a lawsuit. It first instructed its lawyer to terminate the FastTrack contract and return the deposit, and after that was communicated to Castledowns, it instructed its lawyer to cancel the Castledowns contract. Then, without the involvement of its lawyer, it entered into the Addendum Agreement. If anything, the vendor was reckless about triggering a lawsuit. The trial judge specifically found at para. 26 that the vendor was primarily motivated by price. There is no evidence on this record to support the theory that the vendor was motivated in whole or in part by a desire to avoid litigation.

[91] It is also noteworthy that the letter of September 7 sent by the vendor's lawyer to FastTrack did not ask it to confirm or acknowledge the termination. The request for such an acknowledgment would be likely if the clause was intended to signify that termination must be satisfactory to FastTrack.

[92] The interpretation of the condition precedent proposed by FastTrack would make the Castledowns contract subject to the whims of Castledowns's rival and competitor for the property: FastTrack. Both Castledowns and the vendor agreed that they would act reasonably and in good faith, yet FastTrack would not appear to be under any such constraint under this theory of the case. FastTrack could defeat the Castledowns agreement by any spurious argument, so long as it was vigorously asserted. It was one thing for Castledowns to be prepared to make a backup offer. It is quite another thing to suppose that Castledowns would be prepared to make a backup offer that was subject to the whim of its primary rival. If it was the common intention of the parties that "satisfactory confirmation" meant "satisfactory to FastTrack", one would have expected precise language to that effect. It should be noted that it was the vendor's realtor who drafted the clause, and if anything it should be construed against the vendor.

[93] Even if one assumes that any rejection by FastTrack of the purported termination had to be reasonable, the argument fails. Besides "not being impressed", the only reason given by FastTrack for rejecting the termination was that the "lawyer's approval" had to be based on matters "other than price". As previously discussed, this is not the proper interpretation of the clause. In any event, the trial judge found at paras. 37, 61, 63 that the withholding of the lawyer's approval was done in good faith based on matters other than price.

[94] The Castledowns agreement provides that the Seller's Conditions are "inserted for the sole and exclusive benefit and advantage of the Seller". In the face of this language it cannot be argued that the condition was inserted for the benefit of FastTrack. This language also leads to the conclusion that "satisfactory confirmation" means "satisfactory to the vendor". A reasonable contracting party like Castledowns could not be expected to interpret it any other way. The vendor's lawyer, on instructions from the vendor, wrote to FastTrack stating that the "lawyer's approval" had not been forthcoming, and that the contract was terminated. The vendor's realtor and counsel then

advised two representatives of Castledowns that the FastTrack contract had been terminated. Given the covenants to act reasonably and in good faith, it cannot be argued that there was not “satisfactory confirmation of termination of [the FastTrack] private purchase contract”.

[95] As previously mentioned, the overriding covenant in clause 2.1 of the Castledowns agreement to act “cooperatively, reasonably, diligently and in good faith” should be interpreted as encompassing the conditions precedent as well. The exact impact of clause 2.1 will depend on the nature and context of the condition precedent in issue. While the conditions clause (4.2) states that the “<u>satisfaction</u>” of the conditions will be determined “in the sole discretion of the Seller”, it immediately goes on to state that the Seller will “use reasonable efforts to <u>satisfy</u> these conditions”. “Reasonableness” denotes an objective standard, or at least an objective element in the term “satisfy”, which is used in the general provisions of clause 4.2 concerning the conditions, as well as the specific condition “<u>satisfactory</u> confirmation of termination”.

[96] The record does not disclose that, in fact, the vendor acted out of any concern that the FastTrack agreement had been “satisfactorily” terminated. The evidence of Mr. Yaremchuk, the principal of the vendor, is telling. Firstly, it is clear he intentionally terminated the Fasttrack agreement:

> Q. Okay. And did you correct -- or tell the Kozickis that once you knew that the -- Castledowns had removed that clause subject to approval by all partners that you were going to terminate the private purchase contract?
> A. I said I was trying through my lawyer to do so.
> Q. I put it to you, sir, that you instructed your lawyer to terminate the FastTrack agreement.
> A. Yes.
> Q. And that's what you did. You had your lawyer send the September 7th letter, correct?
> A. Yes. (AB 201, l. 33-45; AB 201, l. 4-11)

Remarkably, Mr. Yaremchuk never testified that he was unsure that the FastTrack agreement had been “satisfactorily” terminated. Indeed, he was never asked that question. The vendor relied at all times on the fact that no <u>written confirmation</u> of satisfaction of the condition precedent had been sent, not on whether the condition had in fact been satisfied. The vendor never turned its mind to whether there was any doubt about the termination. It proceeded at all times on the mistaken belief that the vendor had the right to choose between the two purchasers, notwithstanding the termination of the FastTrack agreement. Even if the appellant’s interpretation of the condition precedent is correct, the record does not contain the factual basis for invoking it.

[97] Mr. Yaremchuk appeared to believe that the vendor had an unfettered ability to choose between the two purchasers. To begin with he did not appear to understand the Castledowns agreement was a binding contract:

> Q. All right. Now, after this addendum was concluded, what did you do in relation to the Castledowns agreement?
>
> A. Really nothing. I called my lawyer and I -- I was -- because it was a backup offer I was not even aware that -- my understanding was that I don't have to really do anything. If I don't contact them, or -- I just -- I got done talking to lawyer and I assumed that it was a dead deal. (AB 194, l. 1-9)

[98] Mr. Yaremchuk testified that he had entertained the back up offer in the first place because one of the realtors had convinced him (AB 217, l. 9-21; AB 218, l. 6-15) that FastTrack might be a speculator, and might not have the ability or the motivation to close the deal:

> . . . So it [the Castledowns offer] was live and in my face and it was there. I said okay, I'll try and get out of the other offer because I was not convinced that the other purchases were (a) serious or (b) going to follow through and I was skeptical based on -- based on my experience and conversations with Mike [Kozicki] so it was -- that's what happened. (AB 190, l. 22-27).

He testified he felt pressured into entering into a back up agreement. He described the realtor as “unrelenting”, “aggressive”, “intimidating” and a “powerful speaker and very influential” (AB E487, l. 3-9; AB E496, l. 5, 15). Although he had initially told Castledowns that he would “try to get out of the FastTrack offer” (AB 191, l. 11-12), he lost that motivation once the terms of the deal were improved, and he became convinced that FastTrack was serious.

[99] Mr. Yaremchuk testified that the vendor decided to sell to FastTrack as “a deal is a deal” (AB 239, l. 22-27) and he now knew that FastTrack was a serious purchaser with the ability to remove its conditions and close the deal:

> Q. And if they [FastTrack] weren't serious, they would have just accepted it [the termination], walked away, and you'd go on with the next deal; is that right?
>
> A. That's correct. When I -- when I found out they were upset with the letter and responded probably just minutes after receiving it based on instructions from my lawyer then I understood I had a serious player and that they really could pay for it, do it, and were wanting to go ahead with it from -- from what they said and how...

Q. And the way I remember you telling me your evidence in January was that you were actually pleased and surprised that they had responded in that way, that they were very clear that they wanted to do the deal, they were going to do the deal with you.
A. Mm-hm.

Q. They thought they had an agreement and you said a deal was a deal. And you actually were happy that they turned out to be the kind of guys you thought they were in the first place.
A. Yes. (AB 211, l. 15-36; AB E562, l. 20-26) . . .

Q. And so when you went to that meeting on September 11th with them it was your intention and their intention to work out the details of your agreement; isn't that right?
A. Correct. I -- from my position in this whole matter I just wanted to sell the building to a party that was able to follow through with the condition removal and the payments. (AB 211, l. 15-36)

He felt that as a matter of honour he had to close the FastTrack deal (AB E547, l. 9-25; E564, l. 10-26), not realizing that once he had signed the Castledowns agreement and terminated the FastTrack agreement his options were limited.

[100] While Mr. Yaremchuk acknowledged that FastTrack had threatened litigation, he indicated there was "no pressure" to renegotiate the deal (AB 203, l. 12-18), and neither party wanted litigation (AB 211, l. 26-30; AB 238, l. 23-4; AB 240, l. 14-6). The prospect of litigation was "not an issue" (AB E566, l. 10-21). Mr. Yaremchuk never testified that the avoidance of litigation or any concerns about the termination of the first agreement was his motivation in not following through with the Castledowns agreement. His lawyer was the obvious source of any concerns about the efficacy of the termination of the FastTrack agreement, yet his lawyer was not even consulted on that issue. His lawyer did not testify. Mr. Yaremchuk mistakenly believed the termination of the FastTrack contract was of no consequence, and he could choose between the two purchasers. The signing of the Addendum Agreement was the act that signified which of the two purchasers the vendor would favour, and Mr. Yaremchuk did that without consulting his lawyer, demonstrating that the efficacy of the termination of the Castledowns agreement was not the operative factor (AB 269, l. 12-19; AB 270, l. 1-11).

[101] It is clear Mr. Yaremchuk never turned his mind to whether the first FastTrack agreement had been terminated, whether "satisfactorily" or not. He simply decided to renegotiate the deal with the purchaser he favoured. Once he "rectified" the first agreement (AB E322, l. 1-7), he lost interest in the back up offer. He was never concerned that the original FastTrack agreement had not been

"satisfactorily terminated", as his state of mind was that he had renegotiated it - it was not in his mind a "terminated" agreement at all. In his view it was a continuing "live" agreement (AB E575, l. 15-25), and he never turned his mind to it as a "terminated"agreement. It cannot be suggested that Castledowns agreed to such an interpretation or application of the condition precedent. In any event, the record does not show that the vendor ever formed the opinion that the FastTrack agreement had not been satisfactorily terminated, which was required under the clause. There is no factual basis to support a failure of the condition precedent.

[102] Further, the vendor was at least required to act in good faith in determining whether there had been "satisfactory confirmation of termination". The trial judge asked the rhetorical question "How can the Vendor now assert in good faith that this was not a satisfactory termination of the First Agreement?". This inference of bad faith was open to the trial judge on the record, and cannot be interfered with on appeal in the absence of palpable and overriding error.

[103] The trial judge found that the vendor was motivated by price, not by any concerns about whether the FastTrack agreement had really been terminated. The termination of the FastTrack agreement was unequivocal. But the vendor then went on to negotiate the Addendum Agreement. For the vendor to refuse to even consider whether there had been confirmation of termination because a better deal had now been struck is not good faith, nor is it either "reasonable" or "diligent". Once the vendor agreed to enter into a backup agreement with Castledowns, the vendor's ability to renegotiate the FastTrack agreement, while still acting in good faith vis-à-vis Castledowns, was severely curtailed. The trial judge was entitled to find that it was bad faith for the vendor to refuse to confirm termination of the first FastTrack agreement, merely because the vendor had managed to renegotiate a more advantageous contract after it had signed the Castledowns agreement. Even if one assumes the "satisfactory confirmation" clause depended on the subjective views of the vendor, it does not pass the "good faith" test.

[104] As discussed, once the condition was satisfied, the good faith clause required the vendor to so inform Castledowns in writing. The vendor cannot rely on its own failure to comply with this obligation to terminate the contract. Therefore, the conditions precedent in the Castledowns agreement were satisfied, the agreement became enforceable, and Castledowns was entitled to conveyance of the Vienna building.

Payment of the Deposit

[105] FastTrack argued that Castledowns was in default of its agreement with the vendor, because it never paid the deposit. The trial judge found at para. 33 that Castledowns provided a deposit cheque to its realtor in the sum of $100,000. It is therefore not entirely accurate to say that Castledowns never provided the deposit. The contract provided:

> The Initial Deposit shall be delivered in trust to: ~~*Remax Accord*~~ *C-21 Royal Real Estate*. Unless otherwise agreed in writing the Initial Deposit shall accompany the offer. *Initial deposit payable in 24 hours upon removal of Seller's condition.*

The words in italics were written into the printed form. Castledowns' realtor Remax Accord was proposed as the holder of the deposit, but its name was struck out and Century 21 Royal Real Estate, the vendor's realtor, was substituted. The cheque was provided to Remax Accord to deliver to Century 21 Royal Real Estate in accordance with the contract.

[106] The deposit became payable on "removal of Seller's condition". Since the vendor never fulfilled its obligation to advise Castledowns that the FastTrack agreement had been terminated, the time for turning over the deposit never came. The vendor cannot now rely on any failure of Castledowns to perform. The vendor first advised orally that the FastTrack agreement had been terminated, and then changed its mind and purported to terminate the Castledowns contract. The trial judge found that Castledowns was ready, willing and able to provide the deposit and close at all times. The vendor refused to close. In the circumstances, the vendor cannot complain about not receiving the deposit.

Specific Performance

[107] The trial judge concluded that Castledowns had a valid agreement to purchase the Vienna building, and granted it specific performance. The vendor was content to sell the property, and has not appealed the order for specific performance. The vendor has not argued that Castledowns should be left to its remedy in damages. In the circumstances, it is not necessary to consider further whether Castledowns has shown uniqueness or other equitable considerations that would entitle it to specific performance on these facts, if the vendor had been resisting that remedy.

Conclusion

[108] In conclusion, the original FastTrack agreement was terminated when the "lawyer's approval" condition precedent failed. The termination of the FastTrack agreement satisfied the condition precedent in the Castledowns agreement for "satisfactory confirmation of termination" of the FastTrack agreement. The Castledowns agreement was therefore valid and binding. Castledowns had not committed any breach of that agreement which would disentitle it to enforcement of the agreement. The appeal should be dismissed.

Appeal heard on January 29, 2009

Memorandum filed at Edmonton, Alberta
this 23rd day of April, 2009

Slatter J.A.

Appearances:

E.M. MacInnis and P.G. Kirman
for the Respondent

J.A. Caruk
for the Appellant

CITATION: Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816
COURT FILE NO.: CV-11-9456-00CL
DATE: 20120830

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: **FIRM CAPITAL MORTGAGE FUND INC., Applicant**

AND:

2012241 ONTARIO LIMITED, Respondent

BEFORE: **MORAWETZ J.**

COUNSEL: **J. D. Marshall, for Deloitte & Touche Inc., Receiver**

J. Finnigan and A. McEwan, for Firm Capital Mortgage Fund Inc.

R. D. Howell and D. Schatzkev for G. Gill et al. ("Unitholders")

S. Dewart, for LawPro

HEARD: **JULY 23 AND 26, 2012**

ENDORSEMENT

[1] The Receiver brings this motion for an order (i) approving the Receiver's proposed marketing and sales process in respect of the Respondent's commercial property in Brampton, Ontario (the "Property"); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

[2] The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver's opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed

marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be "vested out" upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

[3] Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

[4] On the other hand, a group of purchasers (the "Unitholders") have entered into agreements with 2012241 Ontario Limited ("the Debtor") and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

[5] At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc ("Firm Capital").

[6] Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of "pre-sale" agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

[7] The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

[8] The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

[9] None of the agreements and leases are registered against the title to the Property.

[10] All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers' interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

> 26. Subordination of Agreement
>
> The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

[11] Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

[12] It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

[13] However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than $1.2 million.

[14] The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

[15] In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

[16] From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

[17] Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

[18] Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

[19] Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act, 1998* (the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

[20] The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

[21] In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a "declarant" or "owner" of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

[22] With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

[23] In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

[24] Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease "for a period yet to run that does not exceeds three years" is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

[25] In addition, the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* (1997), 33 O.R. (3rd) 235 (C.A.).)

[26] Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:

> 19. Agreement not to be Registered
>
> The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property…

[27] I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

[28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.

[29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[30] Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

[31] With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

[32] The remaining question is whether there are any "equities" in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights.

[33] Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

i. Those who paid deposits that are still held in trust;

ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;

iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;

iv. Those who claim to have incurred expenses in renovating or improving their units.

[34] With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

[35] The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

[36] The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

[37] The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

[38] In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

[39] The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

MORAWETZ J.

Released: August 30, 2012

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. 0981478 B.C. Ltd.,*
2018 BCSC 527

Date: 20180404
Docket: H170498
Registry: Vancouver

Between:

Forjay Management Ltd.

Petitioner

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijar, Mohan Vilkhu, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner and Reliable Mortgages Investment Corp.:	Kibben Jackson Daniel Byma Layne Hellrung
Counsel for The Bowra Group Inc.:	Daniel Nugent Janet Kwong

Counsel for 0981478 B.C. Ltd. and Mark Chandler:	Robert Cooper, Q.C. Nicolas Hooge Eric Aitken
Counsel for the Kaur Group:	Kimberley Robertson Thomas Boyd
Purchasers appearing on their own behalf or by agent:	Clinton Calwell (for Verne and Lorna Calwell) Margaret Cook Marian Mahoney (for herself and Mitsui Saito) Janet Milbradt
Counsel for Brigitte Osborn, Jacqueline and Earle Morriss, James and Judy MacLeod:	Ewan MacLeod
Counsel for PeeverConn Properties Inc., Richard and Jacqueline Johnston:	Diego Solimano
Counsel for Lucas Giuriato, Karen McIntosh, Gerrit and Thelma Smidt, Sheila Sharples and Susan Ternes:	Amanda Pereira, A/S, Agent for Rebecca Darnell
Counsel for Josef and Maria Tomica:	Steven Roxborough
Counsel for David and Laurie Brummitt, Gary and Karen Janzen, Walter and Elsje Bisschop, Gopal Naidu, John Roberts, Guy and Myrena Bishop, Rosalie Hersch, Jagtar Kainth, Jordana Charlton, Thomas and Julie Wiebe:	Patrick Selinger John Wiebe
Counsel for Ingrid Kraus, Shannon Smyth, Gerald and Nicola Quinn, Rajeev and Dinsheet Gupta, Strephanie Fahlman, Alvin Los and Emily Rook, Colton Sommerville and Jessica Niven, Karen Batke, Drew St. Cyr, Frances Hansen, Allison Richardson, Elyse Vroom, Vitalii Lavrinovitch and Suk Da Kim, Kelly and Brigitte Burke, Gary and Linda Newton, Lisa McGhee, Warren Kindellan, David and Heather Ray, Nolan Killeen and Alisyn Burns, Alexandra Schoenit, Frederick and Joanne West, Doug and Laurie Lakusta, and Timothy Lamb:	Trevor Hande

Counsel for the Superintendent of Real Estate:	Joni Worton Sandra Wilkinson
Counsel for 625536 B.C. Ltd.:	Matthew Nied Jeremy Shragge
Counsel for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust:	Gordon Plottel Amanda Baron
Counsel for Baramundi Investments Ltd.:	Sanjeev Patro
Counsel for Zuheir Abrahams Inc.:	Ronald Argue
Counsel for Morris Kadylo:	Travis Brine
Place and Date of Hearing:	Vancouver, B.C. March 12-16, 2018
Place and Date of Judgment:	Vancouver, B.C. April 4, 2018

INTRODUCTION

[1] This receivership proceeding concerns a 92-unit strata condominium project, known as "Murrayville House", located in Langley, B.C. (the "Development").

[2] In October 2017, I appointed The Bowra Group Inc. as receiver manager of the Development (the "Receiver"). At that time, the respondent developer 0981478 B.C. Ltd. ("098") and various purchasers were parties to a number of pre-sale contracts. However, despite the Development being ready for occupancy in August 2017, by the time of the receivership, none of the sales had completed. The Development remains vacant at this time.

[3] The Receiver undertook an extensive review of the pre-sale contracts toward determining the status of those contracts. In addition, the Receiver has taken steps such that it is in a position to move forward toward monetizing the Development for the benefit of all stakeholders.

[4] The Receiver now seeks directions from this Court as to how to proceed.

[5] The crux of the application before me is whether the Receiver should complete 40 of the pre-sale contracts executed by 098, being ones that it describes as "without issues". Alternatively, the Receiver recommends that the strata units, which are the subject of those 40 pre-sale contracts, be marketed and sold as soon as possible.

[6] A substantial number of pre-sale purchasers (even some who are not within the 40 that are the subject of this application) and the Superintendent of Real Estate (the "Superintendent") support the Receiver's recommendation to complete these sales. Conversely, the major secured creditors, 098 and 098's principal, the respondent Mark Chandler, oppose the completion of the sales. They argue that these contracts are not valid and enforceable and, alternatively, even if they are, the Receiver should disclaim the contracts to allow a market sale of the units.

THE RECEIVER AND ITS RECOMMENDATIONS

[7] On August 25, 2017, Forjay Management Ltd. ("Forjay") and Canadian Western Trust Company in trust and HMF Home Mortgage Fund Corporation ("CWT/HMF") commenced these foreclosure proceedings seeking to enforce their mortgage security against 098, the Development and Mr. Chandler, a guarantor of the indebtedness. Forjay and CWT/HMF's security ranks second in priority as against the Development.

[8] When Forjay's foreclosure was filed, there were significant issues already affecting the Development. These included legal proceedings and certificates of pending litigation ("CPLs") which had been registered against the lands. In addition, regulatory action had been taken, as I will discuss in more detail below, arising in part from the suggestion that 098 had sold some of the units multiple times. The house of cards quickly disintegrated from there. The insurer under the new home warranty program then took steps toward terminating coverage.

[9] Further complicating matters were that significant issues arose as between the stakeholders after Forjay's foreclosure was filed. For example, 098 disputed the amounts owing under various mortgages, including that of Forjay and CWT/HMF; and, various secured creditors disputed the priority, validity and/or amounts claimed under other security.

[10] Some order was brought to this chaos by the appointment of the Receiver on October 4, 2017 (the "Receivership Order"). On October 12, 2017, that Order was amended to clarify that the appointment was not only over the lands, but also all of 098's assets, undertaking and property relating to the Development.

[11] Relevant to this application, paragraph 3 of the Receivership Order grants broad powers to the Receiver in relation to the Development and in relation to various contracts entered into by 098, including the pre-sale contracts:

> c) to manage, operate and carry on the business of the Debtor [098], including the powers to enter into agreements, incur any obligations in the ordinary course of business…., or cease to perform any contracts of the Debtor;

> …
>
> h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
>
> …
>
> k) to market any or all of the Property, including advertising and soliciting in offers in respect of the Property or any parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court;

[12] After its appointment, the Receiver began immediate efforts to put itself in a position to begin marketing and selling the units in the Development, all with substantial borrowings provided by Forjay. Those efforts included: filing a new disclosure statement, in accordance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"); obtaining coverage under the statutory new home warranty program; confirming that Langley was permitting occupancy of the Development (later confirmed to have been effective on August 8, 2017); completing the outstanding construction; and otherwise ensuring that all other matters relating to the Development were moving toward completion.

[13] While these efforts were underway, the Receiver's other major task was to review the substantial number of pre-sale contracts that 098 had entered into prior to the receivership. The Receiver's efforts were discussed in its First Report to the Court dated November 16, 2017. That Report, updated to today's information, revealed various anomalies or issues:

a) 098 had entered into 151 pre-sale contracts for 91 units, meaning a number of the units had been sold more than once. A chart prepared by the Receiver indicates some units had been sold two or three times and one had been sold four times;

b) in 56 of the pre-sale agreements, 098 had been paid the full purchase price and the purchaser had received a promissory note;

c) a substantial majority of the contracts (79) provided for a credit or discount of between 10 and 100% of the purchase price from that indicated in a price list issued by 098's sales centre which was operational from March 2015 to May 2016 (the "Price List");

d) many pre-sale contracts had been signed after the closure of the sales centre in May 2016 and after market values had substantially increased beyond those indicated in the Price List; and

e) some pre-sale contracts had been signed prior to the issuance of 098's disclosure statement, contrary to *REDMA* requirements.

[14] From this analysis, which led to its recommendations, the Receiver identified various "standard" pre-sale contracts dated from April 2015 to May 2016 that were "without issues" and which it considered "valid". In summary, those contracts are described as having the following characteristics:

a) they were entered into after 098's issuance of a disclosure statement;

b) a deposit of between 3 and 10% of the purchase price had been paid and was held in trust by a law firm;

c) the purchaser has yet to pay the balance of the purchase price;

d) the purchase price was within 90% of the Price List; and

e) the Receiver "believed" that the pre-sale contract prices were at fair market value at the time of signing.

[15] In its First Report, the Receiver recommended that it be authorized to complete these "without issues" pre-sale contracts, after it had filed a new disclosure statement and obtained new home warranty coverage. These include the 40 pre-sale contracts that are the subject of this application. It should be noted that a number of the 40 units were sold twice, but the Receiver's intention is to disclaim these later contracts in favour of these 40 "first in time" contracts.

[16] The Receiver's analysis and recommendations were not well received by the secured creditors. In particular, there was considerable disagreement that the prices in the pre-sale contracts were at the then fair market value. In addition, the secured creditors hotly contested the Receiver's contention that they were aware of the Price List and had agreed to provide partial discharges of their security for those prices. In addition, Forjay and one of the first mortgagees, Reliable Mortgages Investment Corp. ("RMIC"), vigorously disputed that they had agreed with the Receiver to discharge their mortgages on these pre-sales.

[17] In January 2018, the Receiver brought this application for directions. The issues for which directions are sought are:

a) the validity and enforceability of the 40 pre-sale contracts that are "without issues"; and

b) whether the 40 pre-sale contracts should be allowed to complete (or, as I would frame it, whether the Receiver should be directed to disclaim them).

There is no dispute that, if the contracts are disclaimed, the Receiver should take immediate steps to market and sell the 40 strata units at current market value, subject to further court order.

[18] Later events disclosed that there are substantial financial consequences to various stakeholders depending on whether or not the contracts are disclaimed. An appraisal obtained by the Receiver in late January 2018 indicates that the units' value is now collectively 46% higher than the contract prices, translating into a total increase in value of $5,461,005. In large part, the arguments advanced on this application are directed to a determination as to who should "reap the benefit" of this increase.

[19] The Receiver's analysis and arguments are largely contained in its notice of application, the First Report and the affidavit of Mario Mainella #6 sworn January 26, 2018. The Receiver continues to advance the recommendations contained in its First Report. The Receiver's materials indicate that it has embarked upon some

analysis as to validity and enforceability of these pre-sale contracts. For example, the Receiver points to the fact that on their face, these contracts have expired, yet the Receiver argues that they are still enforceable and not "void" because of the subsequent conduct of the parties to those contracts. In addition, in support of its recommendations, the Receiver refers to *REDMA* requirements and, also arguments of "good faith".

[20] As best I can determine, there is no particular analysis by the Receiver of the disclaimer issue, beyond identifying the substantial increase in the value of the units that could maximize the recovery on the assets of 098, but "at the expense of the interest of the holders of the 40 pre-sale contracts". The Receiver also notes that there is an "urgent need to monetize the units in the Development and to provide certainty and closure for the holders of pre-sale contracts for units in the Development".

[21] It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment. A receiver owes fiduciary duties to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.* (2002), 59 O.R. (3d) 376 at para. 15 (Ont. S.C.J.); *Philip's Manufacturing Ltd., Re* (1992), 69 B.C.L.R. (2d) 44 at para. 17 (C.A.).

[22] The role of a court-appointed receiver was discussed in Frank Bennett, *Bennett on Receiverships,* 2nd Ed. (Toronto: Carswell, 1999) at 180:

> … As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide.* Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not

> only facts favourable to pending applications, but also facts that are unfavourable.

[23] The secured creditors take issue with both the Receiver's position and its recommendations, taking the view that the Receiver has improperly entered the fray in taking an active position on the issues where there are competing interests and in doing so, has preferred the interests of the pre-sale purchasers over theirs.

[24] It is also trite law that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all interested parties. Its role is to be even handed, and not prefer one party over the other: *Bank of Montreal v. Probe Exploration Inc.* (2000), 33 C.B.R. (4th) 182 at para. 2 (C.A.) (WL). See also *Bennett* at 272.

[25] In my view, there is some basis for that criticism here. I appreciate that in its materials, the Receiver has discussed the two positions and the effect on the various stakeholders of closing (or not closing) these 40 pre-sale contracts. In addition, the factual background outlined by the Receiver has been valuable in considering the issues, as acknowledged by many counsel. However, the Receiver's position here goes far beyond that.

[26] The Receiver places great reliance on comments of the court in *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) (WL):

> [40] … Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others…. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision…

[27] Many counsel referred to the deference normally accorded to the views of a receiver, such as in considering the formulation of a sales process and any results of a sales process, citing *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R.

(3d) 1 (Ont. C.A.) at 5–6. However, these types of sale issues typically involve the court relying on a receiver's expertise in such matters and in that event, deference is usually well justified. I see little relevance in that scenario to what is before me.

[28] It is clear enough that some of the issues before the Court do not involve a consideration of "business choices" made by a receiver where some deference to the knowledge and experience of a receiver would likely be accorded. The issue as to the validity and enforceability of these pre-sale contracts is a legal issue and a complex one at that. The Receiver has no particular expertise in that regard and was not tasked by the Court with a determination of that issue. I have heard substantial argument and have been taken to a large body of evidence on that issue, as noted by the volume of materials before me and numerous counsel advocating their positions. In those circumstances, where other parties are in the fray, I think it would have been best for the Receiver to have provided facts as known to it and thought to be relevant to a determination, but otherwise to have remained neutral as to the result.

[29] My comments equally apply to the Receiver's position in respect of the issue as to completing the pre-sale contracts or disclaiming them. Given the level of conflict on the issue, neutrality would have been a better course of action, after providing all necessary facts to the parties and the Court that inform that analysis and setting forth considerations on the issue. In any event, I unfortunately agree with many of the secured creditors that the Receiver's analysis is not particularly helpful in the determination of that issue. In some instances, the factual assertions in the First Report are unsupported (i.e. that the 40 sale prices were at fair market value); in another case, the assertion of fact (i.e. that Forjay and RMIC had agreed to discharge their security on these units) was simply wrong.

[30] I appreciate that the Receiver's intention was to bring the matter forward as soon as possible, given the need to liquidate the units as soon as possible for the benefit of all stakeholders. In that respect, I do not question the Receiver's good faith motives. If nothing else, the Receiver's actions have galvanized the warring camps

to their positions and hastened this hearing so that the matter can move forward to some extent.

[31] Accordingly, I intend to rely on the unchallenged factual assertions in the Receiver's materials, including the First Report, and the circumstances that the Receiver suggests are germane to the issues. Unfortunately, I have come to the conclusion that beyond that, the Receiver's recommendations should not be afforded any deference (*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at 111 (Ont. H.C.J.)); rather, I will consider the detailed submissions put forth by the respective camps, since both were well represented on this application and all made extensive submissions on the facts and the law.

THE ISSUES

[32] Many of the arguments addressed the first issue raised by the Receiver, namely, whether the 40 pre-sale contracts were valid and enforceable at this time. In addition, other purchasers asserted that 098 was estopped from asserting that the pre-sale contracts had expired by their terms.

[33] Some arguments were based, not only on the facts as known to the Receiver and the parties, but also as to what other evidence *might* be available through ordinary litigation and the usual pre-trial discovery mechanisms. For obvious reasons, no one wishes to embark on what might be expensive and lengthy litigation to delay the matter further; however, in the absence of a full evidentiary record on at least some of the issues, it raises the definite prospect that this Court is being asked to decide legal issues in a vacuum. This also raises the unattractive prospect of an individual analysis of each of the 40 pre-sale contracts.

[34] Having considered the matter, I am satisfied that the issue can be resolved by consideration of the disclaimer issue alone, premised on the assumption that the contracts remain valid and enforceable as against 098 at this time. Within that issue, many of the factual circumstances relating to the contract issues remain relevant. By that approach, the contract validity issue only becomes relevant if I decide that the

contracts should *not* be disclaimed. For reasons set out below, I have concluded that disclaimer is appropriate here and there is no need to consider the first issue.

DISCLAIMER – GENERAL LEGAL PRINCIPLES

[35] As noted in *Bennett* above at 180, one of the primary goals of a receiver is to maximize the recovery of the assets under its charge. See also *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199 at para. 103, leave to appeal ref'd 2016 ONCA 485.

[36] Having said that, and as I will discuss in detail below, it is common ground that this is not the only consideration a receiver must take into account in the performance of its duties. The receiver is required to assess all equitable interests or "equities" in the disclaimer exercise: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 at para. 22, aff'd 2005 BCCA 154.

[37] One of the tools by which a receiver maximizes the value of the assets for the benefit of the stakeholders is by considering whether it is beneficial to continue to abide by contracts between the debtor and other parties, or to disclaim them. For example, in the context of pre-sale contracts, although a better realization might be obtained by a disclaimer, the extra cost and delay of remarketing and selling the units might outweigh that benefit. I would add at this point that no one has argued that this is the case here.

[38] In *Bennett* at 341-42, the author discusses that a disclaimer is considered within the context of this maximization exercise:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. <u>However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets</u>. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach…
>
> …

> In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages…
>
> [Emphasis added.]

[39] Disclaimer principles as found in numerous case authorities were summarized by Justice Burnyeat in *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 at paras. 53-57. Burnyeat J. summarized the relevant considerations found in those authorities as follows:

> [58] I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

[40] As stated above, paragraph 3(c) of the Receivership Order specifically empowered the Receiver to "cease to perform any contracts of [098]". This would include the power to not complete the sales contemplated by the 40 pre-sale contracts before me: *bcIMC* at para. 60. I agree that the Receiver has properly sought directions from the Court on that issue, given the level of conflict between the stakeholder groups.

[41] It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests—or consideration of the equities as between the

parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. For example, in *bcIMC*, Burnyeat J., at para. 96, stated that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not otherwise available to other unsecured creditors. See also *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 at para. 27 (Ont. S.C.J.).

[42] Such an approach is evident from the court's reasoning in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. In that case, where similar facts were in issue, Justice Morawetz (as he then was) determined the legal priority as between the pre-sale purchasers and the lenders, and then considered whether there were any "equities" in favour of the purchasers so as to displace those prior legal rights: paras. 27, 32.

[43] In *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 [*Romspen/Horseshoe*], Justice Wilton-Siegel stated:

> [31] <u>The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed</u>. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."
>
> [32] <u>In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors</u>. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.
>
> [Emphasis added.]

[44] Mr. Nied, co-counsel for the third mortgagee, 625536 B.C. Ltd. ("625"), advances an analytical framework for consideration of the disclaimer issue. I

substantially agree with those submissions and would, therefore, frame the issues as follows:

a) Firstly, what are the respective legal priority positions as between the competing interests?

b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and

c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

DISCLAIMER – DISCUSSION

1) Respective Legal Priorities

[45] I will now address the respective legal positions and interests of firstly, the mortgagees or lenders and secondly, the pre-sale purchasers.

(i) The Mortgagees' Interests

[46] The first three mortgages came into existence in advance of the 40 pre-sale contracts.

[47] In May 2014, 625's mortgage, a take back mortgage, was granted around the time of 098's purchase of the lands. The face amount of the mortgage is $1.8 million. In May 2014, RMIC and CWT registered their mortgage against the lands in the face amount of $4.2 million. In December 2014, Forjay and CWT/HMF registered their mortgage against the lands in the face amount of $10 million. There is a fourth mortgage registered against the Development by James Mercier, the principal of Forjay and RMIC. Mr. Mercier contends that the loans advanced by RMIC and Forjay were intended to be short-term construction loans, to be repaid by further construction financing.

[48] As a result of priority agreements, the relative position of the mortgages is: (1) RMIC and CWT; (2) Forjay and CWT/HMF; (3) 625; and (4) Mr. Mercier.

[49] There is nothing particularly unusual about any of the first three mortgages. They agreed to advance significant monies and in return, they expected to be repaid the full amount advanced, with interest and costs. In addition, on the subject of partial discharges upon sales of units, the mortgages all provided that partial discharges against strata units were entirely within the discretion of each of the lenders. The mortgages all provided in the standard terms:

> 13.(1) If the land is subdivided:
>
> (a) this mortgage will charge each subdivided lot as security for payment of all the mortgage money, and
>
> (b) the lender is not to discharge this mortgage as a charge on any of the subdivided lots unless all the mortgage money is paid.
>
> (2) Even though the lender is not required to discharge any subdivided lot from this mortgage, the lender may agree to do so in return for payment of all or a part of the mortgage money. …

[50] The 40 pre-sale contracts were executed during the existence of 098's sales centre, which was open from March 2015 until it closed in May 2016, and accordingly, well after all three mortgages were registered against title. Section 4.3 of the March 2015 disclosure statement that 098 provided to all of the purchasers under the 40 pre-sale contracts makes express reference to the existing legal rights of the three mortgagees.

[51] 098's slide into insolvency, at least from the lenders' point of view, did not commence just prior to the appointment of the Receiver. Highlights from the course of events include:

a) in September 2014, RMIC and CWT commenced a foreclosure proceeding under their first mortgage and they presumably filed a CPL against the lands. For reasons not clear to me, this proceeding was held in abeyance;

b) the short-term nature of Forjay/RMIC's mortgages never materialized. The take out financing was never arranged by 098;

c) in May 2016, Mr. Mercier was advised by 098 that it did not have funds and sources of financing to complete the Development. Either Forjay or RMIC went on to advance a further $14.2 million to 098 under their mortgages;

d) in early July 2017, CWT/HMF filed a foreclosure action and registered a CPL against the lands. By this time, the amounts owing under the second mortgage (Forjay and CWT/HMF) were said to be just shy of $19 million;

e) after the filing of CWT/HMF's foreclosure and CPL, things quickly went downhill;

f) the Kaur Group of purchasers are largely identified as those having pre-sale contracts where the full price was paid and a promissory note was executed by 098 (they are not part of the 40 pre-sale purchasers here). In early August 2017, the Kaur Group lodged a complaint with the Superintendent to the effect that some units had been sold to more than one purchaser. On August 4, 2017, the Kaur Group filed an action against 098 and others and registered a CPL against certain units, claiming in part that 098 had used the funds paid by them for improper purposes;

g) at least in part as a result of the filing of the CWT/HMF and Kaur actions and registrations of the CPLs, the Superintendent issued a cease marketing order pursuant to *REDMA*. Under s. 1 of *REDMA*, "market" includes engaging in any transaction that will or is likely to lead to a sale. Accordingly, this order prohibited 098 from completing any sale, save with the Superintendent's concurrence. This order also gave notice to 098 that it was required to file a new disclosure statement; and

h) Forjay's foreclosure commenced August 25, 2017 and, as stated above, led fairly quickly to the appointment of the Receiver.

[52] As I have referenced above, one of the major planks of the Receiver's positon found in the First Report was the contention that Forjay and RMIC had agreed with it to partially discharge their security if these 40 pre-sale contracts were completed. However, during the course of this hearing, it became quite evident that there was considerably more complexity to Forjay and RMIC's discussions with the Receiver. The agreement to discharge was premised on the discharges being granted in "normal circumstances". Further, Forjay and RMIC required that: there were valid pre-sale contracts (which remains in dispute); the closing would occur shortly after the Receiver's appointment; and, the net sale funds would be paid to the first mortgage. None of the latter events occurred.

[53] Many of the purchasers, including the Kaur Group, suggested that Forjay agreed to partially discharge their mortgages if the units were sold for at least 90% of the Price List.

[54] The broader allegations were that all the mortgagees implicitly agreed to partially discharge their security to allow the 40 pre-sales to close. The Kaur Group argued that it was a requirement under s. 11(3) of *REDMA* that the mortgagee pre-approve such partial discharges or alternatively, that the developer make other arrangements satisfactory to the Superintendent to transfer title to a purchaser. Assuming, for present purposes, that 098 was in breach of this requirement, I fail to see that any breach *ipso facto* means that such an agreement existed on the part of the lenders.

[55] By the conclusion of this hearing, there was either evidence or concessions by the various purchasers that no such agreement existed on the part of RMIC, Forjay or CWT/HMF.

[56] Accordingly, there is no evidence of any agreement on the part of the first three mortgagees to discharge their security against the 40 units and some have expressly stated that they did not agree. There are examples where such lenders' agreements were before the court: see *bcIMC* at para. 10; *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 at para. 18; *Romspen Investment*

Corporation v. Woods Property Development Inc., 2011 ONSC 3648 at para. 36, rev'd on other grounds 2011 ONCA 817. Such facts simply do not exist here. Nor is there any evidence that the lenders have conducted themselves in a manner to suggest that they would provide such partial discharges in certain circumstances, upon which 098 or any purchaser might rely.

(ii) The Purchasers' Interests

[57] As I described above, all of the 40 pre-sale purchasers executed what the Receiver described as a "standard" contract, presumably prepared by 098. All contracts included an Addendum "A", which includes relevant provisions for this hearing's purposes.

[58] The first provision is clause 1, titled "**Completion Date**":

> a) … The Completion Date will be that date set out in a notice to the Purchaser (the "**Completion Date**") from the Vendor and will be no less than 21 days after the Vendor … notifies the Purchaser… that the Strata Lot is ready to be occupied. … The notice of the Completion Date (the "**Completion Notice**") delivered from the Vendor … to the Purchaser … may be based on the Vendor's estimate as to when the Strata Lot will be ready to be occupied. If the Strata Lot is not ready to be occupied on the Completion Date so established, then the Vendor may delay the Completion Date from time to time as required, by notice of such delay to the Purchaser … If the Completion Date has not occurred by July 31, 2016 (the "**Outside Date**"), then this Agreement will be terminated, the Deposit and interest thereon will be returned to the Purchaser and the parties will be released from all of their obligations hereunder, provided that:
>
> i) [a *force majeure* clause which is not relevant here]; and
>
> ii) the Vendor may, at its option, exercisable by notice to the Purchaser, in addition to any extension pursuant to Section 1 (a) and whether or not any delay described in Section 1(a) has occurred, elect to extend the Outside Date for up to 120 days.

[59] The second relevant provision is clause 11, titled "**Entire Agreement/Representations**". In part, that clause provides that "No modification or waiver of this Agreement or any portion of this Agreement will be effective unless it is in writing and signed by the Vendor and Purchaser."

[60] The third and final relevant provision is clause 19 and clearly sets out the rights acquired by a purchaser upon execution of a contract:

> **Contractual Rights**. This offer and the Agreement which results from its acceptance create contractual rights only and not any interest in land. The Purchaser will acquire an interest in land upon completion of the purchase and sale contemplated herein.

[61] 098 issued its first disclosure statement in March 2015, by which time completion of construction was anticipated to be from January to April 2016. It is common ground that 098 never issued a "Completion Notice" setting the "Completion Date". Needless to say, the Completion Date did not occur by the Outside Date of July 31, 2016 (clause 1(a)).

[62] As the Receiver notes, based on a reading of the contracts themselves, all 40 pre-sale contracts were terminated by their terms on November 28, 2016, which marked the end of the only 120-day extension period permitted under clause 1(a)(ii). In that regard, the Receiver suggests that it be allowed to "amend" the existing contracts to permit them to complete, presumably meaning that the contracts could be resurrected and a new "Completion Date" set.

[63] On the contract validity issue, both the Receiver and the purchasers rely on the fact that 098 continued to communicate with the 40 purchasers and purported to unilaterally "amend" the Outside Date on several more occasions, as follows:

a) in April 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between May and August 2016;

b) an undated first notice of extension was delivered to 39 of the 40 purchasers under cover of a letter dated July 29, 2016, by which 098 exercised its right under clause 1(a)(ii) of the contract to unilaterally extend the Outside Date by 120 days, i.e. to November 28, 2016. As noted by 625's counsel, it is not clear when the first notice of extension was sent out; in at least one case (SL 11), a notation on the July 29 covering letter indicates that it was mailed August 2, 2016, after the original Outside Date. In one case, the July 29, 2016 covering letter relied on clause 1(a)(i) – being the *force majeure* clause – to extend the Outside Date to November 28, 2016;

c) in September 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between November 2016 and February 2017;

d) in November 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between January and May 2017;

e) an undated second notice of extension was delivered to all 40 purchasers by which 098 purported to again unilaterally extend the Outside Date to March 31, 2017 under clause 1(a) of Addendum “A”. Purchasers were asked to “acknowledge” the new Outside Date;

f) around March/April 2017, 098 sent out an addendum to all 40 purchasers that purported to amend the contracts by changing the Outside Date to May 31, 2017. In most cases, this addendum was not fully executed by both the purchasers and 098 until after March 31, 2017;

g) for the vast majority of the 40 purchasers, the May 31, 2017 Outside Date addendum was the last attempt by 098 to extend the Outside Date and there were no further formal extension notices received from 098;

h) a few purchasers received a third notice of extension from 098 dated May 31, 2017 extending the Outside Date to July 15, 2017 under clause 1(a)(ii) of Addendum “A”'; and

i) a few purchasers received a fourth notice of extension from 098 dated July 14, 2017 extending the Outside Date to August 31, 2017, under clause 1(a)(ii) of Addendum “A”.

[64] The spotty manner in which these last extensions took place is evident from the evidence of Jaspreet Dhaliwal, 098’s chief financial officer, who states that 098

"attempted" to deliver these notices of extension through various means. In any event, Mr. Dhaliwal confirms that 098 did not deliver any further notices of extension purporting to extend the Outside Date beyond August 31, 2017.

[65] In light of all these extensions, a number of purchasers actually inspected their units in the summer of 2017. In addition, some of them received notice from 098 that "occupancy had been received" just after Langley's notice was issued on August 8, 2017. They were also advised that 098 would "begin the closing process". When that did not happen, a number of purchasers even got to the point of filing an action in this Court for specific performance and registering a CPL against their units, all before the receivership.

[66] What, then, is the nature of the purchasers' interests under their contracts?

[67] Again, the pre-sale contracts clearly provide that they create "contractual rights only and not any interest in land", and that the purchasers will only acquire an interest in land "upon completion of the purchase and sale". There is no suggestion by the purchasers to the effect that this contractual provision is not applicable due to waiver or estoppel; certainly, no evidence has been filed in support of any such contention.

[68] The law is clear that contracting parties may contract away their equitable interests, subject to the doctrines of undue influence and unconscionability (which none of the purchasers have argued): *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 at paras. 45, 50; *Bernum Petroleum Ltd. v. Birch Lake Energy Inc.*, 2014 ABQB 652 at para. 97.

[69] Accordingly, there is no reason to disregard the clear intent of the parties as to the nature of the interest to be held by the purchasers upon execution of the pre-sale contracts. Numerous case authorities arrived at that same result in the context of pre-sale contracts of a development.

[70] In *bcIMC*, the Court was addressing the nature of certain pre-sale contracts, which contained similar wording to that found in clause 19. Burnyeat J. discussed

this issue at paras. 63-65 and concluded that he should give effect to that clause by confirming that no equitable interest arose.

[71] In *Pan Canadian,* the court held that certain purchasers could not have purchaser's liens (an equitable remedy) in respect of land because their contracts expressly stated that only contractual rights were created. The court discussed that the "protective" clauses in the agreements negated any intention on the part of the contracting parties to create an interest in land: paras. 36, 43-51, 58.

[72] Finally, the court in *Firm Capital* held that the lender had legal priority over the interests of purchasers where, at least in part, the pre-sale purchasers, by agreement, acquired a "… personal right only and not any interest in the Unit or property": paras. 26-27.

[73] In the alternative, I have also considered the position of the pre-sale purchasers that they have an equitable interest even in the face of clause 19. Unfortunately, this also does not assist them in seeking what is essentially an order for specific performance against the Receiver.

[74] The Court in *bcIMC* cited substantial authority at paras. 70-72 that an equitable interest cannot be specifically enforced in circumstances that are present here. Further, Burnyeat J. citing *CareVest*, stated:

> [73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest*, *supra*, Pitfield J. stated in this regard:
>
> > It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.

> As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

[Emphasis added]

[75] In *1565397 Ontario Inc. (Re)* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.) (WL), Justice Wilton-Siegel stated:

> [33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. …

[76] In *Pope & Talbot Ltd. (re)*, 2008 BCSC 1000, Justice Brenner, as he then was, was dealing with cross applications: the Receiver sought to disclaim an asset purchase agreement, which was in progress at the date of the receivership; and the purchaser sought an order compelling the receiver to complete the sale. Somewhat similar to the facts here, even after the agreed closing date, the parties continued making efforts to close. Then the receivership happened. At para. 25, Brenner J. noted that the purchaser asserted an equitable interest in the assets. However, the Court, as it did in *bcIMC*, considered at para. 26 that the purchaser's status was contingent upon the contract being specifically enforceable. That remedy was not available in *Pope & Talbot* since the parties were not *ad idem* on outstanding matters at the time of the receivership and the receiver did not affirm the contract: para. 29.

[77] The statements of this Court in *bcIMC* at para. 73, citing *CareVest* at paras. 13-14, ring true here in the sense of assessing whether the pre-sale purchasers could have asserted specific performance claims against 098. The circumstances would indicate otherwise:

a) 098 did not have permission for occupancy for the units until Langley issued its notice on August 8, 2017;

b) there were indications even before August 8, 2017 that 098's fortunes were fading, given:

   (1) the petering out of the extension notices after May 31, 2017 are indicative of 098 seeming to have "withdrawn from the field" (see *Pope & Talbot* at para. 31);

   (2) in July 2017, 098 was subject to a foreclosure by CWT/HMF and their CPL had been registered against title. At that time, there was no agreement on the part of CWT/HMF to provide any partial discharges that would have allowed the completion of the sales of these units. No court order could have been enforceable as against CWT/HMF if no agreement was forthcoming;

c) by September 8, 2017, the Superintendent had shut down any sales of units by its cease marketing order. This order in part required that 098 file a new disclosure statement under *REDMA* before any further "marketing" could proceed. Again, I appreciate that 098 was making efforts to have the Superintendent's order lifted so that these sales could proceed, but it would be speculation to assume that this would have been forthcoming. In those circumstances, no order of specific performance could have required 098 to act in breach of that order;

d) on August 25, 2017, Forjay filed its foreclosure action and registered its CPL, adding to the barriers to any closing that might have been sought by any of the purchasers. Again, Forjay did not agree to any partial discharges at any time. It goes without saying that the purchasers would not have taken title to the units with 098's mortgages still registered against them; and

e) on September 30, 2017, 098 lost its new home warranty coverage.

[78] In short, I see no basis upon which an order of specific performance could have compelled 098 to close these sales and provide clear title after occupancy had been confirmed on August 8, 2017. Certainly, there is no basis for any such remedy before that date.

[79] The appointment of the Receiver on October 4, 2017, does not improve any argument on the part of the purchasers. The Receivership Order had no effect on the relative positions as between the mortgagees and the pre-sale purchasers: *Romspen/Horseshoe* at paras. 29, 33-35.

[80] Further, the purchasers could not have sought specific performance as of or after the date of the Receivership Order. The Receiver never affirmed the contract through its conduct or otherwise: *Pope & Talbot* at paras. 31-32. As the Receiver has acknowledged, further efforts were required to complete the Development, including completing exterior work, common areas deficiencies (including landscaping) and in-suite deficiency work.

[81] In addition, the Receiver has acknowledged that upon its appointment, it was not in a position to market, sell or complete the sale of any of the units because, among other things, it had to file a new disclosure statement and obtain new home warranty coverage. The Receiver sought and obtained substantial borrowing powers in order to complete the Development, which included this extra work.

[82] In late January 2018, the Receiver described the Development as "substantially complete". Even as of February 19, 2018, the Receiver had still not obtained the new home warranty and was seeking funds from Forjay to complete that matter and others.

[83] In *Firm Capital*, Morawetz J. stated:

> [28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an

> unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.
>
> [29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[84] I agree. The Receiver could not have been forced to complete the Development so as to enable the purchasers to close their sales.

[85] The other major obstacle in the path of the pre-sale purchasers lies in the requirement that specific performance is only available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available.

[86] Uniqueness is a question of fact that must be assessed in light of the specific circumstances of the particular property in issue: *bcIMC* at paras. 95-96. A person asserting specific performance must show that the property has distinctive features that make an award of damages inadequate: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 45.

[87] Many of the purchasers have stated that they were drawn to Murrayville by its close proximity to the Langley hospital, shopping and the municipal recreational facilities. However, there is no indication that other units in the same vicinity are not available. In fact, there is evidence from some of the purchasers to the effect that there are other similar units available in the marketplace. For example, Nicola Quinn in respect of SL 19 (one of the 40 pre-sales) states that there currently exist "apartments similar to our Murrayville unit".

[88] I do note that at least two of the purchasers paid for improvements to their units, which could stand as some basis upon which to assert that those were unique.

[89] When considering the purchasers' evidence as a whole, it is clear that the defining "uniqueness" is the *price* at which they can acquire the units under the

existing contracts. Ms. Quinn states that these other apartments "cost much more". Even so, no authority has been cited to me that would support that these units are unique in character for that reason. Indeed, such a reason more supports that a damage award would be an adequate remedy.

[90] In summary, the purchasers' interests are grounded in contract and no equitable interests have arisen in any of the units. Those purchasers' contractual rights have no legal priority over those held by the mortgagees. Even if the purchasers hold equitable interests in the lands, those interests are not enforceable in the circumstances.

(2) Realizations/Preferences

[91] Turning to the second question in the analysis, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?

[92] In light of the recent appraisal obtained by the Receiver, there can be no doubt that remarketing and selling these 40 units would enhance the value of the assets to be distributed to the stakeholders. The Receiver described the increase in value as "material". That fact clearly points to disclaimer as being appropriate.

[93] I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. This would be an exceptional result and I know of no authority to order it in these circumstances. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees: *bcIMC* at para. 96; *Penex* at para. 27.

<u>(3) The Equities</u>

[94] Turning to the third consideration, have the pre-sale purchasers established that the equities support overriding the mortgagees' legal priority in their favour, as opposed to allowing a disclaimer?

[95] The circumstances set out above in relation to the respective interests and priorities of the mortgagees and the pre-sale purchasers remain relevant within this part of the disclaimer exercise, but I will not repeat them again.

[96] The pre-sale purchasers, both those represented by counsel and those appearing in person, presented a wide range of arguments in support of completing the sales. I will attempt to distill their arguments, and those of the Receiver, into various categories. They are set out below, in no particular ranking of importance.

[97] <u>Actions/Inactions of 098</u>. The Receiver states that the 40 pre-sale contracts "did not complete because of the actions of 098". The Receiver then argues that the purchasers took all steps required of them to buy their units, but that they were denied the ability to complete the purchase due to the actions of 098. Finally, the Receiver points to the fact that the purchasers remain ready, willing and able to complete, despite having received a further disclosure statement which would have afforded them rescission rights under *REDMA*. This leads to the Receiver's view that "fairness and equity" favour completing the pre-sale contracts.

[98] With respect, this argument is simplistic and, in any event, unpersuasive.

[99] I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.

[100] Further, such general notions of fairness or equity, as cited by the Receiver, are not meant to *ex post facto* elevate the claims of a party so as to relieve that party of the consequences of a harsh result: *Bank of Montreal v. Awards-West Ventures Inc.* (1990), 50 B.C.L.R. (2d) 363 at para. 39 (C.A.). If that were the case, claimants would be lined up to do so.

[101] Again, I do not intend to wade into the details of the contract validity/estoppel/misrepresentation/waiver issues, all in aid of the purchasers avoiding the argument that their pre-sale contracts were not even afoot at the time of the receivership such that no disclaimer is needed. However, I acknowledge the Receiver's and many purchasers' points that 098 did not provide any notice of default or termination, and that the purchasers have been waiting patiently for months, if not years now, based on 098's ongoing assurances that it was nearing completion. Some have been particularly patient, relying on temporary accommodations and moving items into storage. Many are seniors. Many question their ability to re-enter the market (even for lesser units) if they are required to go shopping for condominiums again. Certainly, the current state of the Lower Mainland real estate market is not for the faint of heart.

[102] There is no doubt that some sympathy is in order for the purchasers in these circumstances, even assuming that the contracts remained valid and enforceable to the end. However, those circumstances are not unusual in the sense of pre-sale purchasers not getting their promised unit when a developer fails and the creditors are required to step in to finish the development and sell it and thereafter, distribute the proceeds.

[103] I also consider that the purchasers are no doubt correct when they say that the mortgagees would likely be seeking to complete the pre-sale agreements if the market had gone down. The Kaur Group argues that, if the market had fallen, the mortgagees would have been supporting these sales, to the detriment of the purchasers. However, if a receiver is appointed, s. 16 of *REDMA* dictates that a new

disclosure statement must be filed, in which case any purchaser would have the option of rescinding the contract to avoid completion.

[104] The Purchasers Knew the Risks. It is obvious that the mortgagees took risks in advancing the funds to 098. Of course, the taking of security against the Development was meant to ameliorate those risks.

[105] However, there was also some risk inherent in the pre-sale contracts. The disclosure statements alerted the purchasers to the fact that financing had been arranged and was secured against title to the Development. Further, the pre-sale contracts expressly provided that the purchasers were only obtaining contractual rights and not any interest in lands until the time of completion.

[106] In addition, the purchasers were told in section 7.2(f) of the disclosure statement that, “if [098] fails to complete the sale”, they would be paid their deposit monies together with accrued interest.

[107] Accordingly, while the pre-sale purchasers enjoyed a potential upside in the event of an increase in real estate values between the date of the purchase agreement and completion, they also bore the risk that the developer would be unable to complete the contract. In this case, section 1.5(2) of the amended March 2015 disclosure statement expressly disclosed that Mr. Chandler had been issued cease marketing orders by the Superintendent in 2006 and 2007, a fact that would have highlighted the potential risk in this case.

[108] Purchasers Will Recover Deposits. All of the purchasers under the pre-sale contracts have a deposit currently held in trust. There is no dispute that the purchasers are entitled to the return of their deposits with interest and no dispute that they will be paid those amounts. As stated in *Firm Capital* at para. 34, the purchasers will not suffer any financial loss in that respect.

[109] As mentioned above, two of the purchasers have expended their own funds in making certain improvements to their proposed units. I do not consider this to be of great significance. These funds were paid to 098 before the closing and in doing so,

the purchasers took the risk that the contracts might not close: *Firm Capital* at paras. 37-38.

[110] Purchasers' Claims against 098. If the pre-sale contracts are valid and enforceable, the purchasers may have a damage claim against 098 for any losses suffered as a result of sales not completing. As in similar cases, the purchasers are free to bring a claim for damages against 098 if such a claim exists: *Re Urbancorp*, 2017 ONSC 2356 at para. 6; *Royal Bank of Canada v. Melvax Properties Inc.*, 2011 ABQB 167 at para. 6.

[111] I note that section 7.2(f) of the disclosure statement provides that, if 098 fails to complete and the deposit is repaid, "the Purchaser shall have no further claims against [098]". This section may affect any such claim but I would hasten to add that I am not making any determination as to the enforceability of the above restriction.

[112] I appreciate that, if such a claim exists, this is likely only a hollow remedy, given the status of the receivership; however, this is the remedy the purchasers bargained for under their contracts. Even assuming they had equitable rights against the land, the purchasers were fully aware, or should have been aware through the disclosure statements provided to them, that prior legal rights against the Development may trump that interest. The fact that damages, if awarded, may not be recovered from an insolvent developer cannot affect that result.

[113] Good Faith. The Receiver and many purchasers also argue that the "organizing principle" of good faith applies, as discussed in *Bhasin v. Hrynew*, 2014 SCC 71. They argue that 098 owed the pre-sale purchasers a duty of good faith in the performance of its contractual obligations.

[114] The Receiver states that there are many indications that 098 did not have an intention to treat the 40 pre-sale contracts as being at an end. Contrary indications are said to be that 098 "re-sold" some of the units and that 098 allowed the completion date to pass while electing not to complete.

[115] The Receiver concludes that, since 098 failed to complete the sale of the 40 pre-sale contracts, while continuing to hold onto those deposits, and then sold some of the very same units to other purchasers without advising the first purchasers, 098's actions "cannot be described as acting in good faith".

[116] Many of the participants on this application have levelled accusations against 098 concerning the conduct of its business over the course of this development. One purchaser alleged that they had been "strung along" by 098 as to why delays in closing were happening. Both the Kaur Group and the secured creditors have alleged that 098 improperly diverted funds advanced to 098 that were meant to be used to complete the Development. 098 denies all of these allegations. As for the Receiver's point above, 098 offers up explanations as to why the units were sold more than once; in addition, Mr. Dhaliwal's evidence is that 098 was making serious efforts right until the receivership to complete the sales.

[117] None of these issues are before me for determination. I would hasten to add that, even if 098 was acting otherwise than in good faith under the pre-sale contracts, that does not mean that the secured creditors who wish to benefit from their security were similarly acting in bad faith. It remains the case that the competing equities here are as between the pre-sale purchasers and the mortgagees; not the pre-sale purchasers and 098.

[118] Finally, in *CareVest*, Justice Pitfield affirmed that insolvency, the reasons for it, and the financial results flowing from it are independent of any concerns affecting the specific performance of land: para. 15. Further, as the court stated in *Romspen/Horseshoe*:

> [30] … as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.
>
> …
>
> [32] … The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[119] Accordingly, "good faith" issues such as have been raised by many of the purchasers are irrelevant to the exercise before this Court.

[120] Public Policy. Some of the pre-sale purchasers argued that the Court's consideration of the equities should include public policy factors.

[121] These arguments are grounded in *REDMA*, which unquestionably is consumer protection legislation: *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 17. However, there is nothing in *REDMA* that addresses either of the issues before me (the disclaimer issue or the contract validity issue). As was stated a number of times on this application, the protection afforded to the pre-sale purchasers under *REDMA* was to allow them to rescind the pre-sale contracts in certain circumstances; otherwise, no other legislative protection is afforded to the purchasers.

[122] In this case, the Court must consider the equities as between private parties. The fact that the purchasers have not availed themselves of their *REDMA* remedy does not mean that they enjoy any consideration here based on public policy. Any further protections for this cohort of purchasers must come from the Legislature, rather than this Court. I do not see that public policy arguments apply here in what is essentially a priority contest between these two camps.

[123] Winner and Losers. First, let me state the obvious – there are no winners in these circumstances. The failure of the Development will affect most, if not all, of the stakeholders. I acknowledge here that, while there are principally financial consequences, other perhaps more ephemeral consequences will be felt by others, particularly the pre-sale purchasers.

[124] Many counsel referred to the concept of "reaping the benefit" of the increase in value of the units, and more particularly, who should do the "reaping".

[125] However, both camps rely on contractual obligations of 098. The purchasers were promised their units. The mortgagees were promised to be repaid with interest and that, if default occurred, payment would be secured against the Development. In

those circumstances, the focus is simply on recovery of the asset or the value of the asset – not obtaining any "benefit". In that event, I reject the argument of the purchasers that allowing a disclaimer would result in a "windfall" to the mortgagees. They seek exactly what they are entitled to under their mortgages and nothing more.

[126] As of February 2018, the amounts owing to the first and second mortgagees was approximately $44 million and accruing at approximately $450,000 per month. The amount owed to 625, the third mortgagee, is in excess of $7 million. Even assuming a sale of all units at the increased price confirmed in the appraisal, there will be a shortfall to the secured creditors. As noted by 625, its position is particularly vulnerable given its ranking.

[127] Some of the purchasers submit that the mortgagees were able to do due diligence and negotiate their contracts to better protect themselves. The lenders are said to be in a better position to "bear the loss". That might be the case, but there is nothing unusual about the mortgages or the pre-sale contracts. Any failure to repay the lenders will be a real monetary loss, unlike the purchasers' "loss" of their ability to obtain the units, which is a loss of opportunity rather than a monetary loss. The purchasers will recover their deposit monies with interest so they will not be "out of pocket" any monies under the pre-sale contract.

[128] It is also important to note that the Development's continued progression toward completion has been due solely to Forjay's funding of the Receiver's borrowings. Those are estimated to be $1.3 million at the end of the day. As of the hearing, approximately $683,000 had been advanced. Mr. Mercier understandably objects to the pre-sale purchasers compelling sales at less than fair market value when the Receiver has been able to complete those units only after the advance of further monies by Forjay. It bears noting that these further advances have only served to increase the risk of recovery under RMIC and Forjay's mortgages.

[129] One purchaser also suggested that the mortgagees have other means of recovery at their disposal to shore up any shortfall, unlike the purchasers. He referred to Mr. Chandler's guarantee. He also referred to possible tracing remedies

arising from allegations that 098 improperly diverted monies from the Development to other entities. Forjay has recently filed such an action, which is being vigorously defended.

[130] In my view, it is not appropriate for the Court to rely on such a speculative matter, particularly where it is virtually impossible to assess the likelihood of success. It may be that the mortgagees recover nothing in that further litigation.

[131] Summary. Having balanced all of the above considerations, I am satisfied that the equities in favour of the pre-sale purchasers do not justify overriding the mortgagees' legal priority and giving the purchasers a preference that they would not otherwise enjoy.

SUMMARY AND CONCLUSION

[132] The Receiver is directed to disclaim the 40 pre-sale contracts that are the subject of this application. Further, the Receiver is directed to take immediate steps to remarket and sell these 40 units as soon as possible, subject to legal requirements, and subject to court order.

[133] I have great sympathy for the position of the pre-sale purchasers who have become embroiled in this litigation and who have now potentially lost the ability to obtain what they hoped would be their homes. Mr. Nied, 625's counsel, has suggested that one way to somewhat ameliorate the position of the pre-sale purchasers is for the Receiver to allow them a right of first refusal in respect of their units. This seems a reasonable proposal and one I would adopt.

[134] Accordingly, the Receiver is directed to fashion a process that would allow the 40 pre-sale purchasers a right of first refusal within the future marketing plan, provided that such right is exercised within a reasonable time so as not to unduly delay matters any further.

"Fitzpatrick J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Forjay Management Ltd. v. Peeverconn Properties Inc*., 2018 BCCA 251

Date: 20180612
Docket: CA45234

Between:

Forjay Management Ltd.

Respondent
(Petitioner)

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijjar, Mohan Vilkhu, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., and 1083516 B.C. Ltd., Reliable Mortgages Investment Corp., Joseph and Maria Tomica

Respondents
(Respondents)

And

Peeverconn Properties Inc., Gopal Naidu, David Brummitt, Laurie Brummitt, Gary Janzen, Karen Janzen, Walter Bisschop, and Elsje Bisschop, Brigitte Osborn, Dave and Heather Ray, Alexandra Schoenit/Hyde, Laurie and Doug Lakusta, Tim Lamb, Andreas and Shannon Pfenniger, Gerry and Nicky Quinn, Shannon Smyth, Drew and Kailey St. Cyr, Fred and Terri West, Jennifer Vanpypen, Margaret Cook, Gary and Linda Newton, Marian Mahony

Appellants

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated April 4, 2018 (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, Vancouver Docket H170498).

Oral Reasons for Judgment

Counsel for all of the Appellants, except M. Mahony:	D.A. Solimano and A. Boultbee
Appellant M. Mahony appearing in person:	M. Mahony
Counsel for the Respondents Forjay Management Ltd. and Reliable Mortgages Investment Corp.:	K. Jackson and L. Hellrung
Counsel for the Respondent 625536 B.C. Ltd.:	J.E. Shragge and M. Nied
Counsel for the Respondents 0981478 B.C. Ltd. and Mark Chandler:	N. Hooge
Counsel for the Respondents HMF Home Mortgage Fund Corporation and Canadian Western Trust Company in trust:	C. Dayan
Counsel for Superintendent of Real Estate for British Columbia:	A. Welch
Counsel for the Respondents J. Tomica and M. Tomica:	S. Roxborough
Place and Date of Hearing:	Vancouver, British Columbia June 12, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 12, 2018

Summary:

The appellants entered pre-purchase agreements to buy units in a strata development which subsequently went into receivership. They now appeal an order directing the receiver to disclaim the contracts. Held: appeal dismissed. The judge's discretionary decision is entitled to deference; no errors in principle were made, nor was the evidence misconceived.

[1] **FENLON J.A.**: The appellants in this case all entered into pre-purchase agreements for homes in a strata development. The developer, it appears, mismanaged the funds advanced to him, failed to complete the project, and was put into receivership. That has caused significant and real hardship to the appellants, which we acknowledge. But, as stated during the hearing, we are a court of error. Our task is to look at the judge's decision and her reasons for exercising her discretion to order the receiver to disclaim the contracts, and to ask whether she erred in principle or fundamentally misconceived the evidence, or made any palpable and overriding errors in relation to the facts or reasons that would justify appellate intervention.

[2] I have considered all of the written and oral submissions but I find no such error. To the contrary, the judge's reasons were careful and thorough, addressing all of the issues raised before her. With respect to the appellants' fresh evidence applications, in my view they do not meet the test for the admission of fresh evidence set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. I consider that even if the evidence were to be admitted it would not have affected the outcome in any event.

[3] Finally, I turn to the application to strike portions of the Tomicas' factum. I would decline to make that order. Nor would I find it necessary to add the Tomicas to the appeal as appellants in circumstances in which the order does not apply to them. We have, however, considered the Tomicas' arguments as they were effectively made in support of the appellants' position on appeal.

[4] I would, accordingly, dismiss the appeal.

[5] **HARRIS J.A.**: I agree.

[6] **FISHER J.A.**: I agree.

[7] **HARRIS J.A.**: The appeal is dismissed. The motions to adduce fresh evidence are dismissed. The order with respect to the status of the Tomicas is as set out in the reasons of Madam Justice Fenlon.

"The Honourable Madam Justice Fenlon"

Hamilton Wentworth Credit Union Limited, in liquidation
v. Courtcliffe Parks Limited et al;

Courtcliffe Parks Limited et al. v. Hamilton Wentworth
Credit Union Limited, in liquidation et al.

[Indexed as: Hamilton Wentworth Credit
Union Ltd. v. Courtcliffe Parks Ltd.]

23 O.R. (3d) 781
[1995] O.J. No. 1482
Nos. B117/92 and 92-CQ-20023

Ontario Court (General Division),
R.A. Blair J.
May 30, 1995

Municipal law -- Tax sale -- Municipality requiring leave to proceed with tax sale where land being managed by court-appointed receiver -- Court in granting leave without jurisdiction to vary statutory scheme for sale -- Municipal Act, R.S.O. 1990, c. M.45, s. 382 -- Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

Municipal law -- Tax sale -- Municipality's claim for taxes having priority to court-appointed receiver's claim for fees and disbursements -- Municipal Act, R.S.O. 1990, c. M.45, s. 382 -- Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

Debtor and creditor -- Receivers -- Municipality's claim for taxes having priority to court-appointed receiver's claim for fees and disbursements -- Municipal Act, R.S.O. 1990, c. M.45, s. 382 -- Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

By court order dated May 5, 1992, D & T Inc. (the "Receiver") was appointed receiver and manager of C Ltd., whose only asset was a trailer park located in the Town of Flamborough. At the time of the receivership, the trailer park, which did not comply with municipal zoning, was a health, safety and environmental hazard. It was occupied by tenants, who, for the most part, did not pay their rent. The Receiver expended considerable time and money to attempt to solve these problems. At the time of the receivership, there were also municipal tax arrears totalling $255,797.97. Apart from a minor payment, the Receiver did not pay municipal taxes, and, by the spring of 1995, the tax arrears exceeded $550,000, a sum greater than the appraised value of the trailer park.

To collect the outstanding taxes, the Town sought to sell or become owner of the property under the Municipal Tax Sales Act, but the Receiver took the position that the Town was precluded from this course because the 1992 court order prohibited proceedings in respect of C Ltd.'s assets without leave of the court. The Receiver also took the position that, should the court grant leave to the Town, it should only do so on different terms than would apply under the Municipal Tax Sales Act.

The Town moved for an order that it could proceed to sell the property. The Receiver moved for an order approving payment of its fees and disbursements and for a declaration that these sums had priority to the payment of the municipal taxes.

Held, the Town's motion should be granted; the Receiver's motion should be dismissed.

Under its inherent jurisdiction or under its statutory jurisdiction respecting the appointment of receivers under the Courts of Justice Act, R.S.O. 1990, c. C.43, the court has jurisdiction to require that leave be obtained before steps are taken that will affect the assets being administered under a receivership. This jurisdiction was necessary to preserve the integrity of the court's administration and supervision of the receivership process. Therefore, the Town required leave before proceeding under the Municipal Tax Sales Act. Leave to commence proceedings should be granted unless there is no foundation for the claim or the action is frivolous or vexatious, but it should not be granted perfunctorily and only after a careful examination of the legal factual issues. Here, the Town was seeking to pursue a statutory remedy, and leave should be granted. While the court has jurisdiction to require that leave be granted, it did not follow that there was jurisdiction to impose terms of sale different from those provided under the Municipal Tax Sales Act. Indeed, the court did not have authority to interfere with the statutorily prescribed procedure, which set out a complete and mandatory code.

The court also did not have jurisdiction to declare the Receiver's fees and disbursements to be entitled to priority over the Town's claim for taxes. The Town had statutory authority to collect taxes under s. 382 of the Municipal Act. The statutory provisions precluded the court from awarding a receiver and manager priority over the Town's claim for property taxes. Section 382 of the Municipal Act provided a special lien in favour of a municipality for realty taxes due in priority to all other claimants, except for the Crown. The Receiver was a claimant within the meaning of that section, and the section applied regardless of whether the receiver's fees and disbursements were incurred for the necessary preservation or improvement or realization of the property on behalf of all creditors. Further, if there was jurisdiction to vary the terms of sale, it was not appropriate to exercise the jurisdiction in this case, save for expenses incurred before an appraisal of the property revealed its worth. A receiver's efforts must have regard to the commercial realities of the circumstances and the reasonable expected recovery from the assets of the receivership.

Cases referred to

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); Credit Foncier Franco-Canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. T.D.), affd (1966), 56 W.W.R. 623n (Alta. C.A.); Great West Life Assurance Co. (Re), [1927] 3 W.W.R. 302 (Man. K.B.); Oberman v. Mannahugh Hotels Ltd. (1980), 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312, [1980] 5

W.W.R. 486 (Q.B.); Ontario Securities Commission v. Consortium Construction Inc. (1992), 9 O.R. (2d) 385, 14 C.B.R. (3d) 6, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352 (C.A.); Public Finance Corp. v. Edwards Garage Ltd. (1957), 22 W.W.R. 312 (Alta. S.C.); Regent's Canal Ironworks Co., Ex p. Grissell (1875), 3 Ch. D. 411 (C.A.); Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 59 D.L.R. (3d) 492, 21 C.B.R. (N.S.) 201 (C.A.); Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 15 C.E.L.R. (N.S.) 165, 100 B.C.L.R. (2d) 378, 17 B.L.R. (2d) 127, [1995] 3 W.W.R. 181, 29 C.B.R. (3d) 297 (S.C.); Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1992), 9 C.P.C. (3d) 387 (Ont. Gen. Div.); Winmil Holidays Co. (Re) (1984), 10 D.L.R. (4th) 572 (B.C.C.A.)

Statutes referred to

Assessment Act, R.S.O. 1990, c. A.31, ss. 36, 40
Courts of Justice Act, R.S.O. 1990, c. C.43
Interpretation Act, R.S.O. 1990, c. I.11, s. 29
Municipal Act, R.S.O. 1990, c. M.45, s. 382
Municipal Tax Sales Act, R.S.O. 1990, c. M.60, ss. 1, 3, 4, 5, 8, 9, 10, 12(6), 18

Rules and regulations referred to

Municipal Tax Sales Rules, R.R.O. 1990, Reg. 824 (Municipal Tax Sales Act)

Authorities referred to

Bennett, F., Receiverships (Toronto: Carswell, 1985), pp. 19, 110-11

MOTION and CROSS-MOTION about the priority of a receiver-manager's claim for payment of fees and disbursements and about a municipality's proceedings to collect taxes under the Municipal Tax Sales Act, R.S.O. 1990, c. M.60.

R.B. Thibodeau, for receiver, Deloitte & Touche Inc.

Lee A. Pinelli, for Corporation of the Town of Flamborough.

John M. Hovland, for plaintiff, Hamilton Wentworth Credit Union Ltd., in liquidation.

R.A. BLAIR J.: --

A. FACTS

Background

These proceedings involve two motions arising in the context of a receivership.

The receivership of Courtcliffe Parks Limited has been a particularly tortured, difficult, and expensive process. In this instance, the motions are brought to resolve the competing interests of the receiver, on the one hand, and the Corporation of the Town of Flamborough, on the other hand. The receiver seeks protection for its fees and disbursements incurred during the course of the receivership. The municipality seeks to pursue its remedies for the collection of outstanding realty taxes.

A trailer park, known as "Courtcliffe Park", in the Town of Flamborough, is the only asset of the debtor company; and thus, the only possible source of funds for either of these purposes is the sale of the trailer park, which is currently being operated and maintained by the receiver and on which 116 mobile homes -- most of which are occupied on a year-round nature -- are located.

Courtcliffe Parks Limited has been in receivership since an order of this court made on May 5, 1992 to that effect. Deloitte & Touche Inc. (the "receiver") was appointed receiver and manager of all of its property, assets and undertaking. At the time of the original order, Courtcliffe Park -- which does not comply with municipal by-laws and zoning regulations -- was home for a group of mobile home tenants who were not, for the most part, paying their rent; and it was plagued by extensive safety hazards and operating deficiencies. Significant costs and expenditures were required to rectify serious electrical, environmental and health problems -dangerous and improper hydro connections, sewage hazards and garbage disposal inefficiencies, and an unsafe water supply, to name some.

In May 1992, the receiver took immediate steps to satisfy urgent safety requirements, and in its first report, filed on June 10, 1992, recommended that the operations of Courtcliffe Park be wound down and that all tenants be ordered to provide vacant possession by October 31, 1992. Authority to do so was granted. There ensued very contentious proceedings regarding the collection of rental arrears and the termination of the tenancies. The date for delivering vacant possession was extended. The receiver's efforts to collect rents and to maintain the property continued.

In its third report, filed on March 15, 1993, the receiver presented a plan for the sale of the park, which was approved by order dated April 16, 1993. Appraisals were to be obtained, as part of the plan for sale, on both an "as is-where is" basis, and on the basis that all necessary rezoning and approvals were granted and received such that the trailer park would be a legal conforming use. Such appraisals were obtained, on June 7, 1993, from Jacob Ellen & Associates Inc. of Hamilton. They indicated that the estimated market value, under either basis, was approximately $500,000.

In addition to its efforts to deal with the tenants and to maintain the property, the receiver spent considerable time and energy throughout 1993 in attempting to obtain a rezoning approval from the Town of Flamborough in order to facilitate the sale of the park as a legally conforming trailer park. The application for rezoning was rejected.

Moreover, the receiver's efforts to sell the property have been similarly unsuccessful. Only one offer has ever been elicited. It was in the amount of $300,000 and was not accepted. According to its sixth report, dated August 15, 1994 and filed in connection with these motions, "the Receiver has not subsequently attempted to sell the property and has received little unsolicited interest". Indeed, the receiver states (at p. 22 of the sixth report):

> Based on the foregoing considerations, and the unique nature of the development, it is uncertain if the Receiver would receive an offer in excess of the appraised value of $500,000, regardless of whether the purchaser intended to develop the property as a year-round mobile home park.

Municipal Taxes

At the time of the initial receivership order, on May 5, 1992, Courtcliffe Park's municipal tax arrears, including penalties and interest, totalled $255,729.97. Interest accrues on the arrears at 15 per cent per annum. I am advised that the taxes amount to approximately $120,000 per year. Total arrears as at November 8, 1994 (the latest figures the court has been given) stand at $559,773.51, in any event.

Simple arithmetic indicates that municipal taxes alone exceed the appraised value of the property.

Apart from a minor payment of $2,832.72 on July 16, 1992, the receiver has made no payments on account of municipal taxes; nor has it made any arrangements for payments to be provided. In the meantime, as Mr. Pinelli points out on behalf of the municipality, the receiver has made the following payments, among others:

Utilities:	$202,430.87
Legal Fees & Disbursements	83,910.79
Receiver and Manager Fees & Disbursements	252,071.25

Total	$538,412.91

B. ISSUES

It is the failure to keep taxes current that has led to the present predicament. Two central issues have arisen.

(1) First, the municipality takes the position that notwithstanding the receivership proceedings, it is entitled -- indeed, obliged -- to pursue its remedies of sale in order to collect its tax arrears under the Municipal Tax Sales Act, R.S.O. 1990, c. M.60. The receiver argues that the municipality is barred from taking any such steps by virtue of the "no proceedings without leave" provision of the receivership order, and that if leave is granted it should only be granted upon terms of sale that are broader than those set out in the Municipal Tax Sales Act.

(2) A second issue also arises. The receiver submits that it is entitled to payment of its fees and disbursements, incurred in the process of preserving the property for all creditors -- including the municipality -- in priority to the payment of the municipality's taxes; and it seeks not only approval of those fees and disbursements, but also a declaratory order establishing such a priority.

C. LAW AND ANALYSIS

The Receivership Orders

By order dated May 5, 1992 -- and extended until trial, by order dated May 15, 1992 -- Deloitte Touche Inc. was appointed receiver and manager of "the assets, property and undertaking of Courtcliffe Parks Limited or under their control" (collectively, the "assets"). In that capacity, Deloitte Touche Inc. was empowered to do the usual sorts of things that court-appointed receivers and managers are empowered to do, including the power:

(a) to manage, operate and carry on the business of Courtcliffe Parks in all its phases whatsoever;

. . . . .

(c) to pay all debts of Courtcliffe Parks which [it] deems necessary or advisable to properly operate, manage and sell the business of Courtcliffe Parks and all such payments to be allowed Deloitte Touche Inc. in passing its accounts and shall form a charge on the Assets in priority to the mortgage;

. . . . .

(f) to take possession of and control all property owned by Courtcliffe Parks;

(g) to enter into an agreement or agreements for the sale of the Assets in whole or in part subject to approval of such sale by this Court;

(h) to deal with all tenants and public utilities of Courtcliffe Parks; and,

. . . . .

(j) to take such other steps as [it] deems necessary or desirable to preserve and protect and realize upon the assets and manage and operate the business of Courtcliffe Parks.

The order also contained the customary provision precluding actions or proceedings in respect of the assets or against any of the parties without leave of the court. Paragraph 5 states:

5. This Court Orders that no action or other proceedings (whether through the courts, tribunals, or otherwise) shall be taken or continued in respect of the Assets, Courtcliffe Parks or Deloitte Touche Inc. in relation to Courtcliffe Parks without leave of this Court first being obtained upon seven days' notice being made to Deloitte Touche Inc. and the parties to these proceedings.

Is Leave Required?

The municipality argues that leave is not necessary and that para. 5 can have no bearing upon the ability of the municipality to pursue its tax arrears remedies under the

Municipal Tax Sales Act. Mr. Pinelli submits on its behalf that the court has no jurisdiction to abridge, or abrogate, the statutory rights of a municipality under the Municipal Tax Sales Act or the Municipal Act, R.S.O. 1990, c M.45, s. 382.

The issue is not free from difficulty. In general, however, "where any third party has rights paramount to the receiver and manager, such third party must seek leave of the court before initiating or continuing proceedings already taken": Frank Bennett, Receiverships, (Toronto: Carswell, 1985), at p. 19.

I have concluded -- whatever may be the effect of other arguments relating to property tax arrears and the operation of the statutory tax sales scheme -- that the court has jurisdiction to make an order such as that contained in para. 5 above which encompasses steps taken by a municipality pursuant to such a scheme.

The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors: Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84 at p. 88, 59 D.L.R. (3d) 492 (C.A.); Re Winmil Holidays Co. (1984), 10 D.L.R. (4th) 572 (B.C.C.A.) at pp. 579-80. The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as supervisor in connection with whatever happens to the property that comes under its administration: see Bennett, supra, at pp. 110-11.

All of the assets, property and undertaking of the debtor come under its administration. They remain the property, assets and undertaking of the debtor, notwithstanding the receivership, until otherwise disposed of. They do not vest in the receiver and manager, and they do not become the property of the municipality simply because the legislation creates a statutory lien. The municipality remains the claimant of a statutory lien or charge, by virtue of s. 382 of the Municipal Act. The assets remain under the aegis of the court's administration. An order requiring that leave be obtained before steps are taken that will affect the assets under that administration is therefore, in my view, within the jurisdiction of the court, by virtue of its inherent jurisdiction and by virtue of its statutory jurisdiction respecting the appointment of receivers "where it appears to a judge of the court to be just and convenient to do so": the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended.

Mr. Pinelli submitted that I should read the wording of para. 5 of the order narrowly, and hold that it is not broad enough in its language to catch steps taken by a municipality respecting tax arrears. The words "other proceedings" have to be read in context, the argument goes, and should be read together with the words they accompany, such as "action", "courts" and "tribunals" in para. 5 and "suits", "administrative hearings", "cases" and "actions in law" in para. 4 of the order. The legal principle for this concept is referred to as the ejusdem generis rule. I have little difficulty in concluding, however, that the purpose of para. 5 of the receivership order is to preserve the integrity of the court's role as supervisor over the realization and preservation of the assets which have fallen within its administration; and that its language should be read broadly with that objective in mind.

I recognize that in other cases, such as Re Great West Life Assurance Co., [1927] 3 W.W.R. 302 (Man. K.B.), the words "other proceeding" have been interpreted to exclude extra-judicial matters such as foreclosure of mortgages in the land titles or registry offices. In that case Dysart J. concluded that the language "action or other proceeding" did not encompass such steps. He was of the view that "other proceeding" must mean "some process or step in a matter to be brought before, or pending in, this Court" (p. 303). It is clear from the wording of para. 5 of the May 5, 1992 receivership order that it is intended to be broader than the more restrictive "action or other proceeding" because it provides that "no action or other proceedings (whether through the courts, tribunals or otherwise) shall be taken in respect of the Assets" without leave. To my mind, this language is ample to catch "a process or step in a matter" which is taken "otherwise" than through the courts or an administrative tribunal, "in respect of" the sale of the Courtcliffe Park assets for tax arrears.

The Test for Leave, and its Parameters

It has been held that leave to commence proceedings with respect to receivership assets is to be granted unless there is no foundation for the claim or the action is frivolous or vexatious. At the same time, however, the granting of leave is not to be dealt with on a perfunctory basis or given in a carte blanche manner; it calls for a careful examination of the legal and factual issues: see Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1992), 9 C.P.C. (3d) 387 (Ont. Gen Div.).

When what is sought is leave to pursue a remedy which will have a significant impact upon the very assets which form the subject matter of the receivership, the foregoing caveats regarding the granting of leave apply with particular vigour, in my view. Here, of course, the remedy sought will result in the disposition of the only asset which is available to satisfy either the claims of creditors or the claim of the receiver for recovery of its fees and disbursements.

Nonetheless, what the municipality seeksto do is to pursue a remedy which is clearly given to it by statute. At whatever level the onus is pitched, it seems to me that the municipality has met it, and, accordingly, that leave must be granted.

The question remains, however, whether it should be granted upon terms of sale different from those set out in the Municipal Tax Sales Act, and, if so, on what terms. This, in turn, raises an additional -- and preliminary -- question, namely, whether the court has any discretion, in circumstances such as these, to impose, as a term of granting leave, a sale mechanism different than that mandated by the Act.

Does the Court have Jurisdiction to Impose Terms of Sale

Different from those Set Out in the Municipal Tax Sales Act?

It does not follow that simply because the municipality must seek leave to pursue its remedies under the Municipal Tax Sales Act, the court has jurisdiction to impose terms of sale different from those set out in the Act as a part of the process of granting leave. The two matters are different, and raise different considerations, in my view.

The court's power to require leave to be obtained relates to its supervisory and administrative jurisdiction over the receivership process and is necessary to preserve the integrity of that process. The proceedings with respect to which leave is granted stand on their own feet, however; and, if the statutory remedy being pursued by the municipality carries with it a mandatory procedure prescribed by statute, the court has no authority to interfere with that statutorily prescribed remedy and procedure.

That is precisely the case with the provisions of the Municipal Tax Sales Act, it seems to me. Failure by a property owner or tenant to pay property taxes starts a clock ticking under those provisions. If that clock is not stopped, it triggers the operation of a taxpaying time bomb which, with one exception, can only be diffused by payment of the amounts owing to the municipality or by negotiating an extension agreement with the municipality for making such payment.

The Tax Sale Scheme under the Municipal Tax Sales Act

The scheme, as set out in ss. 1, 3, 4, 5, 8, 9 and 10 of the Municipal Tax Sales Act, is as follows.

Where tax arrears with respect to improved land in a municipality remain owing for more than three years, the treasurer of the municipality may register a tax arrears certificate against "the title to the land with respect to which the tax arrears are owing". Notice of registration is given to the assessed owner of the land, the assessed tenants in occupation of the land, and to persons appearing on the register of title to have an interest in the land. Before the expiry of one year following the registration of the tax arrears certificate, any person may have the certificate cancelled upon payment of what is defined in the Act as the "cancellation price", that is, upon payment of all outstanding taxes together with any outstanding penalties and interest and the municipality's reasonable costs of collection. If the cancellation price is not paid, however, "the land shall be sold or vested in the municipality in accordance with section 9 [of the Act]" (s. 5).

There exists one possibility for avoiding a sale if the cancellation price is not paid. Section 8 provides that the municipality may authorize an extension agreement with the owner of the land, extending the time for payment on certain terms. That authorization, however, must be in the form of a by-law "passed after the registration of the tax arrears certificate and before the expiry of the one-year period" mentioned above. Nothing in the statute permits the authorization of an extension agreement after the one-year period has expired.

Where, at the end of the one-year period, the cancellation price has not been paid and there is no subsisting extension agreement, s. 9(2) of the Act states clearly that "the land shall be offered for public sale by public auction or public tender" (emphasis added).

R.R.O. 1990, Reg. 824, promulgated pursuant to s. 18 of the Act, sets out the Municipal Tax Sales Rules for such sales.

If there is no successful purchaser, the land vests in the municipality. Section 9(11) provides that the treasurer is not bound to inquire into or form any opinion of the value of the land before conducting the sale, nor is he or she under any duty to obtain the highest or best price.

While, under s. 12(6) of the Act, there is some residual discretion in the treasurer of a municipality -- the one "exception" referred to above -- to halt proceedings by registering a cancellation certificate if, in his or her opinion, it is not in the financial interest of the municipality to continue or it is not practical or desirable to continue because of some neglect, error or omission, there is nothing in the statute which permits the court to intervene in such a fashion.

Finally, s. 10 dictates the way in which the sale proceeds are to be applied. They shall be applied:

(a) firstly, to pay the cancellation price;

(b) secondly, to pay all persons, other than the owner, having an interest in the land according to their priority at law; and,

(c) thirdly, to pay the owner.

In my view, these provisions set out a complete statutory code of procedure respecting the sale of lands for the recovery of municipal tax arrears, and for the disposition of the proceeds from such sales. I see no reason to read the mandatory "shall" found in the various foregoing provisions to read the permissive "may". Section 29(2) of the Interpretation Act, R.S.O. 1990, c. I.11, as amended, states that the word "shall" is to be construed in the imperative, and while there are circumstances in which the word may be given a different connotation, the court should assume that the legislature, when it uses "shall", intends the provision to be imperative, unless such an interpretation would be inconsistent with the context or render the clause in question irrational or meaningless: see Public Finance Corp. v. Edwards Garage Ltd. (1957), 22 W.W.R. 312 (Alta. S.C.).

There is nothing in the context of the Municipal Tax Sales Act which would require such a reinterpretation of the word "shall". Municipalities must fund their operations and activities on behalf of the public from the public purse. The legislature has clearly directed them to do so, in part at least, by collecting the taxes due to them (thus, incidentally, reducing the amount of funding that must be directed to the municipalities from provincial sources), and has put in place a strict regime for doing so.

The court, in my opinion, has no authority to interfere with or to alter that statutory scheme or to impose a different regime for the application of proceeds. To do so would be to amend the legislation. That is not the court's function: see, for example, Standard Trust Co. v. Lindsay Holdings Ltd. (1994), 15 C.E.L.R. (N.S.) 165 at pp. 172-73, 100 B.C.L.R. (2d) 378 (S.C.).

Accordingly, in my view, the court has no jurisdiction in these circumstances to impose terms of sale different from those set out in the Municipal Tax Sales Act as a condition of granting leave to proceed.

Receiver's Fees and Disbursements

It would seem to follow from the foregoing that there is no discretion in the court to declare the receiver's claim for fees and disbursements to be entitled to priority over the municipality's claim for taxes.

This view is fortified by the provisions of s. 382 of the Municipal Act. While the sections of the Municipal Tax Sales Act, referred to above, set out the method of enforcement and the statutory scheme for application of the proceeds of sale, it is s. 382 of the Municipal Act which provides the statutory source of a municipality's authority to collect realty taxes and to enforce collection against the land in question. Section 382 states:

> 382. The taxes due upon any land with costs may be recovered with interest as a debt due to the municipality from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving that person's recourse against any other person, and are a special lien on the land in priority to every claim, privilege, lien or encumbrance of everyperson except the Crown, and the lien and its priority are not lost or impaired by any neglect, omission or error of the municipality or of any agent or officer, or by want of registration.

Do these statutory provisions in the Municipal Act and the Municipal Tax Sales Act preclude a court from awarding a receiver and manager a type of "super priority" over the claims of a municipality for property taxes, in appropriate circumstances? In my view, they do. A brief review of the principles surrounding the remuneration of a receiver and manager may be helpful to place this decision in context, however.

In Ontario, the basic principles applying to the recovery of fees and disbursements by a receiver and manager were restated by Houlden J.A. in Kowal Investments Ltd. v. Deeder Electric Ltd., supra, at pp. 87-92. A receiver and manager must look to the assets under its control for recovery of fees and for reimbursement of its charges and expenses. In the absence of an indemnity agreement to that effect, it cannot look to the secured creditor at whose instance it was appointed, or to other creditors for payment; and, of course, the court has no funds to provide for payment. Moreover, the ability to recover is generally confined to the equity in those assets. In order to protect receivers and managers, however, and to ensure that they are fairly remunerated for their efforts -- and in order to ensure that there will be people willing to undertake the important task of acting as receiver and manager -- there are certain exceptions to the qualification that recovery is generally limited to the equity in the assets which are the subject of the receivership. Amongst these exceptions are the following three:

1. If a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security-holder.

2. If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him; and,

3. If the receiver has expended money for the necessary preservation or improvement of the property, it may be

given priority for such expenditures over secured creditors.

See also Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. (1972), 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373 (Man. C.A.); Oberman v. Mannahugh Hotels Ltd. (1980), 34 C.B.R. (N.S.) 181, 4 Man. R. (2d) 312 (Q.B.); Credit Foncier Franco-Canadien v. Edmonton Airport Hotel Co. (1966), 55 W.W.R. 734 (Alta. T.D.), affirmed (1966), 56 W.W.R. 623n (Alta. C.A.).

Thus, while the claim of a receiver and manager for fees and disbursements will normally be confined to the equity in the assets in question, there are circumstances in which those fees and disbursements may be ordered paid in priority to secured creditors where the assets are insufficient to cover all liabilities. It has even been held that the court may order the fees and disbursements of a receiver and manager to be paid out of trust funds held by the debtor in circumstances governed by statute, where the trust funds were being administered by the debtor and where recovery on behalf of the beneficiaries was a main reason for the appointment of the receiver and manager: Ontario Securities Commission v. Consortium Construction Inc. (1992), 9 O.R. (2d) 385 at pp. 389 and p. 398, 14 C.B.R. (3d) 6 (C.A.).

In none of the foregoing cases, however -- and in none that my own research reveals -- has a receiver and manager been granted priority over municipal realty taxes, although in numerous instances such priority has been given over secured creditors. The reason, I conclude, is because the statutory scheme in place forbids it.

Section 382 of the Municipal Act is quite clear:

> 382. The taxes due upon any land . . . are a special lien on the land in priority to every claim, privilege, lien or encumbrance of every person except the Crown . . .

(Emphasis added)

Mr. Thibodeau argued that the receiver is not a "person" within the meaning of that section and, consequently, that the provisions can have no application to preclude the court from awarding priority to the receiver's fees and disbursements. I cannot accept this argument. Nothing in the relevant statutes excludes a receiver and manager as a "person" for these purposes. In fact, only the Crown is excluded: expressio unius, exclusio alterius. Moreover, the receiver is a corporate entity and thus a "person" as defined by the Interpretation Act, s. 29(1). "Person", in my view, is simply the generic word used by the legislature to describe those making claims against the land, of whatever type or origin. What s. 382 provides for is a special lien in fayour of a municipality for realty taxes due, in priority to all other claimants, except for the Crown. The receiver is clearly in the category of claimant, and fallseasily into what is contemplated by the language of the section. Tortuous arguments about whether or not it is a "person" are unnecessary.

One note in passing may be helpful to support this interpretation. In this matter, the only receivership asset of note is the land comprising the Courtcliffe Parks trailer park. The evidence indicates it is unlikely that the land will be sold for more than the municipal tax "cancellation price". If it were to be the case that it did, however, one would expect the receiver to beasserting a claim to be second in line for the application of the proceeds under s. 10 of the Municipal Tax Sales Act. To do so, it would have to be "a person" other than the owner having an interest in the land. Would the receiver accede to an argument in such circumstances that it was not entitled to recover from the excess proceeds over and above the realty taxes, because it was not a "person" as contemplated by the Act? It seems unlikely to me that it would do so.

Accordingly, I am of the opinion that the statutory scheme enacted through the Municipal Act and the Municipal Tax Sales Act for the imposition and collection of municipal property taxes precludes an order granting a receiver and manager priority over the municipality for the receiver and manager's fees and disbursements, regardless of whether those fees and disbursements were incurred for the necessary preservation or improvement and realization of the property on behalf of all creditors.

While this approach denies a receiver and manager a "super priority" with respect to municipal property taxes, it does not, in my view, alter what has traditionally been the case -- and the understanding in the industry -- concerning the payment of such taxes. Such taxes have traditionally been considered to be part of the "necessary costs of preservation" to be made by a receiver and manager. As Mr. Justice Houlden pointed out in Kowal Investments v. Deeder Electric, supra, at pp. 91-92, a receiver and manager is generally given priority over security-holders for such payments. He cited the following passage from the judgment of James L.J. in Regent's Canal Ironworks Co., Ex p. Grissell (1875), 3 Ch. D. 411 (C.A.) (at p. 427):

> The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.

(Emphasis added)

Discretion

I should add, before concluding, that if I am in error in arriving at the foregoing conclusions, and there is some discretion in the court to grant the receiver priority over the municipality for its fees and disbursements, I would not have granted such an order in any event, in the circumstances of this case, except to a limited extent. I would have been prepared to grant the receiver priority only to the extent of its fees and disbursements (including its costs for the "necessary preservation and improvement" of the property) incurred before the Jacob Ellen & Associates Inc. appraisals obtained in June 1993.

There is no doubt that when the receiver was appointed immediate emergency measures were required to place the trailer park in a position where it did not pose a hazard to the health and safety of its existing occupants. Moreover, it was reasonable, in my view, for the receiver to determine to wind down the operations of Courtcliffe Park and to put it in a position to be sold. Carrying out these functions turned out to involve a great deal of time, effort and expense, and the participation in a number of court proceedings.

In his affidavit filed in support of the receiver's motion, Bruce K. Robertson, who is the file manager of the receivership, deposes:

> I unequivocally state to this Court that the time and disbursements spent by the Receiver and its legal counsel relates [sic] almost exclusively to the maintenance, management, preservation and preparation of the subject property of Courtcliffe Parks Limited situated in the Town of Carlisle being carried on as a trailer park. The requirements upon the Receiver in this receivership havebeen extensive and extremely time consuming in view of the nature of the receivership, the attacks that have been made by supposed interested parties on the receivership and the requirements which have been tremendous with respect to dealing with each and every individual tenant of the Courtcliffe Parks property. As can be determined from the previous five reports filed by the Receiver and the approximate nine previous court appearances, the material for which was all prepared by the Receiver and its counsel to protect, preserve, maintain and prepare the subject property, the demand upon the Receiver's time and that of its legal counsel has been extensive, continuous and expansive.

As the judge who has presided over the receivership, and been the recipient of the materials referred to, I have no hesitation in accepting what Mr. Robertson has said with respect to the time and efforts of the receiver and its counsel and the purposes of those endeavours. That is not the end of the matter, however.

The receiver argues that it should be protected vis--vis the municipality's claim for taxes because the fees it has earned and the moneys it has expended have been incurred (i) to preserve and realize the assets for the benefit of all the creditors, including the municipality; and/or (ii) for the necessary preservation or improvement of the property.

A receiver and manager is the officer of the court. That position does not provide it with a carte blanche, however, to continue to build up fees and disbursements without regard to the realities of the circumstances, that is, without regard to the amount of those fees and disbursements, together with the secured and other claims against the receivership assets, in relation to the reasonable expected recovery from those assets. While a receiver and manager is an officer of the court, it is also a commercial entity taking on responsibility for financial gain: Standard Trust Co. v. Lindsay Holdings Ltd., supra, at p. 174. There must be an air of commercial reality to its efforts.

Here, it must have been apparent to all involved upon receipt of the appraisals in mid-1993, that the receivership assets were unlikely to yield very much more than the outstanding property tax obligations existing at the time. Certainly, the total of those tax obligations plus the then existing fees and disbursements of the receiver exceeded the estimated recovery from the property -- regardless of whether it was sold on an "as is-where is" basis or on an improved basis, after all necessary rezoning approvals had been obtained (assuming they could be obtained).

One wonders how anything other than an orderly wind-down of the trailer park and a tax sale could be justified, after that point.

Assuming, without concluding, that some other approach could be justified in the circumstance, the receiver had other ways of protecting itself and of ensuring that the municipality did not pursue its tax sale remedies under the Municipal Tax Sales Act. It could have paid current taxes, to prevent the three-year period, which gives rise to the registration of a tax arrears certificate under that Act, from running. It could have negotiated an extension agreement with the municipality, under s. 8 of the Act, to prevent the one-year period leading to a mandatory sale from expiring. It could have sought an indemnity agreement from the secured creditor. However, it did none of these things.

Although there have apparently been scattered volleys back and forth between the receiver, or its solicitors, and the municipality, or its solicitors, it is apparent that the receiver decided to ignore the tax arrears certificate, and its implications, and to proceed on the basis that it could put the trailer park on its financial feet and obtain rezoning approval for a going concern sale. This ignores the reality that a going concern sale will not -- even on the receiver's own estimate -- yield enough to recoup more than the amount claimed by the municipality.

The receiver has also submitted that the municipality's assessments are erroneous, and that they will be appealed. No steps have been taken to launch such an appeal, though, and the time within which an appeal lies has elapsed under the Assessment Act, R.S.O. 1990, c. A.31, ss. 36 and 40.

Thus, while I would be inclined -- if I had the discretion to do so -- to grant the receiver some form of priority with respect to its disbursements incurred for the purposes of "necessary preservation and improvements" of the trailer park prior to June 1993, and perhaps for its related fees, the extent of that priority, I think, is something that would have to await the results of the tax sale. Only then could the court's discretion, in balancing the interests of the receiver, the municipality and the secured creditor, and in considering all of the circumstances, be properly exercised.

I would not be prepared to make a blanket order granting the receiver priority over the municipality's claim for property tax arrears for its fees and disbursements, in the circumstances here prevailing.

Approval of the Receiver's Fees and Disbursements

For similar reasons, I am of the view that approval of the receiver's fees and disbursements should await the final disposition of the property, and I make no order in that respect at this time.

D. CONCLUSION

For the foregoing reasons, the receiver's motion is dismissed and the cross-motion of the Corporation of the Town of Flamborough seeking leave to exercise its statutory tax sale rights and remedies pursuant to the Municipal Tax Sales Act is allowed. An order is also granted directing the receiver to serve the Corporation of the Town of Flamborough with all materials in relation to all motions brought regarding the receiver's management of Courtcliffe Parks Limited.

Although the Town was unsuccessful with respect to its argument concerning the need for the granting of leave for it to proceed, the substantial issues on these motions related to the terms upon which it would be able to proceed with its tax sale rights and remedies and to the question of whether the receiver was entitled to priority with respect to its fees and disbursements. The Town has been successful on these issues and, accordingly, is entitled to its costs of the motions. I will fix the costs if counsel are unable to agree upon them. Written submission may be made in that regard within 30 days of the release of these reasons, if necessary.

Order accordingly.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Jamshid Enterprises Inc. et al. v. Century Point Residences Ltd. et al.,*** 2007 BCSC 1260

Date: 20070817
Docket: S104192
Registry: New Westminster

Between:

Jamshid Enterprises Inc. and
I. Rezaei & Associates Inc.

Plaintiffs

And

Century Point Residences Ltd., and
Michael Orville

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for Plaintiffs	D. W. Donohoe
Counsel for Defendants	D. I. Riddell
Date and Place of Trial/Hearing:	July 18, 2007 New Westminster, B.C.

Introduction

[1] The plaintiffs apply for an interlocutory final judgment on the issue of liability under Rule 18A of the ***Rules of Court***, B.C. Reg. 221/90, with damages to be assessed at a later date. By consent, and pursuant to the order of Bruce J. on June 21, 2007, the preliminary contractual issue was referred for hearing on July 18, 2007. The parties consented to a list of questions for determination by the court.

[2] These questions pertain to the proper interpretation of a contract concerning the purchase and sale of real property. Specifically, the action arises from the plaintiffs' (also referred to as the "purchasers") purchase of two strata title residential units in a building to be constructed by the defendant Century Point (also referred to as the "vendor") at the corner of 6th Street and 3rd Avenue in New Westminster, B.C. The following five questions have been submitted, by consent, to this Court for determination:

1. Is clause 2 of Schedule A to be interpreted as a benefit to one party or for the benefit of both parties?

2. Is it open under the proper interpretation of the agreement for the plaintiffs to enforce an extension of the completion date in the agreement by reliance on events outside the vendor's control, as contemplated in clause 2 to support an extension?

3. Should the agreement be interpreted to obligate the vendor to use reasonable diligence in constructing the property by the agreed completion date, as an implied term of the agreement, as pleaded in paragraph 18 of the statement of claim?

4. Was it open to the parties to enter into a binding oral agreement to extend the completion date of the agreement?

5. Was it open to the defendants to waive any requirement of the agreement to obtain a written agreement with the plaintiffs to an extension of the completion date?

Background Facts

[3] On February 1, 2004 the plaintiffs purchased two strata title residential units in a ten story apartment building to be constructed by the defendant, Century Point. They each paid a deposit and signed purchase agreements. They received and provided copies of the disclosure statement filed by Century Point with the Superintendent of Real Estate. The disclosure statement projected the completion date and transfer of title as May 31, 2005.

[4] The purchase agreements included Schedule A, which contained additional contract terms. Clause 2 is entitled "completion date". The last two sentences state:

> The notice of the Completion Date given to the Purchaser or the Purchaser's solicitors may be based on the Vendor's estimate as to when the Property will be ready to be occupied, and if the Property is not ready to be occupied on the Completion Date so established, the Vendor may delay the Completion Date from time to time as required by the Vendor until the Property is ready to be occupied, by written notice of such delay to the Purchaser or the Purchaser's solicitors, provided that the Vendor or the Vendor's solicitors, will give the Purchaser or the Purchaser's solicitors not less than 24 hours notice of an extended Completion Date. <u>If the Completion Date has not occurred by May 31, 2005 this Contract will be terminated unless the parties agree in writing to extend</u>, provided that if the Vendor is delayed from completing construction of the Property as a result of any circumstance whatsoever beyond the reasonable control of the Vendor, then such outside date for completion will be extended for a period equivalent to such period of delay.
>
> [Emphasis added]

[5] In the period between the plaintiffs signing the purchase agreements and July 2006, construction activity was sporadic. The building was not completed by May 31, 2005.

[6] On July 13, 2006 the plaintiffs received letters from the defendant, Century Point, which stated:

> Pursuant to the contract of purchase and sale entered into between yourselves and Century Point Residences Ltd. dated February 1, 2004 as amended on July 20, 2004 (collectively the "contract") we hereby give you notice that the completion date has not occurred as required by the contract and that, therefore, the agreement is consequently terminated.

[7] The letter enclosed a deposit release form advising the plaintiffs that their deposits would be refunded upon receiving a signed form.

[8] The plaintiffs say that until they received those letters, they believed their purchase agreements were still in force and would be performed in accordance with the obligations of Century Point.

[9] The defendants admit that the delay suffered by Century Point in constructing the apartment building has, in part, been caused by a large number of factors including financing and construction issues. The defendants further admit that Century Point did not, until July 2006, "remind" the plaintiffs of the automatic termination of their contracts of purchase and sale and the need for them to have their deposit money returned.

Positions of the Parties in Relation to Each Issue

[10] Below, I will set out each of the five questions referred to this Court for determination, along with the parties' respective positions.

1. Is clause 2 of Schedule A to be interpreted as a benefit to one party or for the benefit of both parties?

[11] The plaintiffs' position is that the clause is for the benefit of both parties. The completion date refers to the completion of performance of mutual obligations owed by each party to the other. The plaintiffs submit that there is no basis to interpret clause 2 in respect of the extension of the completion date as a term included for the sole benefit of Century Point.

[12] The defendants assert that clause 2 deals primarily with issues that affect the vendors' ability to construct and complete and contemplates extensions for the benefit of and at the behest of the vendor. Clause 2, read in the context of the remainder of the agreement, is unambiguous and thus parole evidence is unnecessary and inadmissible as an aid for its interpretation. Clause 2 is for the vendors' protection against claims by a purchaser for breach of contract based upon the failure to complete by May 31, 2005 which the defendants refer to as the "outside completion date".

2. Is it open under the proper interpretation of the agreement for the plaintiffs to enforce an extension of the completion date in the agreement by reliance on events outside the vendor's control, as contemplated in clause 2 to support an extension?

[13] The plaintiffs submit that there is no justifiable reason to interpret the contractual language to prevent the plaintiffs from enforcing an extension of the completion date for events that are not within the control of either party.

[14] The defendants submit that if the clause is for the benefit of the vendor, then such a course is not open to the purchasers. If the clause is for the benefit of the purchaser or for both parties, then it will be for trier of fact to determine, at a full trial, if the plaintiffs' actions amount to taking adequate and proper steps to enforce an extension, or if their silence for almost 18 months after the outside completion date gives rise to an estoppel.

3. Should the agreement be interpreted to obligate the vendor to use reasonable diligence in constructing the property by the agreed completion date, as an implied term of the agreement, as pleaded in paragraph 18 of the statement of claim?

[15] The plaintiffs submit that Century Point is obliged to use reasonable diligence in advancing the construction of the property. This is either an express term or a term that is necessarily implied in the agreement to give it business efficacy. By stipulating a projected completion date, the plaintiffs submit, it is clear that Century Point accepted an obligation to proceed in a timely way and use its best efforts to complete the construction by the projected completion date.

[16] The defendants assert that the contract is silent with regard to any requirement of good faith or reasonable diligence. They agree that the courts recognize a duty on a contracting party not to act in a manner that deprives the other party of the contractual benefit that was bargained for. The defendants further submit that this duty is the primary reason behind the terms contained in clause 2 as

a protection for the vendor and there is no obvious necessity for any further implied term in the contract.

4. *Was it open to the parties to enter into a binding oral agreement to extend the completion date of the agreement?*

[17] The plaintiffs submit that it is open to the parties to do so.

[18] The defendants maintain that the contract specifically contemplates the ability to extend the dates within it but the contract does require, in the first instance, that an extension to the outside completion date be made in writing. However, the parties may agree, specifically and orally, to amend that term. It will be for the trier of fact to determine if there was a specific agreement to amend that term to permit an oral agreement.

5. *Was it open to the defendants to waive any requirement of the agreement to obtain a written agreement with the plaintiffs to an extension of the completion date?*

[19] The plaintiffs submit that it was open to Century Point to waive any contractual requirement for a written agreement with the plaintiffs to extend the completion date because time deadlines and "time is of the essence" clauses can always be relaxed and waived by one party to a contract in favour of the other.

[20] The defendants say that the requirement to enter into a written agreement to extend the outside completion date could only be waived by both parties acting in contemplation of their rights and effectively making the agreement referred to under question four. It is for the trier of fact to determine if there was a mutual waiver of any requirement in writing.

Decision

[21] It is my view that clause 2 is clear on its face and does not require the resort to extrinsic evidence as an aid to its interpretation. I have not considered the extrinsic evidence. Below, I set out my interpretation of said clause, in the form of answers to the five questions submitted to me for determination.

1. Is clause 2 of Schedule A to be interpreted as a benefit to one party or for the benefit of both parties?

[22] This clause, and in particular the underlined portion which is the subject of the dispute in the present application, is for the benefit of both parties. I regard the underlined portion as a termination clause. It places temporal limits on the relationship between the parties: if the project is not completed by May 31, 2005, the contract is terminated and both parties are released from any further obligations, unless they agree in writing to extend the completion date. The *proviso* that immediately follows the underlined portion provides that if the parties agree in writing to extend the outside completion date, then the period of the extension must run as long as any period of delay that arises as a result of factors outside the control of the vendor.

[23] The termination clause is potentially beneficial to both parties, depending on various real estate market dynamics. While I do not propose to identify and comment on all the various merits and demerits of the clause from the perspective of each party, I will give one example. From the purchasers' perspective, this clause would be of benefit if, between the signing of the purchase agreement and the termination date, the value of the strata units fell, such that their market value was

below the amount the plaintiffs had agreed to pay for them. Conversely, the clause would be of benefit to the vendor, if, notwithstanding all reasonable diligence in its attempts to complete the project by the termination date, the vendor was still unable to do so and during that period of time the construction costs increased substantially. In the first example the purchaser would enjoy the benefit of having the agreement terminated; in the latter example, the vendor would enjoy the benefit of having the contract terminate.

2. *Is it open under the proper interpretation of the agreement for the plaintiffs to enforce an extension of the completion date in the agreement by reliance on events outside the vendors' control, as contemplated in clause 2 to support an extension?*

[24] It is not open to the plaintiffs to enforce an extension of the completion date in the agreement by relying on events outside the vendors' control. The agreement is clear that if the units are not complete by May 31, 2005, the agreement terminates unless the parties agree in writing to extend it. As I stated in my response to question one, the *proviso* following the underlined portion of the clause is relevant to the duration of the period of extention, once such an extension is agreed to in writing by the parties. The *proviso* does not affect the requirement that an extension on May 31, 2005 must be agreed to in writing by the parties. The extension cannot be enforced unilaterally by either party.

3. *Should the agreement be interpreted to obligate the vendor to use reasonable diligence in constructing the property by the agreed completion date, as an implied term of the agreement, as pleaded in paragraph 18 of the statement of claim?*

[25] It is an implied term of the agreement that the defendants will use reasonable diligence to complete the construction of the property by the agreed completion date. This implied term is necessary to give meaning and purpose to the contract and to give effect to the reasonable expectations of the parties: see G.H.L. Fridman*, The Law of Contract in Canada, 5th ed.* (Toronto: Thomson Carswell, 2006) at pp. 468 and 473.

4. Was it open to the parties to enter into a binding oral agreement to extend the completion date of the agreement?

[26] Under the express terms of the agreement any extension beyond May 31, 2005 must be by agreement between the parties and it must be in writing. However, the parties are always open to agree, either orally or writing, to amend the requirement that the extension be in writing. Whether there was any such amendment is a question of fact. Thus, absent any amendment, the original clause binds, and any extension must be by agreement and in writing. If, however, either party can prove at trial that the parties in fact agreed to amend this requirement, then the terms of the agreed amendment, if there was one, will govern the formal requirements which must be met in order to extend the completion date.

5. Was it open to the defendants to waive any requirement of the agreement to obtain a written agreement with the plaintiffs to an extension of the completion date?

[27] It was not open to Century Point to waive any requirement of the agreement. The purpose of requiring an extension of the completion date in writing is a term that was included for the benefit of both parties. It therefore cannot be waived by either party unilaterally. Furthermore, to permit either party to waive the requirement that

any extension beyond May 31, 2005 be by agreement and in writing would be contrary to the express terms of the clause. Such an interpretation is not consistent with the parties' intentions as stated in clause 2.

Costs

[28] Costs are in the cause.

"The Honourable Madam Justice Gropper"

Citation:	***New Skeena Forest Products Inc. et al v. Kitwanga Lumber Co. Ltd.*** ***2004 BCSC 1818***	Date:	20041213
		Docket:	L033220
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
Chief Justice Brenner
December 13, 2004

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*
R.S.C. 1985, c. c-36

AND

IN THE MATTER OF THE *CANADA BUSINESS CORPORATIONS ACT*,
R.S.C. 1985, c. C-44, as amended

AND

IN THE MATTER OF THE *COMPANY ACT,*
R.S.B.C., 1996, c.62, as amended

AND

IN THE MATTER OF NEW SKEENA FOREST PRODUCTS INC.
ORENDA FOREST PRODUCTS LTD.
ORENDA LOGGING LTD. and
9753 ACQUISITION CORP.

PETITIONERS

KITWANGA LUMBER CO. LTD.

RESPONDENT

Counsel for Receiver	M. Peerson A. Campbell
Counsel for HMTQ for B.C.	D. Hatter
Counsel for Coast Tsimshian	G. McDade, QC
Counsel for City of Terrace	G. Dabbs
Counsel for Don Hull & Sons Contracting, K'Shian Logging and Construction	P. Voight, QC M. Oulton
Counsel for Tsimshian Tribal Council	R. Cherniak
Counsel for Main Logging	S. Jackson

[1] **THE COURT:** On this application, the Receiver seeks a vesting order which would vest title to certain assets of New Skeena free and clear of all claims, including any rights of the contractors who would claim through the harvesting contracts made between the bankrupt and those contractors.

[2] Ernst & Young LLP was appointed the interim receiver and receiver of all the assets and undertakings of the petitioners in this case. The Receiver is engaged in liquidating all of the petitioners' assets. One of those assets is Tree Farm Licence Number 1, ("TFL-1"), which gives New Skeena the exclusive harvesting rights over certain lands in the Terrace area.

[3] The respondents, Don Hull & Sons Contracting Limited, K'Shian Logging and Construction Limited, and Main Logging Limited are logging contractors. These contractors are parties to replaceable harvesting agreements with New Skeena in connection with, among others, TFL-1.

[4] On November 26, 2004, the Receiver wrote to the contractors purporting to terminate their harvesting contracts; and on November 29, the Receiver applied to the court for confirmation of a sale of certain of New Skeena's assets, including TFL-1 to Coast Tsimshian Resources Ltd. One of the terms of the sale was that the replaceable harvesting contracts held by the contractors be terminated.

[5] On December 1, 2004, this court approved the asset sale but adjourned the issue as to the status of the harvesting contracts. In particular, the issue as to whether TFL-1 could be transferred to the purchaser free and clear of any replaceable contracts was deferred to this application.

[6] Hull, K'Shian, and Main are logging contractors. Their principal business has traditionally been conducting full-phase timber harvesting operations, and related construction, on behalf of New Skeena, in the vicinity of Terrace. They have been active participants in the logging industry in the area for some thirty years.

[7] Following the initial restructuring of Repap British Columbia, they entered into replaceable timber harvesting contracts with New Skeena on August 27, 1997. Each of these contracts is a replaceable contract as defined in the timber harvesting contract and subcontract regulation.

[8] These contractors did participate in the previous restructuring of Skeena Cellulose Inc. and its predecessor companies. On the evidence, they have incurred significant investment expenditures in connection with those activities.

[9] New Skeena and its predecessors operated a pulp mill and several saw mills with related forest tenures until the summer of 2001, when it sought protection from its creditors under the ***Companies' Creditors Arrangement Act***.

[10] The attempted reorganization under the C.C.A.A. failed. On the application of the petitioners and NWBC Timber and Pulp Limited, Ernst & Young was appointed interim receiver and receiver on September 20, 2004.

[11] This application involves the nature of the replaceable timber harvesting contract. The harvesting contracts that we are dealing with this in this case are replaceable contracts, as that term is defined in the ***Forest Act***. In an earlier proceeding, I summarized the policy behind the replaceable contract régime as follows:

> The legislation imposing the replaceable contract obligation on licensed holders was introduced in 1991. From the Hansard at the time, it appears that the legislation was intended to provide security of tenure for contractors which was co-extensive with the security of tenure enjoyed by the license holder.
>
> It was designed to protect the interests of logging contractors who are typically small businesses that must make significant capital investments in order to service their contracts. It was also designed to provide stability and security to the contractors and the communities that depend on them. (See re Skeena Cellulose Inc. (2002) B.C.S.C. 1280, at paragraph 18.)

[12] In that decision, as part of a proposed restructuring within the CCAA proceeding, I allowed the petitioner to cancel a number of replaceable contracts.

[13] The essential policy behind this régime is that it imposes an obligation on the holders of replaceable licences such as TFL-1 to harvest a proportion of the timber from the licence through contractors that have entered into these replaceable contracts. The

replaceable contract is, in essence, a contract that will continue so long as the contractor's performance under the contract is satisfactory. Provided that continues to be the case, the contractor is entitled to receive replacement contracts from the licence holder under substantially similar terms for as long as the licence subsists.

[14] There is no issue in this case with respect to the performance of any of the contractors in question.

[15] Until June 2004 the contractor compliance provisions of the applicable regulations required that these contractors continue harvesting under replaceable contracts.

[16] On June 21, 2004 the regulation was amended. It removed the requirement that future contracts under a replaceable licence be made on a replaceable basis. However, the amendment also grandfathered any replaceable contracts in existence as of the date that the regulation was amended.

[17] Some additions were made to the regulations. Section 33.8 sets out what a replaceable contract must provide for in the event that the contract is to be transferred. The second significant change was to section 12.4 of the regulation. Section 12.4 provides:

> If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contracts must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.

[18] The contractors concede that s. 33.8 represents simply another contractual obligation that must be incorporated into these contracts. However they also say that s.

12.4 creates something much more significant than a mere contractual term. The contractors argue that s. 12.4 creates a statutory obligation which is triggered if a licence is terminated by a licence holder for contractor default. Therefore the contractors argue that this amendment to the regulation elevated the rights under these agreements beyond the mere contractual to the statutory and as such these rights attach to the Tree Farm Licence and must run with it.

[19] The fundamental question on this application is whether the court should grant the vesting order sought by the Receiver, which would vest TFL-1 in the purchaser, free and clear of the replacement contract obligations.

[20] The law is clear that a trustee in bankruptcy is entitled to disclaim a contract. Similarly, a court-appointed liquidator is also entitled to disclaim executory contracts. (See ***Holden and Morowetz***, F45.2).

[21] A bankruptcy does not of itself terminate a contract: the trustee is entitled to either perform or disclaim executory contracts. (see ***Seaton v. Doucette*** (1915) 59 Quebec S.C. 92). ***Holden and Morawetz*** state this principle as follows:

> With respect to contracts that the trustee can't perform, he or she may elect either to adopt them or to disclaim them. If the trustee disclaims a contract, the persons who have contracted with the bankrupt can prove a claim in the bankruptcy for damages. (***re Thompson Knitting Company***, 5 C.B.R. 489; ***re Minnie Pearl of Canada Limited*** (1971) 15 C.B.R.(N.S.) 57.)

[22] However it is also clear that, when deciding whether to affirm or disclaim a contract, a court-appointed receiver, as an officer of the court, must have regard to

equitable considerations. As stated by counsel for the Receiver in his written submission to the court:

> This court retains a supervisory power over the Receiver, upon application by the Receiver for a vesting order that would permit the transfer of the assets free and clear of all claims. The court will have regard to equitable considerations in the grant of such an order.

[23] The task of the court on this application is to weigh those equitable considerations as best it can. The equitable considerations favouring the contractors' position is set out in the affidavit of Lloyd Hull, the principal of Don Hull.

[24] In his affidavit, Mr. Hull outlines the long history of Don Hull & Sons Contracting Limited in the area and on the long-standing relationship with the predecessors of New Skeena. Historically, Hull has obtained the vast majority of its revenue from the timber harvesting operations conducted on behalf of Skeena. Under the terms of its contract, Hull was entitled to harvest some 196,500 cubic metres of the allowable annual cut on TFL-1. That number was reduced in October 2000, after the Nisga'a Treaty, to some 166,248 cubic metres.

[25] In 1997 Hull went through the reorganization after Repap British Columbia Inc., Skeena's predecessor, filed for creditor protection. After that restructuring, and after Skeena was formed, Hull conducted harvesting operations on behalf of Skeena pursuant to the harvesting contract.

[26] Between 1997 and 2000, Hull employed approximately 65 people. It has a significant investment in equipment of some 12 to 15 million dollars, and it generated

significant revenues. Hull has incurred loan obligations to the Provincial Government of approximately $750,000.

[27] The replaceable contracts in themselves have value. Hull estimates the value of its contract at some $3.1 million. Because of the recent 20-percent takeback by the Province, Hull is seeking compensation from the Province of $600,000 for TFL-1.

[28] As I said at the outset, there is no evidence of any default or inability to perform on the part of Hull or indeed any of the other contractors.

[29] There are a number of equitable considerations supporting the Receiver's application. There have been no logging operations on TFL-1 since August of 2001. Skeena stopped all harvesting operations due to financial concerns. There is no intention on the part of the Receiver to ever resume logging operations on TFL-1.

[30] The offer that has been made by the Coast Tsimshian partnership must be described as a highly favourable one.

[31] In his affidavit, Mr. Prentice, the Receiver, describes the offers that were received, and in particular the Coast Tsimshian offer. The offer in total is some $4.8 million which includes not only TFL-1 but a number of other assets. The notional amount attributable to TFL-1 is some $3.5 million. In addition, the purchaser has agreed to assume certain silviculture obligations, which are estimated at $3.5 million.

[32] In his affidavit, Mr. Prentice referred to a number of other offers - or perhaps "inquiries", might be another term - from other parties. The simple fact is that none of

them come close to the Coast Tsimshian offer. Significantly, all of these also required that the replaceable contracts be cancelled.

[33] Another factor that the court must consider is the effect of the regulatory amendment in June of 2004. Did that regulatory amendment confer a statutory right or a right greater than a simple contractual right for the benefit of the contractors? If so, to what effect?

[34] I agree that s. 12.4 does create a statutory right in the event of contractor termination because of default. In that case the holder of the licence has a statutory duty to enter into another replaceable contract or contracts.

[35] However, s 12.4 applies only in a case of contractor default. It does not apply in the case of a bankruptcy or insolvency. So while it creates a statutory right triggered in the event of contractor default, I do not see in this regulation the creation of an *in rem* or proprietary right that would attach to the tree farm licence itself and that would run with the tree farm licence itself even in a bankruptcy.

[36] One of the submissions on behalf of the contractors was that the Receiver's application ought to be rejected so that the sale of TFL-1 could be re-shopped.

[37] However the Receiver has already done this. Mr. Prentice has exercised his best business judgement and is recommending that the court approve this transaction, on the terms applied for. It does appear, on the facts, to be a highly favourable offer.

[38] Another consideration is that the cost of this receivership is some $500,000 per month. That is the rate at which all of New Skeena's assets are declining in value over time.

[39] Accordingly, when I weigh the equitable considerations in this case, when I consider that the contractors do not have an *in rem* or a proprietary right, but rather a contractual right, I conclude that the Receiver's application should be allowed.

[40] There will be a vesting order that vests title to the assets, that is TFL-1 and the other assets that are part of the Coast Tsimshian offer, free and clear of the interests of all creditors and the contractors.

[41] I thank counsel for their assistance.

"D.I. Brenner, C.J.S.C."
The Honourable Chief Justice D.I. Brenner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.,***
2005 BCCA 154

Date: 20050318
Docket: CA032519; CA032539; CA032528

Docket: CA032519

Between:

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

And

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

And

In the Matter of New Skeena Forest Products Inc.
Orenda Forest Products Ltd., Orenda Logging Ltd., and
9753 Acquisition Corporation
Kitwanga Lumber Co. Ltd.

Respondents
(Petitioners)

And

Don Hull & Sons Contracting Ltd., and
K'Shian Logging & Construction Ltd.

Appellants
(Respondents)

\- and -

Docket: CA032539

Between:

In the Matter of the Bankruptcies of
New Skeena Forest Products Inc., Orenda Forest Products Ltd.,
Orenda Logging Ltd. and 9753 Acquisition Corporation

Respondents
(Petitioners)

And

Don Hull & Sons Contracting Ltd. and
K'Shian Logging & Construction Ltd.

Appellants
(Respondents)

- and -

Docket: CA032528

Between:

In the Matter of the Bankruptcies of
New Skeena Forest Products Inc.,
Orenda Forest Products Ltd.,
Orenda Logging Ltd., and
9753 Acquisition Corporation

Respondents
(Petitioners)

And

Main Logging Ltd.

Appellant
(Respondent)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Oppal

P. Voth, Q.C. and M.S. Oulton	Counsel for the Appellants Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.
R.A. Millar	Counsel for the Respondents Ernest & Young Inc.
F.M. Kirchner	Counsel for the Respondents Coast T'simshian Resources
S.B. Jackson	Counsel for the Appellant Main Logging
R. Leong	Counsel for the Attorney General of Canada

D.J. Hatter	Counsel for H.M.T.Q. in Right of British Columbia
S.R. Ross	Counsel for the Intervenor Truck Loggers Association
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2005
Place and Date of Judgment:	Vancouver, British Columbia March 18, 2005

Written Reasons by:
The Honourable Mr. Justice Braidwood

Concurred in by:
The Honourable Mr. Justice Oppal

Reasons Concurring in Dismissing the Appeal:
The Honourable Madam Justice Southin (Page 17, Paragraph 35)

Reasons for Judgment of the Honourable Mr. Justice Braidwood:

[1] This is an appeal from an order of Brenner C.J.S.C. in which he vested all assets of New Skeena Forest Products Inc. ("New Skeena") in the court-appointed receiver of New Skeena, Ernst & Young (the "Receiver"), free and clear of the interests of all creditors and contractors.

[2] There are two main issues in this case. First, there is a question of the relationship between the replaceable contract scheme under the ***Forest Act***, R.S.B.C. 1996, c. 157, which is intended to give financial security to contractors in the forest industry, and bankruptcy proceedings. Specifically, the appeal concerns the rights of the appellant forestry contractors to continue their harvesting contracts on Tree Farm Licence 1 ("TFL-1") after a sale by the Receiver of the TFL. Second, there is an issue of the power of the Receiver to disclaim contracts like the contracts held by the contractor appellants.

FACTS

[3] The continuing saga of Skeena Forest Products is well known in this province, and indeed in these courts. The respondent New Skeena, the newest corporate incarnation of Skeena Cellulose Inc., after several reorganization attempts filed for bankruptcy in August 2004. Subsequently, a court appointed the Receiver in September 2004 and the Receiver thereafter commenced liquidating New Skeena's assets. The appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging and Construction Ltd., had contracts with New Skeena under which they harvested trees from TFL-1. TFL-1 is a forest licence granted by the Province to New Skeena under

which New Skeena has the exclusive harvesting rights over certain lands around Terrace. The TFL is a significant asset of the company.

[4] In November 2004, the Receiver entered into an asset purchase agreement for TFL-1 with the respondent Coast Tsimshian Resources Limited Partnership ("Coast Tsimshian"). The agreement is contingent on Coast Tsimshian taking TFL-1 free and clear of any obligations to the appellants under the replaceable contracts. In the court below, Chief Justice Brenner found the Coast Tsimshian offer for TFL-1 "highly favourable". Indeed, none of the other offers made to the Receiver came close to the Coast Tsimshian offer. The other offers also required cancellation of the appellants' replaceable contracts.

[5] The replaceable forest licence scheme is set out in the ***Forest Act*** and ***Timber Harvesting Contract and Subcontract Regulation***, B.C. Reg. 22/1996 [***Timber Harvesting Regulation***]. Chief Justice Brenner described the replaceable forest licence scheme at paragraph 13 of his reasons for judgment. According to his Lordship:

> The essential policy behind this regime is that it imposes an obligation on holders of replaceable licences such as TFL-1 to harvest a proportion of the timber from the licence through contractors that have entered into these replaceable contracts. The replaceable contract is, in essence, a contract that will continue so long as the contractor's performance under the contract is satisfactory. Provided that continues to be the case, the contractor is entitled to receive replacement contracts from the licence holder under substantially similar terms for as long as the licence subsists.

[6] On 2 June 2004, the Province amended the ***Timber Harvesting Regulation*** to remove the requirement that future contracts under a replaceable licence must

also be replaceable. However, the amendment also grandfathered any replaceable contracts, such as the appellants', in existence on the date of the amendments. In addition, the amendments added s. 12(4) to the regulation. Section 12(4) reads:

> If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contractors must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.

The appellants attached much significance to this addition to the regulation both in this Court and in the court below.

TRIAL JUDGMENT

[7] In his reasons for judgment, Chief Justice Brenner noted that a court-appointed liquidator is entitled to disclaim executory contracts, and persons who have contracted with the bankrupt thereafter have a claim in the bankruptcy for damages. He observed that the court-appointed receiver must have regard to equitable considerations when deciding whether to disclaim a contract, and a court considering an application to transfer assets to a receiver must also weigh equitable considerations when deciding whether to transfer assets to a receiver free of contractual obligations. His Lordship then reviewed the equitable considerations supporting the respective positions of the contractors and the Receiver. The appellants appear to take no issue with his weighing of the equities.

[8] Regarding the effect of the June 2004 regulatory amendments, Chief Justice Brenner considered the key question was whether the regulatory amendment

conferred a statutory right or a right greater than a simple contractual right for the benefit of the appellants. In his view, the amendments did not, with one proviso. Under s. 12(4) of the ***Timber Harvesting Regulation***, there is a new statutory right in the event of termination because of default. However, as contractor default was not in issue in the case before him, his Lordship was not of the view that the regulation created an *in rem* or proprietary right that attached to the tree farm licence itself or would run with the tree farm licence in the event of a bankruptcy.

ANALYSIS

[9] The appellants argue in this Court that Chief Justice Brenner erred first in finding the ***Forest Act*** and the ***Timber Harvesting Regulation*** did not give rise to an ongoing statutory duty on the part of New Skeena to enter into replaceable contracts unless the contractor is terminated for cause; and, second, in finding that the ***Timber Harvesting Regulation*** did not create an *in rem* or proprietary right that attaches to the tree farm licence and runs with the licence in bankruptcy.

[10] In the appellants’ submission, forest contractors have a crystallized statutory right because under the legislation licencees must use replaceable contracts for at least 50 per cent of their harvesting, must re-issue replaceable contracts on their termination or expiry, and must ensure replaceable contracts are offered on substantially the same terms and conditions as a contract they replace. According to the appellants, the addition of s. 12(4) to the regulation further clarifies that the obligation to enter into a replacement contract is not personal to the licence holder, but rather integral to the licence itself.

[11] On the other hand, both respondents say an earlier decision of this Court involving Skeena and other logging contractors with replaceable contract rights, ***Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*** (2003), 13 B.C.L.R. (4th) 236, 2003 BCCA 344, is binding on this Court. In ***Clear Creek***, which involved the issue of Skeena's ability to terminate replaceable contracts during a reorganization under the ***Companies Creditor Arrangement Act***, Madam Justice Newbury concluded that the elimination of the contractors' replaceable contract rights did not amount to overriding the licence-holder's statutory obligation to replace the contracts, and that accordingly, in approving an arrangement in which the debtor corporation terminated a replaceable logging contract, a court did not override provincial legislation. (The appellants, of course, argued vigorously that ***Clear Creek*** could be distinguished for several reasons, notably because it concerned a reorganization rather than a bankruptcy.)

[12] The respondents also argue that nothing in the 2004 amendments elevated the rights enjoyed by the appellants from the contractual rights described by Madam Justice Newbury to statutory rights claimed by the appellants.

[13] The intervenor Truck Loggers Association submits that allowing the termination of replaceable contract rights during a bankruptcy will reduce the number of replaceable contracts in the province, and thus undermine an important protection against financial uncertainty for logging contractors. It argues that the 2004 amendments were intended to maintain a province-wide pool of replaceable contracts except where they are cancelled pursuant to specific provisions of the

legislation, and that even if this Court does not find the appellants' replaceable contracts must be assumed by the purchaser, the new licence holder for TFL-1 should be obligated to replace the appellants' contracts with other new replaceable contracts.

[14] After considering the parties' submissions on the issue of the nature of the contractors' replaceable contract rights, I agree in substance with Chief Justice Brenner's reasons. I see no error in principle in what he has said on the matter. In addition, I find these comments of Mr. Justice Thackray, who was then a judge of the Supreme Court, in the context of an earlier reorganization by New Skeena, persuasive:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts....

(See ***In the Matter of the Companies' Creditors Arrangement Act*** *and* ***In the Matter of Repap British Columbia Inc. et al.*** (11 June 1997), Vancouver Registry A970588 (B.C.S.C.), at para. 7). In my view, there is nothing in the recent amendments that changes this basic proposition.

[15] However, the Intervenor raises another question, which is the power of the Receiver to disclaim contracts like those at issue in this case. It submits that as there is no statutory power for trustees to disclaim contracts, there is no such power in the

Receiver. The Intervenor relies on a decision of Donald J., as he then was, in ***Re Erin Features #1 Ltd.*** (1993), 15 C.B.R. (3d) 66 (B.C.S.C.) [***Erin Features***]. In ***Erin Features***, Donald J. "[a]ssumed without deciding that a trustee in bankruptcy generally possesses a power to disclaim" (at para. 3). However, he observed that a trustee's power to disclaim is only "weakly supported" by *dicta* in Canadian authorities (at para. 4) and that the issue was "fraught with difficulty" (at para. 6).

[16] However, Ernst & Young in this case is not a trustee, but rather a court-appointed receiver, and the situation is somewhat different in such a case. In a recent decision of the Alberta Court of Queen's Bench ***Bank of Montreal v. Scaffold Connection Corp.***, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:

> The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

[17] Frank Bennett in his text, *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341 writes:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating

> the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

[18] I also observe that in ***Erin Features***, Donald J. did not appear to take issue with the assertion of the applicant trustee in that case that "a receiver... can confidently be said [to] possess the right to disclaim an executory contract" (at para. 6).

[19] In another leading case, ***Bayhold Financial Corp. v. Clarkson*** (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

[20] The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> * * *
>
> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

[21] Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

[22] There is no provision in the ***Bankruptcy & Insolvency Act***, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The ***Act*** only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1)(k) of the ***Bankruptcy & Insolvency Act*** the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

[23] The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English ***Bankruptcy Act, 1869*** (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, ***Insolvency Act 1986*** (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (***Bankruptcy Act***

1966**,** (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

[24] However, the power of trustees to disclaim contracts has its roots in the English law where there was a common-law power in assignees (who took control of debtor property prior to use of trusteeships in bankruptcy) to disclaim contracts. There is a weight of authority supporting the existence of such a power prior to the enactment of the ***1869 Act***.

[25] In his 1922 text, Lewis Duncan, in *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 304-5, cites several venerable English cases for the proposition that:

> There is no section in the Canadian *Act* corresponding with section 54 of the English *Act* [earlier s. 23] which gives the trustee the right to disclaim onerous contracts or property. The law under *The* [Canadian] *Bankruptcy Act* will be the same as the law in England before the Act of 1869 was passed, with the exception that section 44 of the *Bankruptcy Act* gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it.

[26] In ***In re Sneezum ex parte Davis*** (1876), 3 Ch. D. 463 (C.A.) at 472, James L.J. said that at common law, prior to the passing of the ***1869 Act***, assignees in bankruptcy had the option of deciding whether or not to carry on with performance of an executory contract.

[27] To similar effect, in ***Gibson v. Carruthers*** (1841), 8 M. & W. 321 at 326-27, a case in which the assignees wished to assume a contract under which the defendant, who had contracted with the bankrupt, had agreed to deliver 2000 quarters of linseed to a charter ship, Gurney B. said:

> ...it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate.

[28] In Canada, the Ontario Supreme Court Appellate Division in ***Re Thomson Knitting Company***, [1925] 2 D.L.R. 1007 (Ont. S.C. (A.D.) recognized such a power; see also ***Denison v. Smith*** (1878), 43 U.C.R. 503 (Q.B.); ***Stead Lumber Co. v. Lewis*** (1958), 37 C.B.R. 24, 13 D.L.R. (2d) 34 at 43 (Nfld. S.C.); ***Re Salok Hotel Co.*** (1967), 11 C.B.R. (N.S.) 95, 66 D.L.R. (2d) 5 at 8 (Man. Q.B.).

[29] In more recent times, L.W. Houlden & G.B. Morowetz in their text *Bankruptcy and Insolvency Law of Canada*, 3d ed, looseleaf (Toronto: Thomson Carswell, 2004) at F§45.2 state quite unequivocally that a trustee may disclaim a contract entered into by the bankrupt. Similarly, in a case comment on ***Potato Distributors Inc. v. Eastern Trust Co.*** (1955), 35 C.B.R. 161 at 166 (P.E.I. C.A.), L.W. Houlden writes:

> It is well established law that a trustee may elect to carry on with a contract entered into prior to bankruptcy, provided he pays up arrears and is ready to perform the contract. The trustee could also, if he saw fit, elect not to go on with the contract in which event the vendor would have the right to prove a claim for damages.

[30] I observe that several Canadian commentators have recently opined that in the absence of an express statutory power, trustees in Canada may not disclaim executory contracts, specifically licences: see Piero Ianuzzi, "Bankruptcy and the Trustee's Power to Disclaim Intellectual Property and Technology Licencing Agreements: Preventing the Chilling Effect of Licensor Bankruptcy in Canada" (2001) 18 C.I.P.R. 367; Gabor F.S. Takach and Ellen Hayes, "Case Comment," ***Re Erin Features #1 Ltd.*** (1993) 15 C.B.R. (3d) 66 (B.C.S.C.).; Mario J. Forte and Amanda C. Chester, "Licences and the Effects of Bankruptcy and Insolvency Law on the Licensee" (2001) 13 Comm. Insol. R. 25. However, the position taken by the authors of these articles departs from the traditional understanding of the law in this area.

[31] In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

[32] I observe that recently, in its 2002 *Report on the Operation of the Administration of the* Bankruptcy and Insolvency Act and the *Companies' Creditors Arrangements Act,* Industry Canada's Marketplace Framework Policy Branch considered the extent to which insolvency law should intervene in private contracts to ensure fair distribution or maximize value during an insolvency. The Report notes there is not universal support for the enactment of a detailed statutory

provision like the American one. In a 2001 report on business insolvency law reform, the Insolvency Institute of Canada and the Canadian Association of Insolvency & Restructuring Professionals proposed the enactment of more detailed rules for both powers of trustees to disclaim executory contracts (*http://www.insolvency.ca/papers/2001ReportScheduleA.html*). Ultimately, it may therefore be preferable for the legislature to move to include a power in the statute, but until that time, in my view, trustees enjoy the power protected by the common law.

[33] In the result, the order of 20 September 2004 grants the Receiver the power here exercised and I see no reason in principle that would cause me to alter that result.

DISPOSITION

[34] Accordingly, I would dismiss the appeal and order costs payable to the Receiver by the appellants.

"The Honourable Mr. Justice Braidwood"

I Agree:

"The Honourable Mr. Justice Oppal"

Reasons for Judgment of the Honourable Madam Justice Southin:

[35] I have had the privilege of reading in draft the reasons for judgment of my colleague, Braidwood J.A., concurred in by my colleague, Oppal J.A.

[36] While I am uneasy, without the opportunity for further study, as to his conclusions on both issues, further study would require time. Being alive both to the importance to the parties of a decision being pronounced promptly and to the lack of practical value either to the parties or to the law of a dissent, if that is where I arrived after further study, I do not dissent from his conclusion that the appeal should stand dismissed.

"The Honourable Madam Justice Southin"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.,* 2014 BCCA 113

Date: 20140324
Docket: CA041068

Between:

Pan Canadian Mortgage Group III Inc.

Appellant
(Petitioner)

And

**0859811 B.C. Ltd., as assignee of Nathan Jarman,
Serin Investments Ltd., E & J Management Ltd. and Lynn Elisabeth Wong;
and Steven Kern and Monica Kern**

Appellants
(Respondents)

And

**679972 B.C. Ltd., Collateral Loan Brokers Ltd.,
Gopal Singh Gill, Jaspal Singh Lalli, Maple Leaf Disposal Ltd.,
and The Crown in the Right of British Columbia**

(Respondents)

And

**Rob Parker, Rob Angco, Belinda Lockhart, Glen Lockhart,
Kalwant Ciulla, Alfonso Ciulla, Sarbjit Gill, Ravinder Gill,
Angela Athwal, Harjinder Athwal, Juanita Athwal, Darcie Ouellette,
Ken Wilson, Sheila Wilson, Surrinder Kaur Sangha, Haroon Hussein,
Raj Ranbir Singh Bahad, Narinder Dhaliwal, Suzanne Dhaliwal,
Piara Singh, Lakhvinder Kaur Thandi, Pardeep Singh Thandi,
Shinder Kaur Atker, Kamaljit Kaur Atker, Manohar Singh Purewal,
Jasbir Singh Purewal, Simba Holdings Ltd., Kashmir Kaur Johal,
Balbir Kaur Khabra, Gurjit Kaur Pattar, Ava Carlyle, Balazs Holdings Ltd.,
Thomas O'Hara, Gillian O'Hara, Colin Miller, Maria Miller,
Nicholas Kilpatrick, Linda Kilpatrick, Pamela Lyn Christensen,
Susan Joy Eva Thomson, Julia Marie Joy Thomson, Dr. Sukhjit Bubra,
Jagdip Kaur Shoker, Manjinder Sarowa, Kulvinder Sarowa,
Balbinder Singh Sidhu, Navdip Kaur Sidhu**

Respondents
(Applicants/Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson

On appeal from: An order of the Supreme Court of British Columbia, dated June 19, 2013 (*Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, 2013 BCSC 1078, Vancouver Docket No. H090932).

Counsel for the Appellant 0859811 B.C. Ltd.:	D.W. Donohoe
Counsel for the Appellants Steven Kern and Monica Kern:	J.A. Miner
Counsel for the Applicants/Respondents:	H.L. Jones, O. de Vries
Place and Date of Hearing:	Vancouver, British Columbia February 4 and 5, 2014
Written Submission from J.A. Miner, counsel for the Kern Appellants, received:	February 17, 2014
Written submission from H.L. Jones, counsel for the Applicants/Respondents, received:	March 14, 2014
Place and Date of Judgment:	Vancouver, British Columbia March 24, 2014

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Lowry

Concurring in the Result:
The Honourable Mr. Justice Chiasson (Page 31, para. 57)

Summary:

Respondent Purchasers had entered into Agreements with "L", whom they believed was acting on behalf of Owner ("G") of real property to be developed into townhouses. Each Purchaser paid entire purchase price for a townhouse to L, but acknowledged in Agreement that a strata lot could not be sold before property was properly stratified, so that Purchaser would not acquire an interest in land until he or she "ratified" the deal at that later stage. As well, each Agreement contained a "protective clause" in which Purchaser acknowledged that the Agreement created contractual rights only.

After many months, L notified the Purchasers that the project would not be going ahead and that L hoped to return purchase-monies to them. Property was foreclosed and sold; some $2.5 million remained in trust after payment of mortgage. This part of the foreclosure proceeding concerned priorities as between Purchasers and the holders of registered judgments. Court below granted "purchasers' liens" to the Purchasers, making them secured creditors ranking ahead of judgment creditors.

APPEAL ALLOWED. Majority held that a purchaser's lien is security for monies paid under a binding contract of purchase and sale which gives rise in Equity to equitable title to the land to the extent of the purchaser's payment. The Agreements were not binding contracts for the purchase and sale of property. As well, the protective clauses negatived any intention on the part of the contracting parties to create an interest in land. On these two bases, the chambers judge had erred in finding that a purchaser's lien was available to each Purchaser. Discussion of the equitable remedy of purchaser's lien. Given the foregoing, it was not necessary to discuss various other issues, including the question of whether L had been acting on behalf of G, who did not give evidence.

Chiasson J.A. agreed that no purchaser's lien arose on the basis of the protective clauses and would not have addressed other issues.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs.[1] It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser.
(See generally *Halsbury's Laws of England*, 4th ed., Vol. 28 at paras. 560-64; *Snell's Equity* (31st ed., 2005) at §42-25 to §42-32; C. Harpum, S. Bridge and M. Dixon, eds., *Megarry and Wade: The Law of Real Property* (7th ed., 2008) at §15-056; A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property* (3rd ed., looseleaf) at §34:80; and J.V. Di Castri, *The Law of Vendor and Purchaser* (3rd ed., looseleaf) at §781.) The Supreme Court of British Columbia has granted a purchaser's lien in at least one case, although the Court did not go on to consider how it might be affected by the land registration system: see *Lehmann v. B.R.M. Enterprises Ltd.* (1978) 88 D.L.R. (3d) 87.

[2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the

---

[1] A statutory purchaser's lien is also provided by s. 111 of the *Land Title Act*, R.S.B.C. 1996, c. 250, where a person sells a parcel of land purporting to be described by a plan of subdivision not yet deposited, to a buyer who has accepted delivery of the transfer "without knowledge of the nondeposit".

lien "supplies a remedy where the law falls short of accomplishing full justice". (See Di Castri, *supra*, at §913.)

[3] The chambers judge below was clearly convinced that a purchaser's lien was needed to do justice in the case at bar. Before the Court was an unfortunate set of circumstances involving a proposed townhouse development in Surrey known as the "Hilands". In the absence of a lien, the respondents (herein called the "Purchasers") may stand to lose many hundreds of thousands of dollars as a result of their reliance on representations made to them by Jaspal Singh ("Paul") Lalli and his company, Lallico Investments Ltd. ("Lallico"). The Purchasers, none of whom obtained legal advice before signing the agreements provided to them, understood that Lalli was acting on behalf of the owner of the subject property, 679972 B.C. Ltd. ("679"), and that their purchase money ($200,000 or $250,000 per unit) would be used for the development and construction of approximately 80 townhouses on the property. The Purchasers acknowledged in the agreements that closing could not occur until the filing of the required strata plan and the issuance of strata title to the units. (In fact, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, prohibited the marketing (including the sale) of strata lots until various conditions were met, including the deposit of a strata plan in the land titles office or the issuance of a building permit by the municipality: see ss. 3, 5, 10, 11, 14, 15 and 18.) The Purchasers attended various meetings between 2005 and 2009 at which Lalli informed them of progress in the planning of the project and the obtaining of municipal approvals. They were encouraged to choose which unit(s) they would wish to receive once stratification was complete.

[4] Lalli also told the Purchasers that if they changed their minds about buying a townhouse unit, they could do so before completion, and would receive their money back with interest in accordance with separate "Investment Agreements", signed at the same time as the Purchase Agreements. The Investment Agreements, between each Purchaser and *Lallico*, provided that if and when a Purchaser elected to "terminate" his or her purchase, he or she would lend the "Investment Principal" (the unit price) to Lallico on the terms set forth in a promissory note bearing interest at

10% per annum and due two years (or in some cases, three years) from the "Investment Date". Lallico could at its option elect to satisfy the note by delivering title to a unit within the two-year period, failing which the Purchaser could make demand under the note.

[5] The appellants Mr. and Mrs. Kern exercised their right of "termination" under their Investment Agreement in 2008, and received a cheque for $305,645, issued by 679. The cheque, which appears to have been signed by Lalli alone, was dishonoured. The Kerns then sued 679, Lallico, Lalli, and others, asserting several causes of action, including breach of trust, conversion and debt. (Strangely, they did not sue on the dishonoured cheque.) They pleaded that "the Defendants ... and each of them were acting in concert and/or as mutual agents each for the other and/or under the control or direction of each other ... and communication to one was communication to all". They take the opposite position in the case at bar.

[6] The solicitors for 679, MacKenzie Fujisawa LLP, responded in a letter to the Kerns' solicitor that neither Lalli nor his company had had the authority to bind 679 "in any fashion whatsoever". Thus, the letter contended, none of the representations made by Lalli to the Kerns about the development was attributable to 679. Ultimately, however, 679 chose not to oppose the granting of relief, and in June 2009, the Court granted summary judgment in favour of the Kerns against 679 for $250,000 plus interest at 10% per annum.

[7] As the owner of the subject property, 679 is clearly a key player in this story, but neither 679 nor its principal, Gopal Gill, appeared or provided evidence in this proceeding. Evidently, Gopal Gill is an uncle of Lalli and was the original owner of all the shares and the sole director of 679. At some point in 2006, Lalli acquired 50% of the shares of 679 in consideration of $1.6 million (received by him from the first group of Purchasers), as contemplated by the Investment Agreements. Lalli also became a director of 679 at that time. Another nephew of Gopal Gill, Kal Gill ("Kal"), was also involved in the development and attended some of the meetings, many at

Lalli's house, where Lalli discussed the Hilands project with the Purchasers. We are told that Gopal Gill had no direct contact with any of the Purchasers.

[8] The chambers judge made the following findings:

> Lalli was the Purchasers' primary contact for the vendor, although from time to time [Kal] Gill participated in information meetings with Lalli and the Purchasers.
>
> Throughout Lalli's dealings with the Purchasers he never made a distinction between representing Lallico or 679972 by the time most of the Purchasers signed their contracts. It was understood by the early Purchasers that Lallico would become an owner in the near future and had the authority to bind 679972 in any event. He was a director of 679972 and Lallico became a 50% owner of 679972. He always spoke on behalf of both companies which were inextricably linked in the matters associated with the Property. The Purchasers were meant to understand and they understood that Lalli had the authority to act on behalf of all parties involved, to accept payment and to execute agreements on behalf of the owner of the Property.
>
> Lalli himself confirmed in affidavit and cross-examination on affidavits that when he was speaking to the Purchasers and when signing the Contracts he believed he had the authority to do so for 679972.
>
> The Judgment Creditors challenge that Lalli confirmed that he acted on *behalf* of 679972 or was authorized to do so. [At paras. 36-9; emphasis by underlining added.]

She also found, at para. 42 of her reasons, that all the purchase monies paid by the Purchasers were transferred by Lalli to 679 or its "holding company". By this she meant 642943 B.C. Ltd. ("642"), which she described as the "holding and operating company for [679]." (Para. 118.) The evidence indicates that Gopal Gill was the sole director and officer of 642.

[9] The Purchasers were told that no charges would be registered against the property other than a construction mortgage to facilitate completion of the development, but this turned out to be untrue. Serin Investments Ltd. and related parties (the "Serin Group") made a loan of $1.6 million to two other numbered companies and others in May 2006. They took mortgage security on property owned by the borrowers located in Richmond and Port Moody, and received a covenant from 679. When the borrowers defaulted, they commenced foreclosure proceedings against them and the covenantors. In early 2009, the Serin Group obtained

judgment against, *inter alia*, 679 and filed the judgment in the Land Titles Office against the Hilands property. Later in 2009, the Serin Group assigned their interest in the judgment to 0859811 B.C. Ltd. ("811"). We granted the Serin Group's application, made while this judgment was under reserve, to have 811 substituted in their place as appellants in this appeal.

[10] In February 2008, 679 itself also granted a mortgage against the property to Pan Canadian Mortgage Group III Inc. ("Pan Canadian") to secure a loan of $3.6 million. This mortgage was signed by Lalli as the "authorized signatory" of 679 (his signature being witnessed by the same solicitor for 679 who later denied, in the letter to the Kerns' solicitor, any agency relationship between 679 and Lalli.) Gopal Gill and Lalli personally were additional borrowers and signed as such. The loan proceeds were not used for the Hilands development and the loan went into default in mid-2009. Pan Canadian began foreclosure proceedings in July.

[11] On June 3, 2009, Lalli notified the Purchasers by email that his bank had decided "as a result of the credit crunch … not to honour our construction financing contract". Alternate financing that Kal Gill had hoped to obtain in India had not materialized. Lalli said he had decided the Hilands development would not be proceeding and that the subject property (and other "development sites in which Kal and I are involved") should be sold and the Purchasers' monies returned to them. The email expressed his regret:

> I am so sorry that it has worked out this way, especially for those who were planning to live at the Hilands. There will be times to be aggressive. I believe this is a time to be conservative. Please rest assured that I am committed to taking care of all of you. I have personally injected a significant amount of money into this development. I have "put my money where my mouth is" so to speak. You have my assurance that I have never taken a single penny out of the development over the last number of years despite the fact that pursuing this development has been my full time job. I ask for a bit more indulgence from you so we can make plans to liquidate in an orderly way which will ensure the maximum return for everyone. To this end, I have already met with my lawyer, and asked him to oversee the fair and equitable dispersal of funds once they arrive.

[12] Eventually the land was indeed sold, through the present foreclosure proceeding, for some \$7.68 million. After payment out of the Pan Canadian mortgage and some other minor charges, there now remains in trust some \$2.5 million and interest.

[13] Various applications brought by groups of Purchasers in this action were joined for hearing below and several of the Purchasers were represented by Ms. Jones, who acted on behalf of all the Purchasers on this appeal. Since their claims arose in the context of a foreclosure, the Purchasers did not have the opportunity to file conventional pleadings, which might have asserted various causes of action against 679, Lallico and their principals. The hearing below was concerned solely with who is entitled to the proceeds in trust – and in what order of priority – as between the 47 Purchasers, whose claims total about \$6.2 million; 811, which claims up to approximately \$1.1 million; and the Kerns, who claim the amount of their judgment for \$250,000 plus interest.

[14] All the parties agreed that if the Purchasers were found to be entitled to liens, they would rank in priority to the claims of 811 and the Kerns (the "Judgment Creditors"). The Purchasers agreed amongst themselves that they would share on a *pro rata* basis any amount obtained by them in this proceeding.

The Proceeding Below

[15] The evidence adduced in the court below was unsatisfactory to say the least. I have already mentioned that Gopal Gill did not provide evidence; and there was no accounting evidence from 679 or 642, making it impossible to know with any certainty where the Purchasers' purchase-monies went after they were paid to Lallico. In cross-examination on his affidavit, Lalli deposed that once he had transferred the \$1.6 million received from the first group of Purchasers to MacKenzie Fujisawa LLP to pay for his 50% share in 679, he forwarded the later Purchasers' funds to 642. This was done, he said, for "accounting purposes" and at the suggestion of his solicitor, Mr. Greenwood. Lalli deposed that he had had no written communications with Gopal Gill concerning the project. He acknowledged that

although some "legal agreements", such as a share purchase agreement, a co-owners' agreement, a shareholders' agreement, and a declaration of trust between 679 and Lallico, had been prepared by 679's solicitors, they were never executed because "we were comfortable proceeding without them." He said he thought he had had a "commitment" from Gopal Gill as to what was to be done with the Purchasers' money, but had lost control of the funds once they were sent to 642.

[16] The chambers judge found that Lalli made the following representations to the Purchasers:

> a) Gill was an experienced property developer, was and would remain a director of 679972, and was and would remain an investor in the project;
>
> b) 679972, Lalli, Gill and other related companies promised and intended that all of the money advanced by the Purchasers was to stay in the Property and would not be used for any purpose other than the completion of the Development;
>
> c) The Property did not have any charges against it and 679972, Lalli and Gill promised and intended that no charges would be put against the Property other than a construction mortgage to facilitate the completion of the Development;
>
> d) 679972, Lalli and Gill promised and intended that 679972 was and would be the only company involved in the Development, would own all lands or other assets in relation to the Development and that, therefore, any assets they acquired in relation to the Development would enhance the value of the Development for the benefit of the Purchaser and would be available to satisfy any claims that the Purchasers might have;
>
> e) The purpose of the Contracts was to enable the Purchasers to purchase an interest in the Property and that the Purchasers could instead elect to be paid monies equivalent to their purchase price plus 10% under a promissory note. [At para. 40.]

(The chambers judge defined "Gill" to mean Kal Gill, but seems to have conflated him and Gopal Gill at various points in her reasons.) In the Court's analysis, the weight of all the evidence confirmed that these representations had been made in good faith and were true, with the exception of the representation that no charges other than a construction mortgage would be registered against the subject property.

[17] An obvious issue was whether the representations made and actions taken by Lalli in connection with the Hilands project were binding on 679. Lalli's evidence on this point was strikingly inconsistent. In an examination for discovery conducted in the Kern action in December 2009, he said he did not think he had ever had the authority to sign documents on behalf of 679 "without getting prior approval of both directors." He answered "no" when asked if he had understood that Lallico had had the authority to sign the Kerns' Purchase Agreement on behalf of 679. On the other hand, at a cross-examination conducted in September 2012 by Mr. Miner, Lalli deposed that it had been his "intention that Lallico did have the authority to bind [679]", contrary to the assertion made in the MacKenzie Fujisawa letter mentioned above. He suggested this authority came from the fact that Lallico owned shares in 679. He deposed that he had been the "primary contact person who dealt with the Plaintiffs [sic] on behalf of the vendors [sic] when entering the [Agreements]." And, in an examination of Lalli conducted by Mr. Donohoe in February 2012, the following exchange took place:

> Q I'm going to ask you about paragraph 8, and there you refer to the three legal documents that you described earlier being the land purchase contract, the investment agreement and the promissory note, and you go on and you say that these three legal documents were signed under the corporate name of Lallico, but you were always acting on behalf of and with the authority of [679] as at least a part owner of that company. Is there any qualification or change you would make to that statement?
>
> A Well, I was an owner and partner in [679], and I am an authorized signator for [679].
>
> Q So you remain of the same position then really with respect to that statement; is that correct? You're not going to change that in any way?
>
> A Uh, no.

In the same discovery, Lalli acknowledged having signed various subdivision applications in respect of the Hilands property in his capacity as a director of 679.

[18] I have already quoted paras. 36-9 of the chambers judge's reasons in which she emphasized the Purchasers' *understanding* that Lalli was representing 679 in his dealings with them, and Lalli's *belief* that he had had the authority to do so. After

reviewing further evidence, she stated at para. 57 that the Agreements had been created "entirely by [679] and Lallico and were drafted by [679] and Lallico's lawyer." Her finding, however, was only that Mr. Lalli *believed* he had had such authority and that the Purchasers "were meant to understand and they understood" that he did. She did not find specifically that Lalli or Lallico *did* have authority to act on behalf of 679 or otherwise became its agent.

[19] The judge considered the legal nature and features of a purchaser's lien, beginning at para. 90 of her reasons. She noted that such a lien may be granted even where specific performance is not possible and that in such circumstances, the lien will apply to the entire property rather than to the "particular portion of the property for which the funds were advanced", citing *Lehmann*, *supra*. The judge distinguished *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* 2008 BCSC 897, *CareVest Capital Inc. v. C.B. Development 2000 Ltd.* 2007 BCSC 1146 and *J.A.R. Leaseholds Ltd. v. Tormet* [1965] 1 O.R. 347 (C.A.) on the bases that they had been concerned with equitable interests "*in* land" generally (as opposed to security interests "*over* land") or with the ability of a receiver to disclaim contracts of sale. There was no support in law, she concluded, for the notion that a purchaser's lien is unavailable "if the contracts underpinning [it] do not create an interest in land and/or are incapable of specific performance." (Para. 104.)

[20] The judge also rejected the contention that the Purchasers had been aware, when they advanced their funds, that some or all of their money would be used to purchase other properties rather than to construct the Hilands project. (This possibility would, I note, have been apparent from the recitals in the Investment Agreements.) But even if the funds had gone elsewhere, the judge said, it was the Purchasers' *intentions* as to the purpose of the funds that were essential to the creation of a lien. She continued:

> In this case the vendor represented and the Purchasers relied on the Representations, both written and oral, that the funds advanced by the Purchasers was [sic] to procure, after the development was complete, a townhouse <u>on</u> the Property.

> There is no evidence and really no dispute … that the purpose of the payment of the funds was to secure a right to a townhouse to be built on the Property. [Paras. 120-1.]

[21] The Court rejected arguments to the effect that the Purchase Agreements were uncertain, contained mistakes in the legal descriptions of the subject property, or were otherwise "contrary to the *Land Title Act*". (Para. 122.) The judge found that none of these matters made the Agreements "void for uncertainty"; that most of the items complained of had been satisfactorily explained; and that errors in the legal descriptions of the property in the Agreements were "fixable" (by references to the municipal address of the land). (Para. 131.) Then, in an important passage, she stated:

> Lalli on a fair reading of all of his proffered evidence both in affidavit and cross-examination on his affidavits stated he acted at all times either with the authority of the owner of the land or once his company acquired its one-half interest in the vendor 679972 as an owner.
>
> Thus in my view the Contracts signed by the Purchasers created no interest in land and likely were unenforceable in relation to creating an interest in land to allow specific performance of the contract. Nevertheless the intention of the Contracts to be binding on the parties to the Contracts is clear and agreed to by said parties; that is, according to Lalli for 679972, the owner of the land at the material times and the Purchasers, the payment was for a townhouse to be built on the Property.
>
> In the case at bar all of the elements required for a purchaser's lien are satisfied. The Purchasers provided funds to the vendor for the purchase of land which contract was not completed through no fault of the Purchasers.
>
> The purchaser's liens arose as early as 2005, not as a result of contract but through equity. They have a secured charge against the land that is independent of the contract between the parties. Their liens vested immediately upon payment (all of which were made prior to the Judgment Creditors' claims) and are secured by the Property as a whole.
>
> The Purchasers paid their purchase price to Lalli as Lallico for the represented purpose of the vendor 679972 being able to develop the land and build townhouses to be owned by the Purchasers. Lalli has confirmed that he accepted payment and entered into the contracts of purchase and sale with what he believed was the authority of the vendor. For years after the deposits were paid and right up to the time the Contracts were terminated, the vendor, through Lalli and Gill the joint shareholders and directors of 679972, confirmed that the Purchasers were to obtain a townhouse as a result of their deposit. [At paras. 132-6; emphasis added.]

[22] The Court also rejected the Judgment Creditors' submission that the creation of purchaser's liens in this case would contravene s. 28 or s. 73 of the *Land Title Act*, R.S.B.C. 1996, c. 250. Section 28 deals with priority as between two or more charges *entered on the register* affecting the same land, and provides that they take priority according to the date and time of their respective applications for registration. Section 73 prohibits a person from subdividing land into smaller parcels for the purpose of transferring it or leasing it for a term exceeding three years. Subsection 2 thereof states:

> (2) Except on compliance with this Part, a person must not subdivide land for the purpose of a mortgage or other dealing that may be registered under this Act as a charge if the estate, right or interest conferred on the transferee, mortgagee or other party would entitle the person in law or equity under any circumstances to demand or exercise the right to acquire or transfer the fee simple.

The chambers judge found that neither provision was applicable, since in her words, the liens asserted here were "not based on an interest *in* land, equitable or otherwise, but rather on an equitable right resulting in a security interest or a charge *on* the land." (Para. 143; my emphasis.)

[23] In the result, the Court declared that the Purchasers had established their respective claims to liens over the property, and that the liens had priority over the judgments obtained by the Judgment Creditors.

ON APPEAL

Grounds of Appeal

[24] 811 advanced nine grounds of appeal as follows:

> 1. The learned chambers judge failed to rule on or erred in rejecting the primary submission of the Appellants that any claim of a purchaser's lien was excluded by the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd.
>
> 2. The learned chambers judge erred in ruling that a claim of purchaser's lien should be upheld against an un-subdivided parcel of land which was not the subject and was not intended to be the subject of any alleged existing or future contract of purchase of proposed strata lots by the Respondent investors.

3. The learned chambers judge erred in ruling that a claim of purchaser's lien should be upheld despite the fact that any proprietary claims relying on the contract of purchase of proposed strata lots offend the prohibition in Part 7 of the *Land Title Act* against certain dispositions of land that require subdivision approval.

4. The learned chambers judge erred in ruling that the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd. were sufficiently certain to be enforced and in ruling that the lack of any order for rectification did not bar the Respondent's claims of a purchaser's lien.

5. The learned chambers judge erred in ruling that the equitable principles of acquiescence, laches and equitable estoppel did not apply to the conduct of the Respondents to bar their claims and that the equities favoured the investors.

6. The learned chambers judge erred in her ruling that the investment funds advanced by the Respondents to Lallico Investments Ltd. were traceable to use only for the benefit of Lot 1, PID 027-769-437, which land was declared by the court to be charged by the purchaser's lien.

7. The learned chambers judge erred in failing to correctly interpret and apply ss. 20, 28 and 29 of the *Land Title Act* and s. 86 of the *Court Order Enforcement Act*, which provisions establish priority of charges in favour of the Appellant's registered certificate of judgment against the claims of the Respondents.

8. The learned chambers judge erred in ruling that the Judgment Creditors had no standing to challenge the validity of contracts to which they were not privy.

9. The learned chambers judge erred in ruling that none of the evidence contained in the affidavit of Constable Tine Paterson sworn on 13 October 2010 was admissible evidence.

[25] The Kern appellants filed a very similar factum through their counsel and asserted identical grounds of appeal, but added a tenth ground raising the issue of Lalli's agency, namely that the chambers judge had erred:

> ... in making findings of fact as to the authority of Lallico Investments Ltd. to bind the owner of the lands in the face of uncontroverted evidence of a denial of such authority by the owner of the lands.

This issue is obviously an important one, since unless Lalli or Lallico was an agent of 679, no purchaser's lien against the subject property could arise. However, the bulk of the submissions made on appeal by counsel for the Judgment Creditors assumed that agency had been shown, and were directed to Item 1 of the stated grounds of appeal, an issue of law. I therefore propose to address that issue in depth and will also assume, for purposes of this discussion only, that Lalli or Lallico was acting on behalf of 679 in dealing with the Purchasers.

Standing

[26] Item 8, however, raises a preliminary question which the Judgment Creditors characterize as involving standing: they challenge the correctness of the chambers judge's ruling at paras. 126-8 that the Judgment Creditors, and the Kerns in particular, did not have standing to challenge the "validity" of the Agreements. (In fact, the "validity" of the Agreements was not challenged – no one asserted the doctrines of *non est factum*, unconscionability, illegality or fraud, for example.) The chambers judge provided no reasoning to support her ruling, except the following in connection with the Kerns' position:

> The Kerns as Judgment Creditors are in a particularly legally awkward position since prior to obtaining their judgment they claimed a purchaser's lien which they subsequently abandoned in favor of reliance on contractual provisions, in particular the promissory note, which formed part of the agreement package they signed with Lallico/679972. They demanded, pursuant to their understanding of their contractual rights, repayment of their purchase price for a townhouse plus interest. Subsequently, apparently pursuant to the agreements between Lallico/679972 and the Kerns, 679972 issued a cheque for the amount demanded and unfortunately that cheque was dishonored by the bank for lack of funds. Even then, neither Lallico nor 679972 denied that the contracts were not [sic] valid.
>
> In these circumstances can the Kerns be heard to say their Judgment Creditors status trumps other purchasers' lien rights on the basis that the contracts (which were similar or the same) signed by the owner of the subject lands and the other Purchasers are invalid and otherwise unenforceable? The answer surely is no. [Paras. 127-8]

[27] I do not see this as a question of standing. The chambers judge here was objecting to the 'awkwardness' of the Kerns' position in the face of their previous situation, which was identical to that of the Purchasers now. The Kerns invoked their right set forth in their Investment Agreement to "terminate" their "presale contract" prior to the creation of title to a townhouse unit. They sued on several bases, and obtained a judgment, apparently for debt. Other Purchasers could have done the same, but did not. In the present foreclosure proceeding, the Kerns argue not that the Agreements were "invalid", but that they did not constitute binding contracts *for*

the purchase and sale of townhouse units, as the Investment Agreements make clear on their face. (See para. 33 below.) Nor do I see the Kerns as 'approbating and reprobating'. They are not asserting a right that is inconsistent with their judgment: see P. Feltham, D. Hochberg and T. Leech, eds., *Spencer Bower on The Law Relating to Estoppel by Representation* (4th ed., 2007) at 365. Unless and until it is set aside by a court of law, they are entitled to seek to enforce it fully, including the right to assert the priority over unsecured claimants to which they claim to be entitled under s. 28 of the *Land Title Act.*

Other Preliminary Issues

[28] Many of the remaining grounds of appeal overlap substantially, and with respect, some appear to arise from misconceptions either of the law or of the judge's reasons. Item 6, for example, seems to be based on an assumption that a purchaser's lien requires that the *purchaser's* funds be traceable to the subject property in the same way as trust funds. No authority was cited for this proposition, and I have located none. Such a requirement would be nonsensical, given that in most cases the vendor is already the owner at the time he or she agrees to sell. As Di Castri notes, *supra* at §916, "it is payment *to the vendor* which is the foundation of the purchaser's claim of lien and elevates him to the position of a secured creditor." (Of course, payment to the *agent* of the vendor would be regarded as payment to the vendor.) The lien then attaches to the property that was the subject of the contract or, as in this case, to the proceeds of sale of that property.

[29] Some of the grounds of appeal also seem to assume that the ability to grant specific performance is necessary. The authorities have long rejected that proposition: see *Levy v. Stogdon* [1898] 1 Ch. 478 (C.A.); *Hewitt v. Court* [1983] H.C.A. 7; 149 C.L.R. 639 at 649-650, *per* Gibbs C.J., citing *Middleton v. Magnay* (1864) 71 E.R. 452 and *Barker v. Cox* [1876] 4 Ch.D. 464; *J.A.R. Leaseholds Ltd*, *supra*; and *Capital Plaza Developments Ltd. v. Counterpoint Enterprises Ltd.* [1985] B.C.J. No. 321 (S.C.), at para. 11. Indeed, the cases illustrate that a purchaser's lien is usually sought precisely *because* specific performance is not possible. In

Lehmann, for example, Mr. Justice Hutcheon, then a trial judge, held that a lien was available in respect of funds paid by the plaintiff towards the acquisition of a strata lot notwithstanding that stratification never took place due to financing problems of the vendor. Counsel for the Judgment Creditors in the case at bar emphasize that the plaintiff in *Lehmann* had moved into a unit without receiving title, but it was not on that basis that a lien was found to arise. Hutcheon J. observed:

> There is some support for the proposition that the lien is confined to the land covered by the agreement of purchase. In *Re Karrys Investments Ltd.* (1960), 22 D.L.R. (2d) 552, [1960] O.W.N. 181 (Ont. C.A.), there is a statement not necessary to the decision and without any reasons that the lien in that case did not lie against land not covered by the agreement.
>
> If the purchaser is not able to obtain title because the vendor has failed to complete registration under the *Strata Titles Act*, 1966, or has failed to file a subdivision plan, I know of no reason in principle that would prevent a Court of Equity from placing a lien on the whole of the vendor's property of which the subject-matter of the sale formed a part.
>
> . . .
>
> In *Chalmers v. Pardoe*, [1963] 3 All E.R. 552 (P.C.), relied upon by Mr. Curtis, there appears the following passage at p. 555:
>
>> There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will *prima facie* require the owner by appropriate conveyance to fulfil his obligation; <u>and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended</u>. [At 90-1; emphasis added.]

In the result, Hutcheon J. held that the plaintiff was entitled to a lien "upon the whole of the property" as security for the funds he had paid towards the purchase of a strata lot.

Primary Issue

[30] I agree with the Judgment Creditors that Item 1 is the primary question on this appeal. I would rephrase it, however, as asking whether the chambers judge erred in finding that a purchaser's lien was available even though no binding contract *for the purchase of property* came into existence, and even though the parties to the

Agreements expressly disclaimed an intention to create any legal or beneficial interest in land.

[31] The chambers judge did not consider it necessary to analyze these issues at length. She relied on the comment in *Whitbread*, *supra*, that the lien arises "not as a result of contract, but through equity", so that the terms of the Agreements were effectively irrelevant. She adopted the argument that:

> Specific performance is a remedy that flows from and as a result of the contract. A purchaser's lien exists independent of the contract by virtue of the principles of equity. Thus, the ability to enforce, or even to claim specific performance, does not affect the rights of a holder of a purchaser's lien.
> [At para. 130.]

As already noted, she also reasoned that:

> … in my view the Contracts signed by the Purchasers created no interest in land and likely were unenforceable in relation to creating an interest in land to allow specific performance of the contract. Nevertheless the intention of the Contracts to be binding on the parties to the Contracts is clear and agreed to by said parties; that is, according to Lalli for 679972, the owner of the land at the material times and the Purchasers, the payment was for a townhouse to be built on the Property.
>
> In the case at bar all of the elements required for a purchaser's lien are satisfied. The Purchasers provided funds to the vendor for the purchase of land which contract was not completed through no fault of the Purchasers.
>
> The purchaser's liens arose as early as 2005, not as a result of contract but through equity. They have a secured charge against the land that is independent of the contract between the parties. Their liens vested immediately upon payment (all of which were made prior to the Judgment Creditors' claims) and are secured by the Property as a whole.
> [At paras. 133-5; emphasis added.]

[32] As I will explain below, this reasoning overlooks the essential nature of a purchaser's lien as security for monies paid under a *binding contract of purchase and sale* that gives rise in Equity to "equitable title to the land to the extent of [the purchaser's] payments." See *Capital Plaza* at para. 9; see also *London & South Western Ry. v. Gomm* (1882) 20 Ch.D. 562 at 580-1.) Lord Westbury observed in *Rose v. Watson*:

> When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate.
>
> ... In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.
>
> Then, my Lords, if that contract fails, and the failure is not to be attributed to any misconduct or default on the part of the purchaser, the obvious question arises, Is the purchaser to be deprived of the interest in the estate which he has acquired by that *bona fide* payment? [At 678-9; emphasis added.]

Thus the purchaser's lien developed from the principle that as between the contracting parties, *equitable title transferred to the buyer* under a contract, but closing – the transfer of legal title – failed. Provided the buyer was not at fault, Equity would not countenance the 'aggravation' of his loss by depriving him of the "only means of acquiring the repayment of his money … by following the interest which in respect of that payment of money he had acquired in the estate." (*Rose v. Watson*, at 680.)

The Terms of the Agreements

[33] This brings us to the Agreements themselves. In the operative part of the Investment Agreement, each Purchaser (referred to as the "Investor") agreed to "advance" the purchase price (referred to as the "Investment Principal") to Lallico. In return, the Agreement said, *Lallico would obtain from 679* a contract of purchase and sale in the form attached to the Investment Agreement as Schedule A, which would entitle the Investor to acquire one unit in the project. At the same time, para. 6 contained an acknowledgment by each "Investor" that he or she had been advised it was "*not possible for a buyer and seller to enter into a legally binding Agreement with regard to a townhouse unit that does not yet exist*" (my emphasis), but stated that it was common practice for such persons to enter into "Presale Contracts" that

could be "terminated" by the buyer prior to the creation of title to the townhome unit. Upon the filing of a strata plan and receipt of a disclosure statement, the Investor would have 30 days in which to "ratify" the purchase. Under para. 7, if he or she elected to "terminate" (apparently equated to a failure to "ratify" the purchase), the "Investment Principal" would be lent to Lallico on the terms contained in the form of promissory note attached as Schedule B to the Investment Agreement.

[34] Paragraph 10, referred to by counsel as a "protective" clause, then provided:

> It is agreed and understood by the Investor that nothing in this Agreement shall operate to give the Investor any vested right in LandCo. [679] or LalliCo Nothing in this Agreement shall be construed so as to create a partnership or joint venture between the parties. <u>Nothing in this Agreement will confer on the Investor any legal or beneficial interest in the Lands prior to the date of ratification referred to in Paragraph 6</u>. [Emphasis added.]

and an 'entire agreement' clause appeared at para. 13.

[35] The Purchase Agreements, each signed by a Purchaser and Lallico, began with the following para. 1, headed "Offer":

> The Purchaser hereby offers to purchase from the Vendor [defined as 679] the Strata Lot (as above mentioned) for the Purchase Price and upon the terms set forth herein <u>subject to the encumbrances (the "Permitted Encumbrances") referred to in the Disclosure Statement</u>. The Purchaser acknowledges that the Purchaser is purchasing a residential Strata Lot that is presently under construction. The purchase of the Strata Lot entitles the Purchaser to those items <u>shown in the Disclosure in respect to the Development which has not yet been prepared but which will be delivered to the Purchaser in due course</u> (collectively, the "Disclosure Statement"). (Please refer to the Disclosure Statement). [Emphasis added.]

Under para. 3, each Purchaser paid what was called a "Deposit" in the amount of the entire purchase price, which the Agreement said would become non-refundable after delivery of a disclosure statement (required by the *Real Estate Development Marketing Act*), the creation of title to the strata lot, and ratification of the Purchase Agreement by *both* parties (presumably the vendor, 679, and the Purchaser). None of these events took place. (The completion date inserted in para. 5 of each Agreement was the same date as the date of its execution – obviously an error.)

[36] At para. 15, the protective clause appeared:

> This offer and the agreement which results from its acceptance <u>creates contractual rights only and not any interest in land</u>. [Emphasis added.]

This was again followed at para. 17 by an 'entire agreement' clause (which referred also to the Investment Agreement), and at para. 19 by a clause headed "Acceptance":

> This offer will be open for acceptance on presentation up to 6:00 P.M. on ____________________ and upon acceptance <u>by the Vendor</u> signing a copy of this offer, there will be a binding Agreement of Purchase and Sale of the Strata Lot for the Purchase Price, on the terms and subject to the conditions set out herein. [Emphasis added.]

In each case, the Agreement was signed by the Purchaser and purported to be "accepted by the Vendor" on the same date. The acceptance, however, was signed not by 679, but by Lallico.

No Binding Agreement to Purchase

[37] Mr. Donohoe on behalf of 811 argued in this court that the Investment Agreements were the 'primary' agreements between Lallico and the Purchasers – a contention that garners some support from the fact that in each case, the Purchase Agreement was an attachment to the Investment Agreement, not *vice versa*. He emphasized that, at least at the time they were signed and until the strata plan was filed and the purchases "ratified", the arrangements were "speculative", as each Purchaser acknowledged in writing. There is no such thing, he submitted, as an "investor's lien".

[38] If by this Mr. Donohoe was suggesting that the purchaser of a townhome who intends to rent it or even to sell it is in a different position *vis-à-vis* the purchaser's lien than the purchaser who intends to reside in it, I cannot agree. But where a person pays money not for property *per se* (here a strata lot) but either as a "deposit" (in the hope that stratification will be completed and an acceptable disclosure statement received) under an "agreement" he or she may or may not choose to "ratify", or as an "advance" (to be repaid by promissory note) to a

company that is not the owner of the property, it is difficult to imagine that Equity would regard the person as having acquired an equitable interest, or would regard the property as bound by the contract. As for the chambers judge's observation that a purchaser's lien arises "not as a result of contract but through equity" (see para. 135), I suggest with respect that the more complete statement was made by Farwell J., the judge at first instance in *Whitbread*, who wrote:

> The lien is created by the contract under which the money is paid as part of the purchase-money, and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, but <u>the lien arises from the contract</u>. [At [1901] 1 Ch. 911, at 915; emphasis added.]

Farwell J.'s judgment was expressly approved by the English Court of Appeal in *Whitbread*, and was endorsed again by that court more recently in *Chattey v. Farndale Holdings Inc.* [1997] 1 EGLR 153 at 156.

[39] The observations of Deane J. of the High Court of Australia in *Hewitt v. Court* also illustrate the role of a binding contract in attracting equitable protection:

> The basis of equitable lien between the parties to a contract lies in an equitable doctrine that <u>the circumstances are such that the subject property is bound by the contract</u> so that a sale may be ordered not in performance of the contract but to secure the payment or repayment of money. ...
>
> The suggested requirement that equity would grant specific performance of the contract is usually propounded as being derived from the principle that an agreement for valuable consideration for the present assignment of property <u>operates to transfer the equitable estate in the property if equity would, in all the circumstances, grant specific performance of the agreement</u> .... In the statement of principle however, the reference to specific performance must be understood as meaning not merely specific performance in the primary sense of the enforcing of an executory contract ... <u>but also the protection by injunction or otherwise of rights acquired under a contract</u> ... [At 665; emphasis added.]

[40] The only case to which we were referred involving something *less than* a binding contract of sale and purchase confirms the necessity thereof. *In re Barrett Apartments Ltd.* (1985) I.R. 350 involved the payment of so-called "booking deposits" on account of a future agreement for the purchase of apartment units. As in the case at bar, the parties' arrangements contemplated that a binding agreement

of purchase would be entered into at a later date; and the parties acknowledged in writing that the vendor's receipt of the deposit did not "constitute a note or a memo of any agreement. It is further agreed that no right of action in law arises out of this receipt." (At 353.) The proposed apartment complex never came to fruition and the vendor was ordered to be wound up. The question arose as to priorities between the purchasers' claims to the return of their deposits, and the claim of a mortgagee.

[41] The receiver of the vendor argued that no lien could arise in a situation in which there was "no contract at all" or at best a contract which could not be enforced in an action for a specific performance or in any other way. (At 355.) The lower court rejected this submission on reasoning similar to that of the chambers judge in this case:

> ... this submission is not well founded. It proceeds on the assumption that, for such a lien to exist, the money must have been paid on foot of a contract; and that, where there is no such contract or, at all events, no contract capable of being enforced, no lien can arise. <u>I think it is clear that the lien which is claimed by the depositors in the present case arises not from the existence of any contract but from the right of the prospective purchaser to recover his deposit in circumstances where it would be unjust for the prospective vendor to retain it</u>. The law was thus stated by Vaughan Williams L.J. in [*Whitbread*, *supra*] at p. 838:
>
>> The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity. ...
>
> In the present case, it is conceded that the company has not been for some time in a position to implement the transactions in respect of which the deposits were paid and bring them to completion in the normal way .... In these circumstances, <u>it is clear that, if the company were not in liquidation, the depositors would have an uncontestable right in every case to recover their deposits. If the lien relied on depends upon that right, and need not be the result of any express contract, it follows that the fact that in a number of the cases there is no enforceable contract is not material</u>.
>
> I am satisfied, accordingly, that in each of the fourteen cases where deposits have been paid by prospective purchasers in respect of apartments, the persons who paid the deposits are entitled to a lien on the site in respect of the money so paid; and that, accordingly, they are entitled to rank as secured creditors in the liquidation. [At 355-6; emphasis added.]

[42] On appeal, however, the Supreme Court of Ireland disagreed. It ruled that the persons who had paid the deposits "clearly did not get a purchaser's lien, *for they acquired no beneficial estate or interest in the property."* (My emphasis.) Henchy J. for the majority explained:

> Where, as is the case here, no contract to purchase was entered into by the depositors, and the only payment made was what was called a booking deposit, which was accepted expressly on the basis that it would be returnable upon notification by either party and that the proposed purchase would be the subject of a written contract, <u>the payment of the booking deposit did not give the payer any estate or interest, legal or equitable, in the property – as would have been the case if a written contract had been entered into and the booking deposit had been converted into a deposit paid on foot of the contract. There is no basis in law or equity, therefore, for treating the depositors as having, on payment of the deposit, acquired a purchaser's lien on the property</u>.
>
> . . .
>
> <u>The persons who paid booking deposits in this case clearly did not get a purchaser's lien, for they acquired no beneficial estate or interest in the property</u>. But ought they to be deemed to have acquired some other kind of equitable lien for the amount of the deposit, on the basis that it would be inequitable to deny them the standing of a secured creditor? [At 357-8; emphasis added.]

[43] The case at bar, of course, does not involve merely a "booking deposit" or any other "comparatively small amount". The Purchasers here paid the entire price for the units they expected to be built. The chambers judge found that each Purchaser intended to buy a townhouse and that that was the purpose of the Agreements. (Para. 46.) However, the court must not look to the parties' *subjective* intentions, but must determine those intentions objectively by construing the plain and ordinary meaning of the words used, in the context of the whole agreement and in the "factual matrix" in which it was reached. As we have seen, the parties stated in the Agreements that they were *not* binding themselves to buy or sell townhouse units and that no interest in land was being created.

[44] On this basis alone, it seems to me that with respect, the chambers judge erred in law in finding that a "secured charge against the land" arose "independent of the contract between the parties." (Para. 135.) While it is not necessary that the contract expressly contemplate a purchaser's lien – in this sense, the lien is not the

"result of any express contract", as observed in *Whitbread* – and while the lien may arise where specific performance is not available, the remedy develops logically from the existence of a contract, binding on the conscience of the vendor, that would in Equity have resulted in the transfer of ownership of the property to the buyer. As we have seen, it arises where the vendor has received payment or part payment of the purchase price and transfer of legal title fails for reasons other than the buyer's fault. In these circumstances, Equity will not countenance a further 'aggravation' to the buyer in the form of loss of the payment and will enforce what is seen to be the common intention of the parties. (See also Mr. Justice J.C. Campbell, "Some Historical and Policy Aspects of the Law of Equitable Trusts" (2009) 83 *A.L.J.* 97 at 126.) In my view, it is clear no transfer of equitable title, or of an equitable interest, took place or was intended to take place by means of the Agreements in this case – even if one assumes Lalli had the authority to bind the vendor.

Protective Clauses

[45] Even if I were incorrect in holding that a binding contract of purchase and sale between the vendor and buyer is necessary, I also regard the "protective" clauses in the Agreements as fatal to the existence of the lien in this instance. There is no general principle to the effect that contracting parties may not contract out of private equitable remedies (subject of course to the doctrines of undue influence and unconscionability) and there are many authorities that suggest the contrary: see, e.g., *Bank of Montreal v. Fennell* (1991) 1 B.L.R. (2d) 66 (B.C.S.C.); *Manulife Bank of Canada v. Conlin* [1996] 3 S.C.R. 415 at para. 4.

[46] With respect to equitable liens in particular, the jurisprudence suggests that the remedy may be waived or excluded by the contracting parties. In *Ahone v. Holloway* (1988) 30 B.C.L.R. (2d) 368, McLachlin J.A. (as she then was) noted in connection with a *vendor's* lien, the close relation of the purchaser's lien, that:

> It arises by operation of law and is an incident to the contract between the vendor and purchaser. There is no need for the vendor to stipulate for the lien: *Gordon v. Hipwell* [[1952] 3 D.L.R. 173 (B.C.C.A.)] .... On the contrary, <u>in order to avoid the creation of an equitable lien it must be shown that the parties intended that there should be no lien</u>. [At 376; emphasis added.]

In *Balkau v. Sanda* (1984) 53 B.C.L.R. 292, Boyle J., also discussing a vendor's lien, stated at 299 that the onus was on the purchaser to show that the lien had been waived, abandoned or discharged, citing *High River Meat v. Routledge* (1908) 8 W.L.R. No. 3 at 259.

[47] Two Ontario cases are of more assistance. In *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (1999) 43 O.R. (3d) 319 (C.A.), the Court rejected the argument that a subordination clause contained in the parties' agreement did not apply to a purchaser's lien "because the liens do not arise from the contract but by operation of law." In the Court's analysis, "The purchasers' claim to their deposits clearly arose under the purchase agreements and *any rights flowing therefrom are subject to the terms of those agreements, including the subrogation clause*." (At 320; my emphasis.)

[48] *Counsel Holdings* was applied in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.* 2012 ONSC 4816, in a more complicated contest between one group of purchasers who had entered "pre-sale" agreements for condominium units and made significant investments towards such units, and the receiver of the vendor. The receiver sought an order that such agreements be "vested out" on a sale of the entire property. As the Court noted, all the pre-sale agreements contained subordination clauses under which the purchasers acknowledged that their interests would be subordinate to any mortgages arranged by the vendor. In addition, the purchasers acknowledged, as did the Purchasers in the case at bar, that the agreements did not confer interests in property.

[49] The Court ruled in favour of the receiver, relying in part on the subordination clauses. Morawetz J. wrote:

> … the purchase agreements and leases contain expressed [sic] clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* ....)

> Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:
>
> > 19. Agreement not to be Registered
> >
> > The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property ...
>
> I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees. [Emphasis added.]

(See also *395432 Alberta Ltd. v. Broadcast Hill Holdings Ltd.* 2003 ABCA 96.)

[50] None of these cases is exactly on point with the case at bar, but all support the proposition that an equitable remedy such as a purchaser's lien may be excluded or modified by agreement of the parties. As stated in *Chatty v. Farndale Holdings*, *supra*, by Morritt L.J.:

> It is not disputed that the purchasers' lien arises by operation of law from the contract unless it is modified or excluded by express agreement of the parties or by necessary implication from the contractual arrangements the parties have entered into. The lien so arising is an unqualified equitable right. [At 157.]

(See also *Snell's Equity*, §42-27; *In Re Birmingham, Deceased* [1959] 1 Ch. 523 (which concerned a vendor's lien); *In Re Brentwood Brick & Coal Company* [1876] 4 Ch.D. 562; *bcIMC Construction Fund v. Chandler*, *supra*, at para. 65; R.M. Stoneham, *The Law of Vendor and Purchaser* (1964) at §1346; and *Hewitt v. Court*, *per* Deane J. at 663, citing *Davies v. Littlejohn* (1923) 34 C.L.R. 174 (H.C.A) at 195-6, and *In Re Bond Worth* [1980] Ch. 228 at 251.) Ms. Jones cited no authority to the contrary.

[51] In these circumstances, I am driven to the conclusion that no purchaser's liens came into being because no binding agreement for the purchase of a strata lot came into being; and that even if a binding contract had existed, the Purchasers expressly agreed and intended that their arrangements created contractual rights only. I am also unable to accede to Ms. Jones' submission that the protective clauses were not engaged because a purchaser's lien constitutes a security interest *on* land and not an interest *in* land. I cannot think that the existence of the lien would

turn on a semantic distinction of this kind or that, as Ms. Jones also contended, the exclusion of an "interest" referred only to "title to" the land.

Agency

[52] In light of the foregoing, it is not necessary to resolve the remaining questions raised on the appeal. I wish, however, to return briefly to the matter of agency. The chambers judge made no express finding that Lalli or Lallico had acted as the agent of 679, but treated Lalli, Gopal Gill and their companies essentially as acting in concert. Mr. Miner submitted that the judge had erred in failing to "weigh the evidence" of the MacKenzie Fujisawa letter denying any agency relationship, or of the denials appearing in 679's pleading in the Kerns' action. (With respect, these items were "evidence" only of the position taken by 679 after the fact.) Counsel also relied on the absence of any written authorization of Lalli or Lallico to act on 679's behalf.

[53] Clearly, this was an issue that would have required a thorough examination of all the properly admitted evidence, and detailed findings of credibility. Contrary to Ms. Jones' submission, it was not enough that the Purchasers *believed* Lallico was 679's agent. And, contrary to the suggestion of counsel for the Judgment Creditors, a written document is not required to constitute an agency, nor is the giving of a particular title to the agent by the principal – though both may do so. On the other hand, the director of a company is not necessarily its agent; nor is a 50% shareholder. In the absence of express authority (by written contract, for example), the primary focus must be on the acts or conduct of the purported *principal*. Did he or she hold out the alleged agent as having the authority to bind him or her in dealings with third parties? Did he or she make a representation to a contracting party that was intended to be acted upon by that party to the effect that the agent had authority to act for him or her? Did he or she entrust the alleged agent with duties in the normal course that implied certain authority? (See generally G. Fridman, *Canadian Agency Law* (2nd ed., 2012) Ch. 2 and 3; P. Watts and F. Reynolds, eds., *Bowstead and Reynolds on Agency* (19th ed., 2001) at arts. 22, 74.)

[54] I would not purport to answer these questions in the absence of a full evidentiary record. I raise the matter only because I would not want to be taken as having affirmed the proposition that because Lalli purported to be acting "for" 679 and the Purchasers *believed* he was doing so, he must have been 679's agent. In my respectful view, the chambers judge erred in making this assumption, at least on the basis of the facts stated.

Disposition

[55] At the outset of these reasons for judgment, I inferred that the court below was of the view that a purchaser's lien was necessary to do justice in this case. I too am not without sympathy for the position in which the Purchasers found themselves as a result of their reliance on Lalli's representations. It may be that the Purchasers were persuaded not to pay the attention they should have to the terms of the Agreements they were signing, and not to seek legal advice. I am mindful, however, that on the other side of the equation there were parties who acted more prudently and took reasonable steps for their own protection. I am also mindful that "hard cases make bad law". I do not wish to make bad law by extending equitable protection beyond its fair reach; but one hopes that other avenues of legal recourse may be available to the Purchasers against anyone who should properly be held responsible for their losses.

[56] I would allow the appeal and order that the claims of the Judgment Creditors be paid, in order of the date of their registration against title to the subject property, from the proceeds in trust. Any remaining proceeds should be made available to the Purchasers *pro rata* in accordance with their agreement.

"The Honourable Madam Justice Newbury"

I AGREE

"The Honourable Mr. Justice Lowry"

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

[57] I have had the opportunity to read a draft of the reasons for judgment of Madam Justice Newbury. I agree with her disposition of this appeal, but prefer to limit the analysis to the first ground of appeal. It engages a consideration of the so-called “protective” clauses. I repeat ground one:

> The learned chambers judge failed to rule on or erred in rejecting the primary submission of the Appellants that any claim of a purchaser’s lien was excluded by the terms of the agreements made by the Respondent investors with Lallico Investments Ltd. and/or 679972 B.C. Ltd.

[58] I would not rephrase ground one. It asserts that even if the Purchasers were entitled to liens, such liens were excluded contractually. My colleague concludes, and I agree, that such liens are excluded contractually. In my view, it is not necessary to and I would not address other substantive issues in this appeal, including whether there was a binding contract for the purchase of land.

[59] I do wish to add a comment on the positions of the Kerns.

[60] The Kerns are judgment creditors of 679972 B.C. Ltd. (“679”). As noted by my colleague, the Kerns made a demand on the promissory note given to them by Lallico Investments Ltd. (“Lallico”) and received a cheque from 679 in payment. The cheque was dishonoured.

[61] On this appeal, in opposition to the contention of the Purchasers that they have liens, the Kerns contend that Lallico could not bind the owner of the land, 679. They argue that Lallico and 679 did not act in concert and were not agents for each other. We queried the basis on which judgment was obtained against 679 if there was no agency between it and Lallico and were told that the judgment was on the cheque. After a request by the Court for information as to the basis on which the Kerns’ judgment was obtained, submissions were received advising that the judgment was on the promissory note, not on the cheque. It is stated to be a judgment in debt.

[62] As my colleague notes, we must take the judgment as it is. Because I base my decision on the first ground of appeal, it is not necessary to consider whether Lallico and 679 acted in concert or were the agents of each other. If that were a live issue, I would have difficulty accepting that the Kerns could argue in this Court that Lallico could not bind 679 in the absence of an accurate appreciation of the basis on which the judgment was obtained in the Supreme Court. It is not a matter of going behind that judgment, but a question whether the Kerns would be advancing a legal position that would require this Court to reach a conclusion of fact and law that is inconsistent with the determination of the Supreme Court, that is, whether the position of the Kerns in this Court would be an abuse of process.

“The Honourable Mr. Justice Chiasson”

CITATION: Romspen Investment Corporation v. Horseshoe Valley Lands Ltd., 2017 ONSC 426
COURT FILE NO.: CV-16-11468-00CL
DATE: 2017013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Romspen Investment Corporation, Applicant

AND:

Horseshoe Valley Lands Ltd. and Horseshoe Ridge Homes Inc., Respondents

BEFORE: Wilton-Siegel J.

COUNSEL: *Edward D'Agostino*, for the Applicant by Cross-Motion, Lotco Limited

Eric Golden, for the Respondent by Cross-Motion, Romspen Investment Corporation

David Preger, for the Receiver, Rosen Goldberg Inc.

HEARD: January 18, 2017

ENDORSEMENT

[1] In this receivership proceeding, Rosen Goldberg Inc., in its capacity as receiver of Horseshoe Valley Lands Ltd. ("HVL") (the "Receiver"), has brought a motion seeking an order authorizing it to disclaim an agreement of purchase and sale dated July 21, 2016, entered into between HVL and Garo Bostajian in trust for a company to be incorporated ("Lotco") (the "Grandview APS"). The Grandview APS pertained to a proposed sale by HVL to Lotco of 29 single-family lots in a residential development owned by HVL (the "Grandview Transaction"). Lotco opposes the Receiver's motion. Lotco has brought a cross-motion seeking, among other things, an order requiring that certain individuals attend for examinations as described below in aid of Lotco's position on the Receiver's motion. This Endorsement addresses Lotco's request to conduct such examinations.

Background

[2] Romspen holds a mortgage over the lands of HVL to secure an outstanding loan in the principal amount of over $21.3 million (the "Romspen Loan").

[3] The Grandview APS was entered into on July 21, 2016.

[4] At the time, Romspen had commenced an application for the appointment of a receiver over the property of HVL based on a payment default of $3 million under the Romspen Loan on May 30, 2016 (the "Application").

[5] On July 19, 2016, counsel for HVL provided counsel for Romspen with a copy of the Grandview APS that had not yet been executed and requested a meeting between HVL and Romspen. On July 26, 2016, counsel for HVL provided counsel for Romspen with an executed copy of the Grandview APS.

[6] Lotco waived a due diligence condition in its favour in the Grandview APS on July 28, 2016 thereby making the agreement binding between the parties thereto. Lotco also paid deposits totaling $200,000 due under the Grandview APS on or about August 3, 2016.

[7] The meeting between Romspen and HVL occurred on July 28, 2016. At that meeting, Steve Mucha and Bill Ulicki ("Ulicki") attended on behalf of Romspen together with Romspen's lawyers Brendan Bissell ("Bissell") and Walter Traub. Jim Cooper ("Cooper") attended on behalf of HVL together with HVL's lawyers William Friedman ("Friedman") and Judy Hamilton.

[8] HVL and Romspen negotiated the general terms of a forbearance agreement between July 28, 2016 and August 1, 2016 (the "Forbearance Terms"). As a result of an agreement on the Forbearance Terms, Romspen adjourned the Application *sine die*. Among other things, the Forbearance Terms required HVL to pay a minimum of $3.2 million net of all costs on or before September 30, 2016 out of proceeds of sale of HVL's property or otherwise. The Forbearance Terms contemplated the appointment of Rosen Goldberg Inc. as a Monitor whose consent was required to any sale of land by HVL.

[9] On or about August 21, 2016, the parties commenced drafting a forbearance agreement giving effect to the Forbearance Terms. The final version of the forbearance agreement, dated September 20, 2016 (the "Forbearance Agreement"), required payment on or before September 30, 2016 of "$3.2 million less all applicable costs including, without limitation, real estate commissions, and legal fees and disbursements arising out of the sale of property subject to the [Romspen Mortgage] or otherwise". Lotco did not participate at all in the negotiations regarding the Forbearance Terms or the form of the Forbearance Agreement.

[10] In support of this cross-motion, Lotco has filed an affidavit of Paul Grespan ("Grespan") dated November 25, 2016 (the "Lotco Affidavit"). The Lotco Affidavit generally sets out the facts described above. The Lotco Affidavit further states that Lotco tendered the balance of the purchase price under the Grandview APS on September 22, 2016. Grespan states that on that date, in the absence of a discharge from Romspen, Lotco and HVL agreed to extend the closing to September 28, 2016. Grespan further states that HVL's counsel advised him on September 28, 2016 that Romspen would agree to a partial discharge under the Romspen Mortgage in respect of the 29 lots (the "Lots") if Lotco paid an additional $500,000. Lotco was not prepared to pay the additional amount demanded by Romspen. However, it says it was, and remains, ready, willing and able to complete the Grandview Transaction.

[11] Ultimately, Romspen refused to discharge the Lots subject to the Grandview APS to allow the closing of the Grandview Transaction. Romspen says that the Grandview APS was an improvident offer.

[12] As a result of Romspen's refusal to provide a partial discharge, the Grandview Transaction did not close and HVL failed to make the payment required on September 30, 2016 under the Forbearance Agreement. HVL and Romspen disputed whether such non-payment constituted a default under the Forbearance Agreement. HVL alleged that it was understood and agreed by Romspen that the Grandview Transaction would be completed and that the proceeds of sale of the Grandview Transaction would be the funding source for the payment required under the Forbearance Agreement on or before September 30, 2016. For its part, Lotco has registered a caution against the Lots.

[13] Subsequently, HVL also failed to make a further payment that was required under the Forbearance Agreement to be made by November 30, 2016.

[14] As a result of the foregoing events, Romspen brought on the Application. The Receiver was appointed pursuant to an order of Newbould J. dated November 29, 2016 (the "Receivership Order").

The Lotco Cross-Motion

[15] In its cross-motion, Lotco seeks a declaration confirming that the Receiver is obligated to complete the Grandview Transaction.

[16] At this time, to support that position, Lotco seeks interim relief in the form of an order requiring that the following individuals attend for an examination on their affidavits filed in the Application: (1) two Romspen representatives, being Mark Hilson, who swore affidavits dated July 22, 2016 and November 15, 2016, and Ulicki, who swore an affidavit dated November 21, 2016; and (2) Cooper, who swore a responding affidavit on November 16, 2016 on behalf of HVL. In addition, Lotco seeks to examine Friedman and Bissell, as the lawyers who negotiated the Forbearance Terms and the Forbearance Agreement on behalf of HVL and Romspen, respectively.

[17] In its factum on this cross-motion, Lotco states that it wishes to obtain evidence to show that "[HVL] was authorized by Romspen to complete the [Grandview APS] and that, as at the time when the Forbearance Agreement was signed, Romspen did not require [HVL] to obtain the written consent of [the Monitor] to do so." Essentially, Lotco's position is that (1) Romspen committed to HVL to grant a partial discharge of the Romspen Mortgage respecting the Lots on the closing of the Grandview Transaction and to waive any requirement for Monitor approval of the Grandview Transaction, and (2) that Romspen then defaulted on that obligation after concluding that the value of the Lots had risen following the execution of the Grandview APS.

[18] Romspen has raised a preliminary objection that Lotco has no right to examine on the affidavits filed in the Application on the grounds that they are spent. While this may be technically correct, it does not address the substance of Lotco's cross-motion, which is that it

wishes to examine the individuals named above as third parties to the events giving rise to Romspen's refusal to grant a partial discharge under the Romspen Mortgage in respect of the Lots. Accordingly, I have proceeded on the basis that Lotco seeks an order that these individuals attend an examination under Rule 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Analysis and Conclusions

[19] As mentioned, Lotco seeks the right to examine the individuals identified above in order to obtain evidence to support its position that Romspen defaulted on a commitment given by it to HVL to grant a partial discharge of the Lots upon the closing of the Grandview Transaction and to waive any requirement for Monitor consent to this transaction. For the purposes of this cross-motion, I have proceeded on the basis that the examinations sought by Lotco would demonstrate the existence of such a commitment although, to be clear, I am not making any finding to such effect. The issue for the Court is one of relevance, that is, whether the subject-matter of the proposed examinations would be relevant to the Receiver's motion seeking court approval to disclaim the Grandview APS.

[20] The examinations sought by Lotco, given the questions it wishes to put to the individuals named above, are directed toward the issue of whether there is direct or inferential evidence that Romspen made such a commitment. If such a commitment by Romspen is a relevant consideration on the Receiver's motion, then I consider that the Lotco cross-motion should be granted, except insofar as it extends to the examination of Bissell, which I would deny on the ground that it would entail a breach of solicitor-client privilege that cannot be justified in the present circumstances.

[21] Accordingly, the question on this cross-motion can be stated as follows: is the issue of whether Romspen defaulted on a commitment to HVL to grant a partial discharge over the Lots a relevant consideration in the determination of the Receiver's motion to disclaim the Grandview APS?

[22] I conclude on the basis of the following reasoning that, even if established by such examinations, the alleged Romspen default of an obligation to HVL would not be a relevant consideration for a court on the Receiver's disclaimer motion. The principal reason for this conclusion is that, as discussed below, Romspen did not owe any contractual or other duty to Lotco and the Receivership Order did not change this legal position, or the equities, between Lotco and Romspen.

[23] It is important to note that, in this case, Romspen had no direct contractual obligation to Lotco to grant a partial discharge. At the time of execution of the Grandview APS, Lotco could have required that HVL provide it with an undertaking by Romspen to provide a partial discharge of the Lots on closing, but it did not do so. Further, the Grandview APS does not contain a covenant of HVL to obtain such a discharge from Romspen. Instead, the existence of a partial discharge is effectively a condition of closing. In addition, Lotco does not plead that Romspen made any representations, or took any other actions, that would give rise to a duty of Romspen to Lotco to grant a partial discharge on the closing of the Grandview Transaction.

[24] These circumstances define the remedies that would have been available to Lotco if the receivership had never occurred. In such circumstances, Lotco may have had an unsecured claim against HVL for breach of contract. However, Lotco's entitlement to a mandatory injunction requiring Romspen to grant a partial discharge of the Lots from the charge under the Romspen Mortgage to permit completion of the Grandview Transaction would be governed by the absence of any legal duty of Romspen to grant such a partial discharge. Further, while Lotco says that, prior to the Receivership Order, it would have been able to stand in the shoes of HVL and obtain an order requiring Romspen to grant a partial discharge on behalf of HVL, there is no case law of which Lotco's counsel, or the Court, is aware that would support such a right. Further, and in any event, as HVL consented to the Receivership Order, HVL has waived its right to assert such a claim against Romspen on this basis.

[25] The Receivership Order provides that the Receiver steps into the shoes of HVL but it does not alter or otherwise affect the rights of HVL's creditors relative to HVL. Nor does it alter Lotco's position vis-à-vis Romspen. Lotco's claim against Romspen will continue to be governed by the absence of a legal duty of Romspen to Lotco.

[26] Lotco argues that, in determining the disclaimer motion, a court will be required to have regard to all of the equities between the parties. In this regard, it relies on the decision of Strathy J. (as he then was) in *Royal Bank of Canada v. Penex Metropolis Ltd*., 2009 CanLII 45848 (Ont. Sup. Ct.). Lotco says that, in addition to the legal relationship between Lotco and Romspen as described above, a relevant equitable consideration would be that Romspen caused the receivership proceedings by defaulting on its obligation to grant HVL a partial discharge in respect of the Lots to permit HVL to close the Grandview Transaction. Lotco says that, as a result of that default and the appointment of the Receiver, Romspen is benefitting from the Receiver's ability to bring the disclaimer motion. Lotco says this is inequitable because Romspen is effectively benefitting from its own default and that this inequity should be addressed by enforcing the Grandview APS rather than permitting the Receiver to disclaim it.

[27] There are three problems with this analysis.

[28] First, I agree that, in making its determination on the Receiver's disclaimer motion, a court will have regard to other considerations in addition to the absence of any legal duty or obligation of Romspen in favour of Lotco. Specifically, the right of the Receiver to disclaim Lotco's interest will depend upon, among other things, the nature of Lotco's interest (i.e. whether it is contractual or proprietary), the relative priorities of the Romspen Mortgage, the evidence regarding the equity in the Lots, and the operation of the doctrine of marshalling, if applicable.

[29] However, Lotco's right to rely on such factual and legal circumstances, to the extent that they support its position, has not been affected in any way by the Receivership Order. Romspen has not improved its position relative to Lotco as a result of the receivership. Even if it could be established that Romspen's default of a commitment to HVL to deliver a partial discharge on the closing of the Grandview Transaction set off a chain of events that has ultimately resulted in the receivership as HVL suggested, this is a matter solely between HVL and Romspen.

[30] Second, as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."

[32] In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[33] Third, and most importantly, I do not accept the premise of Lotco's argument that Romspen is benefitting from the receivership in a manner that is relevant to any consideration of whether to permit the Receiver to disclaim the Grandview APS. Simply put, as discussed above, the Receivership Order did not change the legal position or the equities between Lotco and Romspen.

[34] Lotco argues, however, that Romspen will benefit from the Receiver's ability to seek court approval to disclaim the Grandview APS. However, the Receivership Order involves only a procedural rather than a substantive change in circumstances. The Receivership Order effected a stay of any proceedings that Lotco might otherwise have brought seeking a mandatory injunction against Romspen. Under the receivership, Lotco's entitlement to such relief will be determined in the context of the Receiver's motion to disclaim the Grandview APS. However, to repeat, the Receivership Order, and the principles governing a receiver's right to disclaim a contract, do not alter in any way the substantive rights that Lotco can assert on that motion.

[35] Based on the foregoing, I conclude that, even if Lotco could establish that Romspen defaulted on a commitment to HVL to grant a partial discharge of the Lots, Romspen's rights relative to Lotco have not increased as a result of the receivership nor have Lotco's rights relative to Romspen been diminished or prejudiced. On this basis, a Romspen default of its obligations to HVL, even if established, would not be a relevant consideration for a court in its determination of the Receiver's disclaimer motion. Accordingly, Lotco's motion for an order requiring that the individuals identified above attend examinations is denied on the grounds that such examinations are not directed to a matter of relevance on the disclaimer motion.

[36] The parties have agreed that costs of this motion are to be reserved for the motion judge hearing the Receiver's motion for authorization to disclaim the Grandview APS.

Wilton-Siegel J.

Date: February 13, 2017

COURT FILE NO.: CV-09-8157-00CL
DATE: 20090904

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Royal Bank of Canada**, Applicant

Penex Metropolis Ltd. et al., Respondents

BEFORE: Justice G.R. Strathy J.

COUNSEL: *David Foulds* and *Jonathan Davis-Sydor*, for Van Wagner Communications Company, Canada

Hilary Clarke, Larry Crozier and Lisa Brost, for Ernst & Young Inc. (Receiver)

Liz Pillon, for EPR Metropolis Trusts and Metropolis Entertainment Holdings Inc.

Fred A. Platt, for Cambrian Court[*]

DATE HEARD: August 24, 2009

E N D O R S E M E N T

[1] There are two motions before the Court. First, Van Wagner Communications Company, Canada ("Van Wagner") moves for an Order declaring that Ernst & Young Inc., the Court-appointed Receiver (the "Receiver") of the Respondents[1] is not entitled to disclaim the Exclusive Sales Agency Agreement between Van Wagner and the Respondents (the "Agreement"). Van Wagner also seeks a declaration that certain funds are held in trust by the Receiver for the benefit of Van Wagner, pursuant to the Agreement.

---

[*] At the outset of the hearing, Mr. Platt advised the Court that his client's only interest in the motions pertains to alleged trust claims being asserted by his client and by Van Wagner. He stated that counsel had agreed that issues between those parties would be left for another day, if necessary. On that basis, Mr. Platt was excused and withdrew from the hearing.

[1] The Respondents are Penex Metropolis Ltd., in its capacity as general partner of, and as nominee and trustee of, and for, Metropolis Limited Partnership and Metropolis Limited Partnership.

[2] Second, the Receiver brings a cross-motion for a declaration that the Agreement is not binding on a purchaser of the business of the Respondents and that the Receiver is entitled to sell the assets of the business free and clear of any obligations under the Agreement.

Factual Background

[3] This proceeding concerns a 13-floor, 332,000 square foot, mixed use, multi-media entertainment, retail and office complex located on the northeast corner of Yonge-Dundas Square in Toronto (the "Property") that is owned by Penex Metropolis Ltd. ("Penex"). Yonge-Dundas Square, which is said to be modeled after Times Square in New York and Piccadilly Circus in London, is home to a number of digital and billboard-type signs. The Property itself is covered on all sides by approximately 25,000 square feet of digital and static signage used for outdoor advertising. Penex is the legal owner of the Property.

[4] Van Wagner is in the business of developing, marketing and selling outdoor advertising signage. It is an affiliate of one of the largest privately held out-of-home communications companies in North America.

[5] Royal Bank of Canada ("RBC") acts as agent for a syndicate of lenders that provided financing for the construction of the Property and is the first secured creditor. The second secured creditor is a subsidiary of Entertainment Properties Trust, a REIT with its head office in Kansas City, Missouri. The second secured creditor has entered into a strategic alliance with the parent of Penex.

[6] Van Wagner and Penex entered into an Exclusive Third Party Exterior Signage License Agreement (the "Joint Venture Agreement") for the Property in June, 1999. Under the Joint Venture Agreement, Van Wagner was to own 35% of the signs and receive 35% of the advertising revenue from the signs, while Penex would own 65% of the signs and receive 65% of the advertising revenue. Among other duties, Van Wagner would exclusively market the signs.

[7] The Property was delayed in construction and in the fall of 2005 had just started above ground construction. In September of 2005 Penex purported to terminate the Joint Venture Agreement. Van Wagner commenced litigation against Penex, which was settled in the summer of 2006 when Penex and Van Wagner entered into the Agreement that is the subject of this litigation.

[8] The Agreement provides that Van Wagner is to be Penex's exclusive sales agent for the marketing and sale of advertising on a number of static signs located at the Property. Van Wagner is a non-exclusive sales agent on the "tri-vision" sign, which rotates through a maximum of three advertisements on the same sign. Van Wagner has no rights or responsibilities with respect to the digital video board.

[9] The only exception to Van Wagner's exclusive agency rights on static signs relates to tenant advertising and sponsorship opportunities. Pursuant to paragraph 2C of the Agreement, these remain exclusive to Penex. Accordingly, should any tenant or sponsor of the Property require signage rights on any one of the static signs, Penex has the right to grant such signage

rights (per paragraph 2F of the Agreement), but must pay Van Wagner a sales commission as detailed below. This commission is in recognition of Van Wagner's surrender of its rights to part ownership of the signs and the limitations placed on Van Wagner's marketing efforts.

[10] As consideration for the services to be provided by Van Wagner as Penex's exclusive sales agent, paragraph 4A of the Agreement provides that Penex is to pay Van Wagner a sales commission equal to:

> 22.5% of "Net Advertising Revenues" (as defined in paragraph 4C of the Agreement) derived from signs sold by Van Wagner; and
>
> 20% of Net Advertising Revenues derived from signs other than sign 2 or sign 3 that are sold to sponsors and tenants by Penex.

[11] As a result of allegations that Penex had breached the Agreement by causing its personnel to sell advertising on static signs in competition with Van Wagner, Van Wagner commenced an action in this court against Penex to enforce the Agreement.

[12] Van Wagner also sought an interim and interlocutory injunction to prevent Penex from violating the exclusivity provisions of the Agreement until trial. That motion was heard before Patillo J. on December 5, 2007, following the exchange of extensive affidavit materials and cross-examinations.

[13] After a full day of argument, Patillo J. agreed that if Penex was allowed to continue breaching the Agreement, Van Wagner would be irreparably harmed and granted Van Wagner an injunction until trial. Following the language of the Agreement, the injunction is binding on any successors or assigns of Penex.

[14] Penex sought leave of the Divisional Court to appeal the decision of Patillo J. In a decision released April 23, 2008, Carnwath J. found that there was no good reason to doubt the correctness of the decision and denied Penex's motion for leave to appeal to the Divisional Court.

[15] Van Wagner alleged that Penex continued to breach the Agreement in spite of the order of Pattillo J. As a consequence, Van Wagner brought a motion for appropriate relief. This motion was ultimately settled on consent in March, 2009, with the parties agreeing to an Order setting out the terms of the relationship between Van Wagner and Penex until trial. This Order was issued by Lederer J. on March 10, 2009.

[16] On April 27, 2009, RBC applied to this Court to appoint Ernst & Young as the Receiver of all of the assets, undertakings, and properties of Penex, including the Property. This Court granted the relief sought. The initial appointment order (the Initial Order) is based on the model receiving order of the Commercial List, and contains the following standard provisions:

> 3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …
>
> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

[17] Neither Van Wagner nor its counsel was provided with notice of the application to appoint a receiver. Van Wagner was not informed of RBC's application until the afternoon of Friday, May 1, 2009, when Van Wagner received a letter from the Receiver attaching a copy of the Initial Order and advising that the Receiver did not intend to perform the Agreement. The letter further stated that the Receiver would not require Van Wagner's further services, and would not be making any payments or be responsible for any amounts payable under the Agreement.

The Issues

[18] There are three issues before me:

First Issue: Was the Receiver entitled to disclaim the Agreement?

Second Issue: Are the fees due to Van Wagner by Penex held in trust?

Third Issue: Does the Agreement bind a purchaser of the Property?

[19] I will discuss these in turn.

Discussion

<u>First Issue: Was the Receiver entitled to disclaim the Agreement?</u>

[20] The Appointment Order authorizes the Receiver to cease to perform any contracts of Penex. This reflects the established law and practice: *Bank of Montreal v. Scaffold Connection Corp.* (2002), 36 C.B.R. (4th) 13, [2002] A.J. No. 959 (Q.B.) at para. 11. A receiver must have the ability to refuse to adopt contracts in order to give meaning to its power to convey the assets free and clear of other parties' interests: *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.* (2005), 9 C.B.R. (5th) 267, [2005] B.C.J. No. 546 (C.A.) at paras. 18 and 20.

[21] There is little dispute about the principles concerning disclaimer of contracts by a receiver. The real issue is the application of those principles to the facts of this case. I will begin, however, by briefly outlining the principles.

[22] Both counsel refer to the leading text, *Bennett on Receiverships*, 2nd ed. (Toronto: Thompson Canada Limited, 1999) in support of the proposition that the receiver is an officer of the court. The learned author states at p. 180:

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court disclosing not only facts favourable to pending applications, but also facts that are unfavourable.

[23] The author notes that a court-appointed receiver is not bound by existing contracts, but the receiver must exercise discretion before disclaiming a contract. If it seeks to break a *material* contract, it must seek leave of the court. At p. 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court.

[24] I also accept the general proposition, set out in *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Q.B.) affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (C.A.), at para 40, that a receiver is not entitled to prefer the interests of one creditor over another. Its duty is to act for the benefit of all interested parties:

> The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

[25] A receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. In deciding whether or not to adopt a contract, the duty of the receiver is to exercise the care "comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own": *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (C.A.) at para. 15; *Textron Financial Canada Limited v. Beta Ltee/Beta Brands Ltd.* (2007), 31 C.B.R. (5^{th}) 296 (Ont. S.C.J.) at para. 21.

[26] If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court. As noted by the Ontario Court of Appeal in *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5^{th}) 256, [2005] O.J. No. 5351 (C.A.) at para. 40.

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable differences. These decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others…The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

See also *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, [1991] O.J. No. 1137 (C.A.) at para. 14.

[27] A receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96.

The Receiver's Position

[28] The Receiver says that after its appointment it considered the Agreement for the purpose of determining whether it should continue to perform it. As part of its analysis, the Receiver says that it:

(a) reviewed the terms of the Agreement;

(b) reviewed the historical sales revenue generated from all signage by both Van Wagner and Penex;

(c) had discussions with the former manager of the Property, regarding signage issues and with the individuals who formerly managed the signage;

(d) on the recommendation of the Receiver's court-approved property manager, had discussions with a Toronto signage company, about the signage business, including the market conditions for signage, the market participants and the locations within Dundas Square;

(e) reviewed with Penex: (i) signage contracts to which Penex was party on the Receivership Date; (ii) signage contracts that were out for signature on the Receivership Date; (iii) Penex's process for dealing with Van Wagner; and (iv) the amounts owed to Van Wagner by Penex as at the Receivership Date;

(f) met with representatives of Penex's second secured creditor, who are familiar with the signage at the Property;

(g) reviewed the websites of certain major signage companies operating in Canada as well as industry associations, to obtain market information;

(g) had discussions with representatives from Brookfield Financial Real Estate Group Limited ("Brookfield") regarding the sales process previously undertaken by Penex regarding the Property, including the impact of the Agreement on that sales process;

(h) reviewed an appraisal report dated January 30, 2009 that set out information on current utilization of the signage and the signage market; and

(i) reviewed pleadings in the 2007 litigation between Penex and Van Wagner as well as the decision of Patillo J. in that litigation.

[29] The Receiver reports that after considering this information, it concluded that it was not in the interests of Penex or its stakeholders to continue to perform the Agreement. Broadly speaking, there were three reasons for this decision.

[30] First, the Receiver had concerns that there were terms of the Agreement that were not in the interests of Penex or its stakeholders: (a) there was an indemnification clause in the Agreement that requires Penex to indemnify Van Wagner for claims arising in connection with the operation of the sign structures except in cases of Van Wagner's gross negligence – the Receiver felt that this term was excessively onerous; (b) the Receiver concluded that the rate of 22.5% for third party sales commissions was above market, which it considered to be in the range of 15%; (c) the Receiver concluded that the exclusivity provisions in the Agreement had a negative effect on Penex's ability to earn advertising revenue, created inefficiencies and confusion in the marketplace, and limited Penex's marketing options; and (d) the Receiver concluded that performance of the Agreement would require the Receiver and its advisors to work closely with Van Wagner in relation to the signage issue. In view of the history of the relationship between Van Wagner and Penex, which the Receiver considered to be "plagued by recriminations, acrimony and disagreements", the Receiver was concerned that there would be continued discord and that a viable business relationship would not be possible.

[31] Second, the Receiver had concerns about Van Wagner's performance of the Agreement, including: (a) it had only one sales representative in Canada; (b) sign utilization appeared to be considerably less than market; and (c) since the opening of the Property in 2008, static signage revenues were about $3.75 million, of which Van Wagner was responsible for only about a third, the balance being generated through sales to tenants of the Property or leads of Penex staff or other agents.

[32] Third, the Receiver considered that adoption of the Agreement would give Van Wagner a higher interest than it had prior to the making of the appointment order. The Receiver says that the first and second secured lenders provided financing before the Agreement came into effect and were unaware of the Agreement. They, and other secured creditors, are entitled to sell the Property free of any claims of unsecured creditors. The Receiver believes that Van Wagner's pre-receivership claim is an unsecured claim against Penex and does not anticipate that the proceeds of sale of the Property will be sufficient to satisfy the claims of any unsecured creditors. The Receiver says that Van Wagner is seeking payment of its pre-receivership claim and the effect of this would be to elevate that claim above the claims of the secured creditors, who had negotiated for and took security in the property.

Van Wagner's Position

[33] I will briefly summarize the arguments made on behalf of Van Wagner. They are set out extensively in the factum filed by counsel on behalf of Van Wagner and my summary is not intended to be exhaustive, nor is it in precisely the same order as addressed by counsel.

[34] First, Van Wagner says that the Receiver should have sought court approval for the disclaimer of the Agreement, because the contract was a material one.

[35] Second, it submits that the Receiver had no experience in the signage market and it should have made greater investigations of the market and should not have relied upon advice received from Penex employees, whose views about Van Wagner were biased and who were themselves the cause of the disruptive relationship between the parties.

[36] Third, it says that in light of the history of the relationship between the parties and Van Wagner's knowledge of the market, the Receiver should have discussed the issues with Van Wagner before terminating the contract and should have given Van Wagner an opportunity to respond to the Receiver's concerns.

[37] Fourth, Van Wagner says that the Receiver erroneously concluded that the Agreement was not advantageous to Penex and the 22.5% commission rates in the Agreement were "well above market rate". Van Wagner says that while rates may be lower where the agreement is for brokerage only, this was not a simple brokerage contract and therefore it has a higher rate. As well, Van Wagner says that the rate is partly for the purpose of compensating Van Wagner for the loss of part ownership of the signs as a result of Penex's breach of the earlier Joint Venture Agreement.

[38] Fifth, Van Wagner takes issue with the Receiver's conclusion that the Agreement is detrimental to the stakeholders and fundamentally disagrees with the Receiver's analysis of the Agreement. I will not set out the various arguments made by Van Wagner under this heading, which occupy some five pages of the factum and took up a considerable part of oral submissions.

[39] Sixth, Van Wagner says that its performance to date has not been detrimental to the Property and that the Receiver's investigation of this issue was neither balanced nor informed. Van Wagner says that the Receiver relied upon tainted information from former Penex employees whose conduct was responsible for the prior litigation between the parties that was successfully resolved in favour of Van Wagner. Again, the submissions on this issue were extensive.

[40] Seventh, the Receiver failed to give adequate consideration to the impact of termination of the Agreement on Van Wagner, particularly in light of the previous conclusion of Patillo J. that Van Wagner would suffer irreparable harm if the Agreement was breached.

[41] Eighth, Van Wagner says that continued performance of the Agreement is actually financially beneficial to the stakeholders.

[42] Ninth, the disclaimer of the Agreement has the effect of expropriating the commissions that were earned by Van Wagner and transferring them to the secured lenders. It is alleged that this is unfair to Van Wagner and confers a windfall on the secured lenders.

Conclusion on the First Issue

[43] Having considered the Receiver's reasons and the concerns raised by Van Wagner, I have come to the conclusion that, although there are points to be made on both sides as to whether the Agreement was advantageous or not, it cannot be said that the Receiver acted in a commercially

unreasonable manner, unfairly, or in bad faith in deciding to disclaim the Agreement. On the contrary, the Receiver's report indicates that the Receiver made appropriate inquiries and investigations prior to disclaiming the contract. Based on the evidence before me, the Receiver could reasonably conclude that the rates paid to Van Wagner under the Agreement were above market value and included a premium to compensate Van Wagner for rights it had given up under the Joint Venture Agreement. The Receiver could also reasonably conclude that the exclusivity provisions of the Agreement fettered its ability to negotiate signage agreements with potential users, limited the flexibility that it would require to deal with signage issues, and was potentially cumbersome, inconvenient, and inefficient.

[44] This is precisely one of those cases, referred to in *Ravelston Corp. (Re.)*, above, in which a receiver must choose between several courses of action, none of which is obviously preferable to another. While I do not necessarily accept every reason advanced on behalf of the Receiver on this issue, or reject every one of Van Wagner's objections, I cannot conclude that the Receiver acted unreasonably, arbitrarily or inappropriately in disclaiming the Agreement.

<u>Second Issue: Are the fees due to Van Wagner held in trust for Van Wagner?</u>

[45] In support of its submission that the fees are held in trust, Van Wagner refers to paragraph 4D of the Agreement, which provides, in part:

> All Gross Revenue shall be made payable to the Owner and deposited in a designated chequing account with Royal Bank of Canada in Toronto (with statements to both parties), or such other bank as is designated by Owner, with cheque signing to be a person representing and designated by the Owner. <u>The Fee due to Van Wagner shall be held in such account in trust for Van Wagner and shall be remitted to Van Wagner</u>, and the balance of the Gross Revenue shall be remitted to Owner, in each case, within fifteen (15) days following the end of each calendar month together with a statement showing the amounts collected and the manner in which compensation is calculated. […] <u>The parties shall hold all funds received in trust for the benefit of the parties hereunder in accordance with their interests.</u> Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time and the parties hereto agree to follow such other payment and banking procedures as reasonably may be required by Owner's lenders from time to time and which are consistent with the principles set forth in this Agreement and are approved by Van Wagner (which approval shall not be unreasonably conditioned, withheld or delayed). [emphasis added]

[46] Van Wagner submits that the "three certainties" required to establish a trust are present - certainty of intention, certainty of subject matter, and certainty of object: see: *Air Canada v. M & L Travel Ltd.*, [1993] S.C.J. No. 118, [1993] S.C.J. No. 118; *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92. It submits that paragraph 4D

shows a clear intention to create a trust, that the subject matter of the trust is clear (fees owing to Van Wagner), and the object of the trust is clear (Van Wagner).

[47] The difficulties with Van Wagner's submissions are set out in the Receiver's factum. First, clause 4D itself contemplates that the trust arrangement was subject to the approval of Penex's lenders. It provides:

> … Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time …

[48] There is no evidence that the lenders approved the trust arrangement and at least some evidence that one lender did not approve it. There is certainly an argument that a condition-precedent to the establishment of a trust was not satisfied.

[49] The second problem with Van Wagner's submission on this issue is that no trust account was in fact established, and that Van Wagner was either aware, or ought to have been aware, that one had not been established. One could conclude from this that the parties never gave effect to their intention to create a trust.

[50] The third problem is that revenues from sales of static signage advertising space, from which Van Wagner was entitled to fees, were in fact deposited in Penex's general operating account where they were co-mingled with other funds. The Receiver submits that the co-mingling of the trust funds is fatal to the existence of a trust: *GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5^{th}) 202, [2005] O.J. No. 589 (C.A.).

[51] These concerns are serious and more than simply technical objections. I have concluded, however, that it is not necessary to resolve the issue at this time. I accept the submission of counsel on behalf of the Receiver that this issue should be addressed when the Court is asked to make an order regarding the distribution of the proceedings of the Property. That motion will be made on notice to all potential claimants and can be considered, if necessary, on a more complete evidentiary record than exists before me.

<u>Third Issue: Does the Agreement bind a purchaser of the property</u>

[52] Van Wagner takes the position that any purchaser of the Property must assume and be bound by the Agreement. The Receiver reports that, having consulted with the financial adviser engaged and approved by the Court to sell the property, it is concerned that uncertainty about the existence of a legal obligation to assume the Agreement will have a detrimental affect on the marketability of the Property. Based on this submission, I agree that the issue should be resolved at this time and not deferred until offers to purchase the Property have been submitted.

[53] Van Wagner relies upon paragraph 13(k) of the Agreement, which provides:

> This Agreement shall be binding upon and inure to the benefit of [Penex] and its successors and permitted assigns, <u>including, without limitation, any subsequent fee owner of the Building</u> and shall be binding upon and inure to the benefit of Van Wagner and its successors and permitted assigns. [Emphasis added]

[54] Van Wagner submits that, in light of the history between the parties, it would be fair and equitable to require the Receiver to abide by this term of the Agreement.

[55] Apart from this, Van Wagner offers no authority for the proposition that the Agreement runs with the Property, such that a purchaser would be bound to assume it.

[56] Paragraph 13(k) is, with variations, a standard clause in many forms of agreement, including agreements for the supply of services. It cannot reasonably be construed as creating an interest in land so as to bind a subsequent purchaser from the Receiver. I accept the submission of counsel on behalf of the Receiver that in order to run with the land, two conditions must be met. First the covenant must be negative in substance and a burden on the covenantor's land: *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd*., 2001 BCCA 268, [2001] B.C.J. No. 852, at para. 16; *Durham Condominium Corp. No. 123 v. Amberwood Investments* Ltd. (2002), 58 O.R. (3d) 481, [2002] O.J. No. 1023 (C.A.) at paras. 18 and 20. A positive covenant does not run with the land. Second, in order to run with the land, the Agreement must touch and concern the land. This covenant does not concern the Property. It concerns services to be provided to the owner of the Property.

[57] It is not disputed that the Appointment Order gives the Receiver the authority to market the Property, to sell the Property, and to "apply for a vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property." In view of the authorities cited by counsel for the Receiver, and in the absence of any authority put forward by counsel for Van Wagner, I find that the Agreement does not run with the Property. The Receiver is entitled to a declaration that a purchaser of the Property is not bound by the Agreement.

Conclusion

[58] For these reasons, Van Wagner's motion is dismissed and the Receiver's motion is granted. If costs cannot be agreed upon, they may be addressed by brief written submissions, including a costs outline, addressed to me care of Judges' Administration. Counsel for the Receiver and for EPR Metropolis Trusts shall serve and file submissions within fifteen days. Counsel for Van Wagner shall file responding submissions within fifteen days of receipt of the other parties' submissions. Those parties may file brief reply submissions, if necessary, within five days thereafter.

G.R. Strathy J.

DATE: September 4, 2009

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16

Date: 20200526
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN

GOVERNMENT OF YUKON
as represented by the Minister of the Department of
Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

John T. Porter and Laurie A. Henderson	Counsel for the Petitioner
No one appearing	Yukon Zinc Corporation
No one appearing	Jinduicheng Canada Resources Corporation Limited
H. Lance Williams	Counsel for Welichem Research General Partnership
John Sandrelli and Cindy Cheuk	Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT
(Application by Welichem Opposing Partial Disclaimer)

INTRODUCTION

[1] Welichem Research General Partnership, ("Welichem"), is a secured creditor of the debtor company, Yukon Zinc Corporation ("YZC"). PricewaterhouseCoopers Inc.

(the “Receiver”) was appointed by Court Order dated September 13, 2019, as the Receiver of YZC. Welichem brings an application for the following relief:

1) the Receiver’s notice of partial disclaimer of the Master Lease is a nullity and of no force and effect;

2) the Receiver has affirmed the Master Lease and is bound by the entirety of its terms; and

3) the Receiver must pay to Welichem all amounts owing under the Master Lease from the date of the Receiver’s appointment and ongoing.

BACKGROUND

[2] The background set out in *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15, applies here, in addition to the following facts.

[3] On March 1, 2018, YZC sold 572 items, comprising most of the equipment, tools, vehicles and infrastructure at the Wolverine Mine (the “Mine”) to Maynbridge Capital Inc. (“Maynbridge”) for $5,060,000 (plus tax). Maynbridge and YZC entered into a Master Lease agreement also on March 1, 2018, for the lease of all 572 items.

[4] The term of the Maynbridge lease was six months, with a total rental payment of $331,603.30 (plus applicable taxes) to be prepaid on the commencement date. Interest was 13%. The lease contained a purchase option of $5,060,000 on or before September 2, 2018. It was secured by a general security agreement dated March 1, 2018, over all of YZC’s present and after-acquired property, including the Master Lease items.

[5] On May 31, 2018, YZC and Welichem entered into an initial loan agreement in the amount of $1,000,000 as principal.

[6] On July 23, 2018, Welichem advanced a second $1,000,000 loan to YZC. YZC granted a General Security Agreement in favour of Welichem, dated July 23, 2018.

[7] On August 30, 2018, YZC and Welichem entered into a third loan agreement of $6,550,000 as principal. YZC granted a new General Security Agreement in favour of Welichem dated August 30, 2018.

[8] On September 3, 2018, YZC used the monies from the third loan to purchase from Maynbridge the 572 Master Lease items for the sum of $6,550,000, by exercising the purchase option under the lease agreement with Maynbridge.

[9] YZC sold these items to Welichem that same day, September 3, 2018, for $5,060,000. This reduced YZC's loan debt to Welichem to $3,490,000.

[10] Also on September 3, 2018, YZC and Welichem entered into a lease agreement (the "Master Lease"). Welichem leased to YZC all of the items purchased from Maynbridge and sold to Welichem. These are the same 572 Master Lease items that had been sold to Maynbridge and leased back to YZC, set out in Schedule A of the Master Lease (the "Master Lease Items"). The Master Lease and General Security Agreement with Welichem were in exactly the same form as those between YZC and Maynbridge.

[11] The terms of the Master Lease with Welichem include the following:

- i) Rent of $338,430.82 plus taxes for each three-month period. Payment each month of $110,000.
- ii) Interest at 25% per annum, increasing to 50% on default.
- iii) Option to purchase the Master Lease Items for $5,060,000 plus taxes.
- iv) YZC to grant security against all of its present and after-acquired property.

v) YZC to keep the items in good repair, condition and mechanical working order.

vi) YZC to deliver the Master Lease Items at its expense to a location specified by Welichem at the end of the term of the Master Lease, whether by expiry or termination.

vii) YZC required to insure the Master Lease Items against theft, loss or destruction.

[12] Welichem's interests as a secured creditor and as a lessor were registered and perfected under the Yukon *Personal Property Security Act*, R.S.Y. 2002, c. 169, and the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359, on September 26, 2018.

[13] Welichem became the first-ranking secured creditor of the assets of YZC. They also held a first-ranking charge with the leasehold interest, as a result of subordination agreements with other parties with registered personal property security interests against YZC: namely, Jinduicheng Canada Resources Corporation Limited ("JDC Canada"), Jinduicheng Molybdenum Group Co. Ltd., Aihua Dang, Jingyou Lu, and Yu Luo.

[14] A reserve for the full three-month payment (until December 2018) was retained by Welichem from the purchase price. After December 2018, YZC made no further payments. Nor did it make repayments on the outstanding amount of the loan of $3,490,000. By December 1, 2018, Welichem began charging 50% interest, and at the date of the receivership, it claimed the outstanding amount under the loan agreement was $6,820,000.

[15] Since September 2019, the Receiver has been responsible for ensuring the care and maintenance at the Mine is carried out, and the site is stabilized. The Receiver is also developing a sale and investment solicitation plan ("SISP").

[16] When the Receiver initially entered the Mine it found the following:

i) The site crew consisted of two two-person teams for a two-week shift, the minimum number allowed for safety reasons. One shift did not have an individual with supervisor certification;

ii) The employees had been ready to leave the Mine site because they were not being paid their wages and they had safety concerns;

iii) The majority of the heavy equipment at the Mine was in need of repairs and subject to 10 outstanding work orders from YWCHSB;

iv) The Mine was in a state of permanent closure under the Water Licence; and a state of temporary closure under the Mining Licence; and

v) No lease payments had been made by YZC to Welichem since December 2018 and there was no insurance on any of the Master Lease Items.

[17] The Receiver has identified 79 of the 572 Master Lease Items that it views as essential for the continuing and necessary care and maintenance and environmental remediation of the Mine (the "Essential Items"). These items include trucks - pick-ups, dump trucks, water trucks, vacuum trucks - trailers for staff accommodations, water treatment plant, fuel tanks, glycol storage tanks, generators, graders, excavators, skid steers, quad, water compressor, incinerator, compactor, frost fighter, scissor lift, pumps and a transformer.

[18] The Receiver reported that without the Essential Items, it has no means to control water on site, no ability to generate electricity for Mine facilities, no equipment to maintain the road or airstrip, no vehicles and no living accommodations for staff to carry out care and maintenance.

[19] As of December 31, 2019, the Receiver incurred over $200,000 to repair Essential Items to a workable operating standard.

[20] After several months of unsuccessful negotiations with Welichem, the Receiver issued a notice of partial disclaimer to Welichem on November 8, 2019. It provided that the Receiver intended to disclaim or resiliate (defined below) the Master Lease but was preserving the Receiver's right to use the Essential Items, for a monthly payment of $13,500 as compensation for their use. The Receiver issued this notice after considering a number of factors, including the proportion of Essential Items in relation to all of the Master Lease Items; the feasibility of renting or purchasing alternate equipment; the amount spent by the Receiver on repairs to the Essential Items; and the projected wear and tear for use of the items during receivership.

ISSUES

[21] The issues in this application are:

i) whether the Receiver has the authority to use the Essential Items to carry out its duties (i.e. partially disclaim the Master Lease);

ii) if so, whether that authority was exercised properly in accordance with the Receiver's duties; and

iii) whether the use of these items constitutes an affirmation of the Master Lease, requiring the Receiver to make full payments to Welichem from the date of its appointment and ongoing.

POSITIONS OF THE PARTIES

[22] Welichem's grounds of objection are: first, at law the Receiver has a binary choice - affirm the entire contract or disclaim the entire contract. Second, the partial disclaimer was an attempt to alter unilaterally the material terms of the lease. This was beyond the Receiver's authority and beyond the terms of the Court Order appointing them as Receiver. The Court has no authority or jurisdiction to impose an agreement with new terms on the parties. Third, s. 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"), does not include the ability to disregard property and civil rights, in this case Welichem's ownership of the Master Lease Items. This is reinforced by s. 72(1) of the *BIA*, which says the provisions of the *BIA* 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 the *BIA*. Finally, the Court's inherent jurisdiction does not allow it to alter the lease agreement. Alternatively, if inherent jurisdiction does apply, the Court should not exercise that inherent jurisdiction, given its limits, including jurisprudence that says it should be used sparingly and in exceptional circumstances. This is not one of those circumstances because alteration of the lease terms as set out in the partial disclaimer would prejudice Welichem.

[23] The Receiver agrees that generally a contract is disclaimed in its entirety. However, there is no legal authority prohibiting a partial disclaimer. The Receivership

Order contains several provisions authorizing its actions. The powers provided by s. 243 of the *BIA*, or s. 26 of the *Judicature Act*, R.S.Y. 2002, c.128, are broad enough to include this action in these circumstances, and the Court has discretion provided by s. 243 of the *BIA* and its judicial interpretation. Alternatively, the Receiver relies on Bennett's text on Receivership in which he writes "in the proper case, the receiver may move before the court for an order to breach **or vary** an onerous contract including a lease of premises for equipment" [emphasis added] (Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto, Canada: Carswell, 2011) at p. 436 ("*Bennett on Receiverships*"). The Receiver's duties include acting honestly, fairly, in good faith, with transparency and in a commercially reasonable manner, all of which were fulfilled here. More specifically, the Receiver has a duty to protect all stakeholders, including Welichem, in the context of an urgent situation. The Receiver carefully considered its options, exercised its duties appropriately in the circumstances and did not act arbitrarily in issuing the notice of partial disclaimer.

BRIEF CONCLUSION

[24] The Court has the authority to authorize the Receiver to use the Essential Items it identified as necessary in order to continue the care and maintenance and environmental remediation, pursuant to the statutory discretion in s. 243(1)(c) of the BIA or in s. 26 of the Judicature Act. The Receiver has not affirmed the contract by its actions and is not required to pay the monthly lease amounts to Welichem, with the exception of the $13,500 per month for the use of the Essential Items.

ANALYSIS

The context

[25] “The nature of insolvency is highly dynamic and the complexity of a firm’s financial distress means that legal rules are not fashioned to meet every contingency.” (Janis P. Sarra, *Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters* (2007), 3 ANNREVINSOLV at 9 (WL) (“*Examination of Statutory Interpretation*”)).

[26] The actions of the Receiver must be assessed in the context of this case. That context is the Receiver’s appointment in September 2019 at a time when the Mine had not been operating for over four years; the Mine had flooded in 2017 and its condition was continuing to deteriorate; the regulator, Government of Yukon (“Yukon”) as represented by the Department of Energy, Mines and Resources, had entered the property to manage environmental and safety issues in October 2018; and the Receiver’s mandate was to stabilize the Mine and manage a process to transition the site to a responsible owner, if possible.

[27] The context also includes the involvement of Welichem for the first time in May 2018, when the Mine was in the deteriorated state described above. In addition, YZC had been successfully prosecuted twice for breaching its licence conditions; and it owed $25,000,000 in security to Yukon as of May 2018.

Definition of Disclaim, Resiliate and General Principles Applicable to Receivers Disclaiming Contracts or Leases

[28] To disclaim means to renounce or repudiate a legal claim or right. This means that the non-repudiating party is no longer obligated to perform the contract. To resile

means to draw-back from an agreement or contract (Bryan A. Garner ed. in chief, *Black's Law Dictionary*, (St. Paul, MN: Thomson Reuters, 2009) sub verbo “resile”).

[29] In the insolvency context, the receiver's ability to disclaim or affirm contracts of the debtor is permitted by the operation of s. 243(1) of the *BIA*, the order appointing a receiver, and the common law. Where a receiver affirms a contract, it will be subject to its terms and liable for its performance (*Bennett on Receiverships*, at pp. 435-436). Where a receiver disclaims a contract, it will not be personally liable for its performance.

[30] The common law has confirmed a receiver's authority to disclaim a contract and sets out the principles that apply to a receiver in making its decision to do so. The decision of a receiver about the future of the contracts of the debtor is made after they analyze the specific fact situation before them, guided by their general duties set out in the *BIA*, applicable principles at common law and the terms of the order appointing them.

[31] The general duties of a receiver include acting fairly, honestly and in good faith and dealing with the property of the debtor in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd*., [2002] O.J. No. 1398 (O.N.S.C.), at para. 15; *Philips Manufacturing Ltd., Re*, [1992] B.C.W.L.D. 1683 (B.C.C.A.), at para. 17, quoted in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, at para. 21. It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment (*Forjay*, at para. 21). It has a duty to the court to act in accordance with the

terms of the order and the law (*Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488 (N.S.S.C.), at para. 30).

[32] The British Columbia Court of Appeal, in the case of *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, provided a thorough review of the common law in both England and Canada as well as the statutory authorities giving power to trustees to disclaim contracts. The Court concluded at para. 31:

> In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

[33] Similar conclusions and guidance were provided by the Nova Scotia Supreme Court Appeal Division in *Bayhold Financial Corp. v. Clarkson Co*., [1991] N.S.J. No. 488, at para. 53, quoting *Receiverships* by Frank Bennett (*Toronto: Carswell, 1985)*:

> ... In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[34] In *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, the Court noted that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not available to other creditors (para. 96). The receiver must consider whether failure to disclaim might result in an unjustified preference in favour of one stakeholder (*Forjay*, para. 41).

[35] The British Columbia Supreme Court in *Pope & Talbot Ltd*., Re, 2009 BCSC 17, at para. 17, described the process undertaken by a receiver in deciding what to do about the debtor's contracts:

> Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

[36] It is acknowledged by the parties and I accept that a partial disclaimer or variance of a contract by a receiver is at the very least unusual. Welichem argues there is no legal authority allowing it and that if it were permitted, receivers would be trying to do it all the time.

[37] The first question is whether there is authority from the Receiver's Order, the statute and the law sufficient to support the Receiver's actions in this case.

i) Does the Receiver Have Authority to Use the Essential Items

a) Receiver's Order

[38] The Receiver derives its power and authority from the Court Order made under the *BIA* appointing it as Receiver, dated September 13, 2019. The Order includes at para. 3 that the Receiver is:

> … empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …

> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor,
>
> …
>
> (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
>
> …
>
> (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if considered necessary or appropriate by the Receiver, in the name of the Debtor;
>
> …
>
> (s) to the extent authorized and approved by Yukon, to carry out care and maintenance activities with respect to the Mine and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
>
> (t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

[39] Welichem argues that the wording in s. 3(c) of the Order supports its view that the Receiver has only a binary choice available to it. A partial disclaimer or variance would require the wording "cease to perform all or part of the contract", similar to the phrase "cease to carry on all or part of the business."

[40] This argument ignores ss. (s) and (t) of the Order, giving the Receiver general authority to take steps reasonably incidental to its powers and statutory obligations. It also ignores ss. (i) and (p) which set out the Receiver's powers to undertake

environmental and workers' health and safety assessments, and obtain any regulatory approvals or permits it considers appropriate or necessary. These sections are relevant to ensuring proper care and maintenance and environmental remediation are continued in the context of an unstable mine site.

[41] Section 3(c) which includes the Receiver's power to cease to carry on all or part of the business is also relevant to the use of Essential Items. The business of the company is the operation of a mine. The Receiver is not carrying on that business; it is carrying on care and maintenance and remediation in order to preserve the assets and allow the Mine to become operational in future. Most of the equipment and infrastructure covered by the Master Lease is for the purpose of carrying out the operation of mining. The Receiver has specifically identified the specific equipment and infrastructure it needs in order to carry on the work it is required to do - i.e. care and maintenance and environmental remediation. This is consistent with their powers as set out in s. 3(c).

[42] The Receiver's general powers under the Order include protecting and preserving the Property, defined in the Order as the assets, undertakings and property, including all proceeds, of the Debtor. The Receiver's responsibilities for the Property must be understood in the context of the definition of property set out in s. 2 of the *BIA*, which includes "**obligations arising out of or incidental to property"**. In this case the obligations arising out of or incidental to the Property necessarily include carrying out the care and maintenance and environmental remediation at the Mine. The Essential Items are necessary to carry out that work.

b) Statute

[43] The determination of the Receiver's authority to use the Essential Items and the Court's authority to permit it or not requires an interpretation of s. 243(1) of the *BIA* and s. 26 of the *Judicature Act*.

[44] The Receivership Order addresses what powers the Court has granted, based on the powers the Court may grant under the statute. These statutory powers found primarily in s. 243(1) of the *BIA* are:

> ... 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]

[45] Section 26(1) of the *Judicature Act* provides:

> 26(1) A *mandamus* or an injunction may be granted or a **receiver 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**, and that order may be made either unconditionally or **on any terms and conditions the Court thinks just.** [emphasis added]

[46] The modern rule of statutory interpretation is: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd

ed. 1983), at p. 87). It is a useful tool for construing legislation that grants broad powers to courts in general terms. By insisting on a purposive analysis, it helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court.

[47] The Ontario Court of Appeal in the decision of *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 ("*Third Eye*"), reviewed the history of s. 243(1) of the *BIA*, and in particular the scope of s. 243(1)(c). The Court noted Parliament imported the same broad general wording from s. 47(2)(c) of the *BIA* which was enacted in 1992 – that is, "take such other action that the court considers advisable." The broad powers provided to the interim receivers by courts pursuant to s. 47(2) of the *BIA* had been endorsed by judicial interpretation of the section. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (O.N.C.J.) ("*Curragh*"), found that s. 47(2) of the *BIA* permitted the Ontario court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. His reasoning was as follows at para. 22:

> ... It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what **"justice dictates" but also what "practicality demands."** It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. ...[emphasis added]

[48] The Court of Appeal in *Third Eye* went on to interpret Justice Farley's comment as follows at para. 53:

> Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what “justice dictates” but also what “practicality demands”.

[49] The Jackson and Sarra hierarchy referred to by the Court of Appeal is from the paper *Examination of Statutory Interpretation* referenced at para. 25. The authors' thesis was that courts should first engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation to reveal that authority. Before accessing other judicial tools, courts should exercise their authority under the statute. Statutory interpretation may reveal a discretion, and the courts may determine its extent; or statutory interpretation may reveal a gap. If there is a gap, the common law may permit it to be filled, and the judge has discretion as to whether they invoke authority to fill the gap. The final step in the hierarchy is the exercise of inherent jurisdiction. It may fill the gap and the judge still has discretion to invoke the authority of inherent jurisdiction or not.

[50] Applying this hierarchy to Justice Farley's conclusion in *Curragh* that the Court can enlist the Receiver to do what justice dictates and practicality demands, the Court of Appeal in *Third Eye* observed that Justice Farley was exercising his discretion under the statute, not the court's inherent jurisdiction.

[51] The Court of Appeal noted that when Parliament enacted s. 243 of the *BIA*, it was evident courts had interpreted the wording “take such other action that the court considers advisable” in s. 47(2)(c) as permitting the court to do what “justice dictates”

and "practicality demands" (para. 57). Thus they conclude that this meaning was imported into s. 243.

[52] The Court of Appeal then quoted from Professor Wood in his text *Bankruptcy and Insolvency Law* (Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at p. 510, who concluded the following about Parliament's intention for receivers appointed under s. 243:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. <u>This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets.</u> [emphasis already added] (para. 58)

[53] The Court of Appeal stated the importance in interpreting s. 243 of reviewing the purpose of receiverships generally. This is part of understanding the scheme and object of the *BIA*. The purpose of a receivership is to:

> "enhance and facilitate the preservation and realization of the assets for the benefit of creditors" (*Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Park Ltd*. [1995] O.J. No. 1482 (O.N.C.J.), at para. 18), … generally achieved through the liquidation of the debtor's assets: Wood, at p. 515. … The receiver's primary task is "to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust CO. v. 1117387 Ontario Inc*., 2010 ONCA 340, at para. 77". (para. 73)

[54] Certainty of equitable distribution of a debtor's assets among creditors is also important. Further, the assets of an insolvent business must be managed responsibly, in compliance with regulatory requirements, in order to preserve the assets, the reputation of the insolvent and to maximize the value for creditors.

[55] The question becomes whether the authority provided by the statute is sufficient to allow the Receiver to use the Essential Items in this legal and factual context. Case law is of assistance in this assessment.

[56] Welichem relies on the case law in support of its argument that the Receiver has a binary choice only - to affirm the whole lease or disclaim the whole lease - saying this is consistent with the law of contract. Most of the cases referred to are in the context of supply contracts, not leases.

[57] Welichem refers to one case from 1896, *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, in which the Court held that partial disclaimer was not permitted. This 124-year-old English case was decided in the context of a contested probate of a will, not in the context of an insolvency or the application of the *BIA*. The testator had appointed trustees, one of whom was the executor, to manage and distribute all of his property, which was located both in England and overseas. The executor disclaimed all the property in England, but not the testator's overseas property. In holding that the disclaimer was not valid, the Court noted that it was the testator's intention to have one trustee manage and deal with all of his property, regardless of its location.

[58] I agree with the Receiver this case has no applicability here because of its age, different context and facts.

[59] Welichem further argues that the Receiver's actions disregard Welichem's ownership of the equipment and cannot be justified by s. 243(1)(c) because of its remedial purpose and consequent limits. Welichem relies in part on the comments of the Nova Scotia Supreme Court in *Railside Developments Ltd., Re*, 2010 NSSC 13, at paras. 80 and 88, saying that the words of s. 243(1)(c) of the *BIA* are broad, but their

focus is remedial, since that section of the statute creates the remedy of receivership. The scope of this section cannot extend to affect existing property and civil rights, to the extent they are not overridden by the *BIA*. This is further supported by the wording in s. 72(1) of the *BIA* which states that the provisions of the *BIA* 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.

[60] *Railside* dealt with whether s. 243(1)(b) of the *BIA* allowed the Receiver to register condominium units without consent of the owners required pursuant to s. 11(1)(b) of the Ontario *Condominium Act*, S.O. 1998, c. 19. Their justification was that selling individual units rather than a single complex would maximize value for stakeholders. The Court had to analyze whether there was an operational conflict between the provincial statute and the *BIA* that prevented s. 11(1)(b) from operating when s. 243 applies. The Court found that there was no operational conflict and held that the Receiver had to obtain consent of the lien holders in order to register the condominium units.

[61] In *Railside*, the focus was the ultimate goal of maximizing value of the condominium assets. In achieving that goal there was the potential for conflict with the legislative requirement to obtain consent (which may be withheld) of the owners to sell. In the case at bar, while maximizing value for all the creditors is the ultimate objective, the use of the Essential Items is not in conflict with that goal. The use of the Essential Items is necessary in order to preserve all of the debtor’s assets at the Mine, and those related to those assets, and to enhance their value beyond their current state, in turn maximizing the value for all creditors. Unless the Receiver continues to carry out the

care and maintenance and environmental remediation, there is a risk of significant compromise to the debtor's property.

[62] The Receiver's actions are not an incursion on the property and civil rights of Welichem. The Receiver has paid and continues to pay Welichem monthly for their use of the Essential Items. It has invested over $200,000 in repairs (as of the date of this application) to bring the equipment to operational standards. This is more than Welichem received under its lease with YZC.

[63] Welichem argues it is prejudiced by the Receiver's attempt to retain the benefits of the Master Lease without the obligations. Welichem notes the Receiver has refused to pay insurance for the Essential Items; the use is causing wear and tear and subsequent depreciation of the equipment; and the compensation amounts are inadequate and arbitrary.

[64] The Receiver must act to benefit all creditors, not just Welichem, in preserving the debtor's assets by carrying on the necessary care and maintenance and environmental remediation. Welichem's interests are limited to preserving its position as first secured creditor and maximizing value for itself. While the Receiver owes a fiduciary duty to Welichem, it also owes fiduciary duties to the other stakeholders - Yukon, the unsecured creditors, the public, including affected First Nations. It must balance the interests of all.

[65] In my view, the unique circumstances of this case call for the application of the interpretation of s. 243(1)(c) of the *BIA* first set out in *Curragh*, a case with underlying facts similar to this one. *Curragh* was an insolvent lead-zinc-silver mine, albeit a much larger one than the Wolverine Mine, in Faro, Yukon. As noted above, Justice Farley

described the condition of insolvency as carrying its own internal seeds of chaos, unpredictability and instability, thus allowing the Court to enlist the receiver to do what justice dictates and practicality demands (*Curragh*, at para. 22).

[66] In the case at bar, the ongoing environmental instability at the Mine site; the Mine's remote location; and the chaotic circumstances that existed at the time of the Receiver's appointment, including employees who were on the verge of abandoning the site, unusable equipment due to neglect, workers' health and safety concerns, and the absence of sufficient funding to continue the most basic care and maintenance are all factors that distinguish this case from the others that are relied on by Welichem. Welichem's initial involvement with the Mine in May 2018, given the Mine's deteriorated and financially unstable state at that time raises questions about its commercial reasonability. The Receiver owes duties not only to Welichem but also to the other creditors. These are factors to be considered in determining what justice dictates and practicality demands.

[67] Topolniski J. in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:

> 27 Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. ...

[68] Here, the pragmatic problem-solving approach is to allow the Receiver to use the Essential Items, only 12.4% of the Master Lease Items, in order to ensure the care and maintenance and environmental remediation can continue.

[69] For the above reasons, I find there is authority under s. 243(1)(c) of the *BIA* for the Court to allow the Receiver to use the Essential Items for the purpose of carrying out necessary care and maintenance and environmental remediation.

[70] This analysis applies equally to the interpretation of s. 26 of the *Judicature Act*, which also contains broad language. Although no cases were discussed in this application that are similar to this one in which the Court interpreted and applied this section directly, the same principles apply if the *Judicature Act* were relied upon.

ii) Did the Receiver Exercise its Authority in Compliance with its Duties

[71] Upon its appointment in September 2019, the Receiver entered the Mine and did a full inventory of the items. The Receiver gave careful consideration to options available to it related to the existing lease in carrying out its mandate and the factors affecting those options. These factors included:

- i) During the first three months, the Receiver had numerous discussions with Welichem about short-term rental of the Essential Items and long-term involvement of the Master Lease Items in the SISP. They were ultimately unsuccessful in achieving any agreement.
- ii) The basic care and maintenance activities and necessary water treatment could not be carried out without the use of the Essential Items. Specifically the Receiver:
  - a) Could not control the water on site (ground water, surface water, underground water, water in the tailings storage facility);
  - b) Could not generate power for electricity for the site;
  - c) Could not maintain the 26 km access road or airstrip; and

d) Would not be able to have vehicles or living accommodations for staff to carry out care and maintenance activities.

iii) The Receiver considered the monthly lease payments of $110,000 to be high, given the poor or unusable condition of many of the Master Lease Items, due to the non-operation of the Mine and the restricted funding since 2015. Examples of the neglected items included:

a) All but one of the trucks was locked out by the Yukon Workers Compensation Health and Safety Board ("YWCHSB");

b) Only two of ten power generators were operating and on inspection one of the two was found to be a fire hazard;

c) The heat trace system was malfunctioning causing the pipes to freeze;

d) The YWCHSB had issued ten orders related to the safety certification of vehicles; the condition of emergency transport vehicles; the absence of emergency response plan; the inadequacy of fire suppression equipment; as well as stop work orders on various pieces of Master Lease equipment. The Receiver addressed all of these orders except for repairs on non-essential Master Lease Items.

iv) The Receiver considered the cost of insurance of $150,000 to be inordinately high, especially given the Receiver's use of only 79 items. It noted that insurance had not been maintained by YZC over Welichem's objections. The current continuous presence of more employees and contractors on site, the remote location of the Mine and therefore the lower risk of access by others to the items were considered.

v) The Receiver was concerned about the potentially high cost of the end of lease requirement to return all Master Lease Items to a place of Welichem's choosing.

vi) The Receiver considered the cost and time to replace these Essential Items to be unreasonable given the remote location of the Mine and the need to continue the care and maintenance and remediation activities immediately. There was real potential for environmental damage and consequent risks to public health and safety if it became necessary to wait for replacement equipment to arrive.

[72] The Receiver calculated the $13,500 per month cost for the use of the 79 Essential Items on the basis of their percentage of the 572 Master Lease Items, as well as the percentage of their value based on the December 2017 appraisal. These Essential Items were only 12.4% of the Master Lease Items. The Receiver has made monthly payments in this amount to Welichem, since December 2019.

[73] In my view, the Receiver has not acted arbitrarily. It has exercised proper discretion in the circumstances. It carefully considered its options, was transparent about its intentions, and attempted to negotiate a mutually acceptable agreement with Welichem. It has been honest and fair. The Receiver provided legitimate reasons showing the onerous nature of the lease terms in the circumstances. In exercising its duty to maximize value for all of its stakeholders, the Receiver acted in a commercially reasonable manner in doing so.

[74] The ongoing deterioration of the condition of the Mine and the need for the Receiver to act quickly in order to prevent an environmental disaster were driving forces behind the Receiver's actions. Although not specifically contemplated in the legislation or precedents to date, the Receiver's carefully considered and fairly implemented decision to use the Essential Items in order to continue with the care and maintenance and remediation of the Mine site and to compensate Welichem for their use was justifiable and appropriate under the authority provided in s. 243(1) of the *BIA*.

[75] *Bennett on Receiverships* states at p. 436, "In the proper case, the receiver may move before the court for an order to break **or vary** an onerous or material contract including a lease of premises or an equipment lease where the payments are significant … [T]he receiver must act reasonably and exercise good business sense" in doing so [emphasis added].

[76] It is significant the term vary is used in the text in a discussion about leases of premises or equipment. The other cases referred to for the principles applicable to disclaimer are in the context of supply contracts, not leases, and vary is not mentioned in that context. Bennett also says "in the proper case" indicating the limits of its use.

[77] There is a significant body of law and legal principles explaining the meaning of 'vary' in contract law. It is not necessary here to pursue an analysis of that in this case because of the unique circumstances here.

[78] I view this text excerpt as general support for the Receiver's appropriate exercise of authority under s. 243(1) of the BIA in the proper case, such as this one, to use the Essential Items of the Master Lease.

[79] As noted at the hearing of this application by counsel for the Receiver, and explained above, it is not necessary to resort to the inherent jurisdiction of the Court in this circumstance as sufficient discretion is provided by the statute to both the Receiver and the Court.

iii) Did the Receiver Affirm the Lease, Making it Responsible for Lease Payments?

[80] Welichem argues that by using the Essential Items, the Receiver has affirmed the contract and should pay the entire monthly lease amounts and comply with all of the lease obligations.

[81] In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication (*Pope & Talbot ltd.*, at para. 15).

[82] In the case at bar, the Receiver has not affirmed the contract by using only the Essential Items in the context of an urgent continuation of care and maintenance and environmental remediation. The result would be absurd in that if this amounted to an affirmation, the Receiver would be required to pay the full amount of $110,000 per month to Welichem, for the use of only 79 of the 572 items, after spending over $200,000 in repairs on those 79 items. This result also ignores the unique factual circumstances in this case and consideration by the Receiver of all the options available.

[83] The Receiver is not required to pay all amounts owing to Welichem under the Master Lease or comply with all of its obligations as a result.

CONCLUSION

[84] I find that the use by the Receiver of the Essential Items is a disclaimer of the Master Lease and a permissible variation for the reason that its terms are onerous and not commercially reasonable in the circumstances. The Receiver properly exercised its authority under s. 243(1) of the *BIA* and/or s. 26 of the *Judicature Act* to do so.

____

DUNCAN J.

BENNETT on RECEIVERSHIPS

Second Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

1999

CARSWELL
Thomson Professional Publishing

The paper used in this publication meets the minimum requirements of American National Standard for Information Services – Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Canadian Cataloguing in Publication Data

The National Library of Canada has catalogued this publication as follows:

Bennett, Frank.
Bennett on receiverships

2nd ed.
Previously published under title: Receiverships.
Includes index.
ISBN 0-459-26279-3

1. Receivers—Canada I. Title. II. Title: Receiverships.

KE8540.B46 1998 346.71'078 C98-932750-7
KF9016.B46 1998

This book is printed on recycled paper.

CARSWELL
Thomson Professional Publishing

One Corporate Plaza, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4
Customer Service:
Toronto: 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax 1-416-298-5094

> in-trade and other assets, and then under the order of the Court the debts of the concern were liquidated and the balance divided. If it was desired to continue the trade at all, it was necessary to appoint a manager, or a receiver and manager as it was generally called. He could buy and sell and carry on the trade. . . . so that there was a well-known distinction between the two. The receiver merely took the income, and paid necessary outgoings, and the manager carried on the trade or business in the way I have mentioned.

The appointment of a receiver usually coincides with the appointment of a manager in the same entity. In this dual role, the receiver and manager may operate the debtor's business pursuant to the terms of the appointment. Initially, such terms may authorize the receiver and manager to continue and preserve the debtor's business. Subsequently, the receiver and manager may be authorized to liquidate or sell the business as a going concern.[23] On the other hand, the security holder may simply appoint a manager of the property leaving to itself the right to sell. This situation often occurs in a mortgage enforcement whereby the mortgagee appoints a property management company to collect the rents and look after the real estate aspects while exercising the power of sale itself.

If the security instrument does not charge the debtor's goodwill, only a receiver can be appointed.[24] However, if the security instrument covers all the debtor's property and effects whatsoever, the court will infer that the goodwill was included in order to permit the appointment of a receiver and manager.[25]

There is no difference in the standard of care between a receiver and a receiver manager. While there is a difference in function, that difference does not diminish the obligations of a receiver to act reasonably according to what the circumstances and the court order requires.[26]

In this book, reference to a receiver includes a receiver and manager unless the context provides otherwise.

2. STATUS OF RECEIVER AND MANAGER

(a) Court Appointment

As the receiver is court-appointed, the receiver is agent of neither the security holder nor the debtor. The receiver is an officer appointed by the court and accountable to the court which made the appointment as well as being accountable to and owing fiduciary duties to all interested parties, including the

23 *Wahl v. Wahl (No. 2),* [1972] 1 O.R. 879, 16 C.B.R. (N.S.) 272 (S.C.).
24 *Whitley v. Challis,* [1892] 1 Ch. 64 (C.A.).
25 *Re Leas Hotel Co.; Salter v. Leas Hotel Co.,* [1902] 1 Ch. 332.
26 *Willows Golf Corp. (Receiver of) v. International Capital Corp.* (1994), 122 Sask. R. 75, 16 C.L.R. (2d) 206 (Q.B.), appeal allowed in part (1995), 134 Sask. R. 81, 34 C.B.R. (3d) 82, [1995] 9 W.W.R. 1 (C.A.).

debtor.[27] As a court officer, the receiver must discharge its duties properly and is afforded protection on any motion for advice and directions.[28] The receiver is not subject to the control of the security holder who applied to the court for the appointment[29] nor is the receiver subject to the control of the debtor which did not appoint the receiver. The receiver should act promptly in fulfilling its duties so as not to prejudice creditors. Once appointed by the court, the receiver should not take the position of the security holder who initiated the appointment.[30] In a

27 *Re Philip's Manufacturing Ltd.* (1992), 69 B.C.L.R. (2d) 44, 12 C.B.R. (3d) 149, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161 (C.A.); *Re Jenny Lind Candy Shops Ltd.*, [1935] O.R. 119, 16 C.B.R. 193 (S.C.) citing Halsbury's Laws of England; *Alberta Treasury Branches v. Tetz* (1998), 60 Alta. L.R. (3d) 42, 2 C.B.R. (4th) 119 (Master). In Ontario, prior to the merging of the County and Districts Courts with the Supreme Court in 1984, now known as the Ontario Court (General Division), a receiver appointed in the Supreme Court was answerable in that court and should not become involved in County Court proceedings: *Victoria Insurance Co. of Canada v. Young's-Grave Bloodstock Inc.* (1984), 49 O.R. (2d) 47, 47 C.P.C. 119 (S.C.).

In *Re Philip's Manufacturing Ltd.*, the court set out certain fundamental principles governing the office of a court-appointed receiver-manager:

1. A receiver-manager appointed by the court in a debenture-holder's action is an officer of the court responsible to the court and not to the holder of the debenture at whose instance the appointment is made: *Parsons v. Sovereign Bank of Canada,* [1913] A.C. 160, 9 D.L.R. 476 (P.C.); *Royal Trust Co. v. Montex Apparel Industries Ltd.*, [1972] 3 O.R. 132, 17 C.B.R. (N.S.) 45, 27 D.L.R. (3d) 551 (C.A.).
2. A receiver-manager so appointed owes fiduciary duties to all parties, including the debtor: see *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44 (C.A.), and cases there referred to.
3. Such a receiver-manager is at all times subject to the supervision of the court and entitled to the court's directions: see the above authories, also *Canada Deposit Insurance Corp. v. Greymac Mortgage Corp.* (1991), 2 O.R. (3d) 446 (Gen. Div.) [appeal dismissed (1991), 4 O.R. (3d) 608 (C.A.)], and cases there cited.

Similar to a trustee in bankruptcy, the receiver as an officer of the court should keep an even hand in dealing with all parties: see *Re Reed* (1980), 28 O.R. (2d) 790, 34 C.B.R. (N.S.) 83, 111 D.L.R. (3d) 506 (C.A.).

The role of a court-appointed receiver [*Plisson v. Duncan* (1905), 36 S.C.R. 647] has been referred to in comparing the role of an *amicus* in a custody and access hearing: *Romaniuk v. Alberta* (1988), 58 Alta. L.R. (2d) 114, 44 C.C.L.T. 148, [1988] 4 W.W.R. 107, 50 D.L.R. (4th) 480 (Q.B.).

28 *Parsons v. Sovereign Bank of Can.,* [1913] A.C. 160 (P.C.). See below under "Powers and Duties, Court Appointment."

29 *Royal Trust Co. v. Montex Apparel Indust. Ltd.,* above, note 27, [1972] 3 O.R. 132 at p. 136 (C.A.); applied in *Royal Bank v. Vista Homes Ltd. et al.* (1984), 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124 (S.C.).

30 *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 78 Sask. R. 87, 76 C.B.R. (N.S.) 241, 62 D.L.R. (4th) 243 (C.A.) dismissing an appeal from (1989), 73 Sask. R. 140, 73 C.B.R. (N.S.) 73 (Q.B.) where as a result of the receiver's delay, the rights of contractors were prejudiced in the enforcement of their claims against a trust fund.

court appointment, the receiver ought to have independent counsel in order to avoid any bias or prejudice.[31]

It is important to review the legislation governing the court-appointment of a receiver. The legislation may specifically provide for the appointment of a receiver, or receiver and manager, and it may make reference to the powers and duties of the receiver. Where the legislation provides for the appointment of a receiver, it should be interpreted to encompass a receiver and manager as the remedies are not mutually exclusive.[32] The legislation may also provide special remedies to the security holder or receiver. Under *Personal Property Security Act* legislation, the court-appointed receiver is able to take advantage of technical errors made by other secured parties in determining priorities.[33]

While the order authorizes the receiver to take control of the debtor's assets, it does not transfer the debtor's title to the receiver. Title remains in the debtor's name until such time as the receiver disposes of or realizes upon the assets.[34] The proceeds of realization, while under the control of the receiver, take the place of the assets prior to any order for distribution.

Although title does not vest in the court-appointed receiver, the receiver in its managerial capacity takes charge of the management of the debtor's assets. The powers of the officers and directors of the debtor corporation are suspended during the currency of the order with respect to the management of the assets under the receiver's care. The officers and directors do not possess any residual power to create debt or enter into new contracts with third parties. If the officers are retained by the receiver, their powers are not reinstated. However, the directors can commence proceedings that do not prejudice or conflict with the security holder in the enforcement of the security. In fact, the directors are under a continuous obligation to the shareholders and to the unsecured creditors to act

31 *Royal Bank v. Vista Homes Ltd. et al.*, above, note 29; *Bank of Montreal v. Big White Ski Dev. Ltd.* (1988), 25 B.C.L.R. (2d) 86 (S.C.); *NEC Corp. v. Steintron Int'l Electronics Ltd.* (1986), 14 C.P.C. (2d) 305 (Ont. S.C.); *Royal Bank v. Lee* (1992), 3 Alta. L.R. (3d) 187, 9 C.P.C. (3d) 199 at p. 203 (C.A.); *Canadian Commercial Bank v. Pilum Investments Ltd.* (1987), 62 C.B.R. (N.S.) 319 (headnote only) (Ont. S.C.). However, in a court-appointed receivership by way of equitable execution, it seems that counsel for the creditor ought to be able to continue to act for the receiver since the receivership is creditor-driven and the creditor is unlikely to change counsel at this stage to pursue additional actions.

32 *Cook's Ferry Band v. Cook's Ferry Band Council*; [1989] 3 F.C. 562, 75 C.B.R. (N.S.) 228, [1989] 4 C.N.L.R. 105 (T.D.) referring to section 44 of the *Federal Court Act*, R.S.C. 1985, c. F-7.

33 See, for example, section 20 of the *Personal Property Security Act*, R.S.O. 1990, c. P.10.

34 See, for example, *Adelaide Capital Corp. v. St. Raphael's Nursing Homes Ltd.* (1995), 42 C.B.R. (3d) 17 (Ont. Gen. Div.).

honestly and in the best interests of the debtor to attain the best possible price for its assets.[35]

Included in these powers is the right of the receiver to waive any solicitor and client privilege of the debtor in order to obtain information regarding the assets and affairs of the debtor.[36] As a result, the solicitor's lien is ineffective as against the receiver since the solicitor has no better right to retain the client's documents as would the client. If the client is bound to deliver the documents to the receiver, the solicitor is similarly bound to do so.[37]

The powers of officers and directors are not suspended, however, with respect to the defence of the action brought by the security holder against the debtor or in action against the security holder. The appointment of the receiver does not expunge the contract between the security holder and the debtor. The directors continue to have power to instruct counsel to defend or otherwise sue on the contract.[38] Furthermore, their powers do not appear to be suspended with respect to any statutory liabilities imposed upon officers and directors. This seems to be a hardship on officers and directors, since they are no longer in

---

35 *Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.*, [1978] Q.B. 814, [1978] 2 All E.R. 896 (C.A.); considered in *Meadow Rue Hldg. Ltd. v. Alberta* (1989), 98 A.R. 394, 76 C.B.R. (N.S.) 167 (Master); *Bank of Montreal v. Northguard Hldg. Ltd.* (1989), 58 Man. R. (2d) 241, 74 C.B.R. (N.S.) 86 (C.A.); followed in *Société Générale (Canada) v. 743823 Ontario Ltd. and Savage Shoes Ltd.* (1989), 41 C.P.C. (2d) 286 (Ont. Master); *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 at p. 189, 54 C.P.R. (3d) 161 (Ont. Gen. Div.). Presumably, if there are other assets that are not covered by security and not under the receiver's control, the directors should be able to deal with them and in the case of lawsuits, with sufficient indemnity to the security holder: *First Investors Corp. v. Prince Royal Inn Ltd.* (1988), 60 Alta. L.R. (2d) 269, 69 C.B.R. (N.S.) 50, [1988] 5 W.W.R. 375 (C.A.). Additionally, if the receiver refuses to take an action which might benefit the debtor, the directors should pursue the action, and according to the *Newhart* case, it is incumbent on the directors to do so for other creditors. But see *Tudor Grange Holdings Ltd. v. Citibank NA*, [1991] 4 All E.R. 1 (Ch.D.) where the court doubted the correctness of the *Newhart* case.

See also *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264 (Q.B.), affirmed (1989), 65 Alta. L.R. (2d) 374 (C.A.) where the court inferred that the order appointing a receiver and manager could be varied to permit the debtor to create debt instruments for the purposes of qualifying under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. As a result of the 1997 amendments to that Act (S.C. 1997, c. 12, sections 120-127), a debtor need not create debt to qualify to take protection.

36 *Ont. Securities Comm. v. Greymac Credit Corp. et al.; Ont. Securities Comm. v. Prousky* (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 146 D.L.R. (3d) 73 (Div. Ct.); *Re Russell & Dumoulin* (1986), 9 B.C.L.R. (2d) 265 (S.C). See *Royal Bank v. Lee* (1992), 3 Alta. L.R. (3d) 187, 9 C.P.C. (3d) 199 (C.A.) where the court-appointed receiver erred in releasing a privileged document.

37 *Imperial Developments (Can.) Ltd. (Receiver of) v. Field & Field* (1988), 59 Alta. L.R. (2d) 193, 68 C.B.R. (N.S.) 164, 28 C.P.C. (2d) 257, 51 D.L.R. (4th) 700 (C.A.); *Northland Bank v. L.G. Lands Ltd. et al.* (1983), 44 B.C.L.R. 237, 47 C.B.R. (N.S.) 305, [1983] 4 W.W.R. 86 (S.C.); *Re Aveling Barford Ltd.*, [1988] 3 All E.R. 1019, [1989] 1 W.L.R. 360 (Ch.D.).

38 *Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd.*, above, note 35; *Del Zotto et al. v. Internat. Chemalloy Corp.* (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268 (S.C.); *T.D. Bank v. Fortin* (1978), 26 C.B.R. (N.S.) 168, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111 (B.C. S.C.); *Bank of N.S. v. Saskatoon Salvage Co. (1954) Ltd.* (1983), 29 Sask. R. 285, 51 C.B.R. (N.S.) 167 (C.A.); *First Investors Corp. v. Prince Royal Inn Ltd.*, above, note 35.

possession or control of the assets and are not likely to be in a position to fulfill their obligations.

Subject to the terms of the order, the receiver does not have any limitations in managing the debtor's operations, although the receiver has the general responsibility of operaing it in a business-like manner. If the receiver discharges that responsibility *bona fide,* the receiver is entitled to an indemnity for the actions performed in the course of the duties. If the receiver acts beyond the terms of the order, the receiver is not entitled to be indemnified unless the receiver can demonstrate conclusively that its acts were *bona fide*, and that such actions benefitted the administration and were required in order to discharge the duties prior to court approval.[39]

Insofar as environmental liabilities are concerned, the court-appointed receiver does not become liable for costs of any clean-up or for the damages caused by or attributed to the debtor to a contaminated site *before* the appointment. In other words, the receiver is not vicariously liable for environmental damages.[40] However, where the receiver carries on the debtor's business, the receiver as an officer of the court has a duty to protect the environment in accordance with the law and, therefore, it becomes liable for damages for an environmental clean-up if it fails to comply with statutory environmental regulations and losses occur.[41] Without specific legislation, the court-appointed receiver in carrying on the business does not become liable for an amount in excess of the value of the property over which it is appointed.[42]

The receiver is a principal with respect to the employees and the contractual obligations of the debtor. The order impliedly terminates these relationships as they existed.[43] If the receiver decides to continue to carry on the business, the receiver does so not as an agent but as a principal; thus, the employees become new employees of the receiver. Prior to the appointment, the proposed receiver should review, to the extent possible, the business operations of the debtor. Soon after the order is made, the security holder ought to bring a motion to the court for directions as to whether or not the receiver should continue to retain the employees and perform the obligations of the debtor to third parties.

While the debtor is bound by the terms of existing contracts, the court-appointed receiver is not. If the receiver intends to break such contracts, it should

---

39 *Re Edinburgh Mtge. Ltd. and Voyageur Inn Ltd.; Rothberg v. Fed. Bus. Dev. Bank* (1977), 24 C.B.R. (N.S.) 187 (Man. Q.B.), affirmed (1978), 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 (Man. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Can. Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. Master), reheard and affirmed (1976), 21 C.B.R. (N.S.) 272 (Ont. S.C.).

40 *Bank of Montreal v. Lundrigans Ltd.* (1992), 100 Nfld. & P.E.I.R. 36, 12 C.B.R. (3d) 170, 92 D.L.R. (4th) 554 (Nfld. T.D.).

41 *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.*, above, note 27, allowing an appeal from (1989), 75 Alta. L.R. (2d) 185, 80 C.B.R. (N.S.) 84 (Q.B.), applying *Canada Trust Co. v. Bulora Corp.* (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), affirmed (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.).

42 *Bank of Montreal v. Lundigrans Ltd.*, above, note 40. See subsection 14.06(2) of the *Bankruptcy and Insolvency Act* with respect to receiverships under Part XI.

43 *Reid v. Explosives Co.* (1887), 19 Q.B.D. 264 (C.A.).

bring a motion before the court for an order to do so as the breach renders the debtor liable in damages and may impair the debtor's goodwill.[44]

As a court-appointed officer, the receiver is a principal in its dealings with third parties. Therefore, the receiver is liable for contracts it enters into.[45] But the receiver may be indemnified for any such liability out of the assets under its control and possession.[46] Where there are insufficient assets to cover this indemnification, the court cannot make the security holder or the parties initiating the appointment responsible, even though the debtor consented, unless the original order so provided.[47] In the alternative, the safer practice is for the receiver to contract with third parties, but in doing so, specifically disclaim any personal liability. In other words, the receiver can contract with another as receiver of the debtor without personal liability. Accordingly, third parties may only look to the assets under receivership for payment.

To maintain some semblance of order and control, the order appointing the receiver usually provides that no action or proceeding may be taken or continued against the debtor or receiver without leave of the court. In the event that an interested person believes he or she has rights paramount to those of the receiver and those of the security holder who obtained the appointment of the receiver, then that person should seek leave of the court for permission to claim priority before taking any legal proceedings.[48]

Similarly, the court will not allow all the creditors to become parties in the receivership action. While the receiver is a court officer and represents all creditors, most creditors do not become parties but only those who have a direct financial or legal interest in the receivership become parties. Such creditors may, for example, claim priority or make a proprietary claim against the assets in receivership.[49]

Subject to leave being obtained, the court will not allow the possession of the debtor's assets by a court-appointed receiver to be disturbed by anyone, however good his or her claim may be. Any interference with the receiver's

---

44 *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.); see also Chapter 7, "5. Contracts".

45 *Moss S.S. Co. v. Whinney*, [1912] A.C. 254, [1911-13] All E.R. Rep. 344 (H.L.).

46 *Rogers v. Thorne Riddell Inc.* (1982), 41 C.B.R. (N.S.) 184 (Alta. Q.B.).

47 *Burt, Boulton & Hayward v. Bull*, [1895] 1 Q.B. 276 (C.A.); followed in *Re Ashk Development Corp.* (1988), 61 Alta. L.R. (2d) 375, 70 C.B.R. (N.S.) 72 (Q.B.) where the trustee in bankruptcy applied unsuccessfully for an order granting it leave to sue the court-appointed receiver in its personal capacity for failure to liquidate the debtor's assets according to stated amounts; see also *Boehm v. Goodall*, [1911] 1 Ch. 155.

48 *See Trusts & Guar. Co. v. Oakwood Clubs* (1931), 40 O.W.N. 581 (C.A.), where a prior mortgagee commenced a foreclosure action against the receiver without leave; *Stephens v. Royal Trust Co.* (1917), 25 B.C.R. 77 (C.A.).

49 *Grey v. Royal Bank* (1989), 102 A.R. 347, 77 C.B.R. (N.S.) 202 (C.A.).

possession without leave of the court is a contempt.[50] It is no defence to a contempt proceeding that the person has an honest belief that he or she is entitled to the asset. If a person has a valid claim, it should be advanced through the court rather than taking the matter into its own hands. Such a rule is necessary in order to enable the court to administer justice among the conflicting parties. If anyone interferes with the gathering of the assets, the receiver may proceed to commit such person or corporate officer to jail or it may commence an action restraining such a person from interfering with the collection of the assets. The court, however, will not restrain persons who are not parties to the action.[51]

In most cases, once the third party is aware of the order, it will desist or bring a motion for leave to proceed with a claim concerning priorities. If not, the receiver may have to move for a restraining order and, if there are subsequent breaches, the receiver may bring contempt proceedings. In *Dixon v. Dixon,*[52] the court restrained a deliberate act calculated to destroy the receiver's management. In that case, the receiver dismissed one of the partners. In turn, the partner began tampering with the employees by inducing them to leave and join a rival business.

(b) Private Appointment

In most cases, a security instrument which charges all or substantially all of the debtor's property will provide a clause for the appointment of a receiver and manager. While the security holder has the option of taking possession itself or bringing a motion for a court-appointed receiver, in Ontario the security holder normally pursues a private receivership if it does not anticipate many problems.

Where the security holder appoints a receiver by instrument, the security holder may remain liable for the actions and conduct of the receiver. The receiver is an agent of the security holder when taking possession and disposing of the

---

50 *Merchants Consolidated Ltd. (Receiver of) v. Canstar Sports Group Inc.* (1994), 92 Man. R. (2d) 253, 25 C.B.R. (3d) 203, [1994] 5 W.W.R. 210 (C.A.), on appeal from (1992), 84 Man. R. (2d) 100, 17 C.B.R. (3d) 282 (Q.B.), additional reasons at (1993), 87 Man. R. (2d) 26, 19 C.B.R. (3d) 89 (Q.B.).
See also *Ontario Securities Commission v. Gaudet (No. 2)* (1988), 65 O.R. (2d) 424, 70 C.B.R. (N.S.) 181 (S.C.) where the bank issued a petition for a receiving order in bankruptcy against the debtor without leave of the court. The court dismissed the petition and held the bank in contempt despite its argument that the then *Bankruptcy Act* had constitutional supremacy over the provincial *Securities Act*.
See also *Royal Bank v. Sherkston Beaches Ltd.* (1988), 64 O.R. (2d) 126, 70 C.B.R. (N.S.) 197, 49 D.L.R. (4th) 460 (S.C.); *Del Zotto v. International Chemalloy Corp.* (1976), 14 O.R. (2d) 72, 22 C.B.R. (N.S.) 268 (S.C.).

51 *Royal Bank v. Canstar Sports Group Inc.* (1988), 71 C.B.R. (N.S.) 189, [1989] 1 W.W.R. 662, (*sub nom. Royal Bank v. Merchants Consolidated Ltd.*) (1988), 55 Man. R. (2d) 241, 55 D.L.R. (4th) 370, 30 C.P.C. (2d) 271 (C.A.); *C.I.B.C. v. Trapper John's Restaurant Ltd. et al.* (1984), 52 C.B.R. (N.S.) 28 (B.C. S.C.). See also *Bottoms v. Pac. Northwest Lbr. Co.*, [1929] 4 D.L.R. 415 (B.C. S.C.).

52 [1904] 1 Ch. 161.

BENNETT on RECEIVERSHIPS

Second Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

1999

CARSWELL
Thomson Professional Publishing

The publisher is not engaged in rendering legal, accounting or other professional advice. If legal advice or other expert assistance is required, the services of a competent professional should be sought. The analysis contained herein represents the opinions of the author and should in no way be construed as being either official or unofficial policy of any governmental body.

The paper used in this publication meets the minimum requirements of American National Standard for Information Services – Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

Canadian Cataloguing in Publication Data

The National Library of Canada has catalogued this publication as follows:

Bennett, Frank.
Bennett on receiverships

2nd ed.
Previously published under title: Receiverships.
Includes index.
ISBN 0-459-26279-3

1. Receivers—Canada I. Title. II. Title: Receiverships.

KE8540.B46 1998 346.71'078 C98-932750-7
KF9016.B46 1998

This book is printed on recycled paper.

CARSWELL
Thomson Professional Publishing

One Corporate Plaza, 2075 Kennedy Road, Scarborough, Ontario M1T 3V4
Customer Service:
Toronto: 1-416-609-3800
Elsewhere in Canada/U.S. 1-800-387-5164
Fax 1-416-298-5094

that continuation of tenancy agreements is mandatory even where the term of the lease extends beyond the expiry of the redemption period.

In the absence of a general power to let and renew leases, the court-appointed receiver should obtain leave of the court if the proposed lease or renewal lease is for a period of time extending beyond the redemption period, if any, or is for a period of time that may be excessive given the circumstances of the debtor's business. On the other hand, the private receiver takes the risk that the new lease or renewal is commercially reasonable, unless there is legislation permitting the receiver to apply for directions as to the terms of the proposed lease or renewal lease.

5. CONTRACTS

(a) Existing Contracts with Debtor

At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not it should complete or adopt those contracts. In cases where the contract is almost complete, such as in the case where the debtor had sold goods, but had not delivered them, the court examines the contract and the conduct of the debtor. If the debtor intended that title to the goods pass to the purchaser and separated them from other inventory, the court will enforce the contract in favour of the purchaser[166] or, in the case real property, direct the receiver to perform the contract.[167]

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership.[168] However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. On the other hand, if the receiver chooses to perform such contracts, the receiver becomes personally liable for their performance where it does not disclaim personal liability.

In *Re Newdigate Colliery Co.*,[169] the debtor carried on a business of mining and selling coal. When the court-appointed receiver took possession of the property, the receiver found that the debtor had entered into many contracts which if completed would not generate sufficient profits. The price of coal had risen

166 *NEC Corp. v. Steintron International Electronics Ltd.* (1985), 59 C.B.R (N.S.) 91 (B.C. S.C.).
167 *Freevale Ltd. v. Metrostore (Holdings) Ltd.*, [1984] Ch. 199, [1984] 1 All E.R. 495 (Ch. D.).
168 *Re Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 294 A.P.R. 198, 86 D.L.R. (4th) 127 (C.A.), dismissing an appeal from (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.).
169 [1912] 1 Ch. 468 (C.A.).

and the receiver sought authority to disclaim the contracts. However, the court concluded that the increased profits that could be generated by allowing the receiver to break the debtor's contracts were not a sufficient reason to give the receiver power to disclaim contracts generally. The court reviewed the differences between a court-appointed receiver and a court-appointed manager, and stated categorically that the court-appointed receiver and manager owes a duty to both the debenture holder and the debtor. In this case, the increased profits would ultimately become subject to the claims of persons who would be entitled to damages for breach of contract. If the court were to authorize the receiver and manager to breach the contracts, it would be benefitting the debenture holders at the expense of the unsecured creditors.

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor.[170] If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages.[171] If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.[172] If the receiver chooses to adopt the debtor's contract, the receiver becomes personally liable for that performance where it does not disclaim such liability.

Insofar as employment contracts are concerned, the receiver requires the existing employees initially on taking possession and during the continued operation of the business. To avoid severance problems, successor employer provisions, and personal liability for adopting the debtor's contracts with the employees, the receiver is best advised to continue with the employeees who have knowledge of the debtor's affairs if the receiver can enter such contracts without personal liability. If the receiver is unable to do so, it ought to dismiss the debtor's employees and re-hire on a selective basis after they have obtained independent legal advice.

In private receiverships, the appointment of a receiver does not automatically terminate existing contracts unless the contracts provide so. In private receiverships, the debtor stands charged with the obligations of the contract and therefore the privately appointed receiver, as agent of the debtor corporation, incurs no obligation to perform existing contracts after the receivership has commenced. There can be no novation of contract even if the receiver performs the terms of such contract, but the receiver may be exposing the debtor to a claim

170 See *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.). See also below "5.(c) Set-Off".

171 Above.

172 *Can. Commercial Bank v. Annandale Holdings Ltd. et al.*, above, note 161. See also above "4.(b) Landlord in Receivership, (ii) Leases".

of set-off.[173] Thus, the receiver will not be personally liable if the receiver continues the contract in the debtor's name. But if the receiver guarantees the payments under the contract, the receiver becomes personally liable under the contract. While the agency clause is generally effective when the receiver carries on business, it does not protect the receiver against third parties if there is a personal guarantee[174] or where the contract is in the receiver's name.

Similarly, the private receiver is not liable in tort for a breach of an existing contract as the agency clause gives the receiver immunity.[175] However, if there is no agency clause, or the debtor is bankrupt, the security holder as principal is then liable for the receiver's obligations.

Needless to say, the receiver will complete existing contracts for the debtor corporation to the extent that they are beneficial to the security holder. In completing such contracts, the receiver is, however, subject to the terms of the contracts and any claim for set-off.[176] The privately appointed receiver may elect not to complete existing contracts unless they are beneficial to the security holder, even though, from the debtor's point of view, discontinuing the business may be detrimental.[177]

In the event that the privately appointed receiver decides to break an existing contract or otherwise not complete it, any liability flowing from such breach is a liability incurred by the debtor. Notwithstanding any lawsuit or subsequent judgment against the debtor company, the receiver maintains priority over the debtor's assets for the benefit of the security holder.[178]

Pending the receiver's initial investigation into the affairs of the debtor, the receiver may be forced to make payments to certain creditors. For example, if the receiver has possession of assets leased by the debtor and makes payments under the lease for a short period of time after the appointment, the receiver is not necessarily bound by the contract.[179]

(b) New Contracts with Receiver and Manager

The court-appointed receiver is a principal in its dealings with third parties.[180] The court-appointed receiver is personally liable to creditors with whom the receiver contracts although the receiver does have the right to be indemnified

173 *Parsons v. Sovereign Bank of Can.*, above, note 170; *Forster v. Nixon's Navigation Co.* (1906), 23 T.L.R. 138.

174 *Fill-R-Up Ltd. v. Toronto Dominion Bank* (1989), 75 C.B.R. (N.S.) 318 (headnote only) (Ont. S.C.).

175 *Said v. Butt*, [1920] 3 K.B. 497, [1920] All E.R. Rep. 232.

176 *Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd.*, [1974] Q.B. 1, [1973] 1 All E.R. 394 (C.A.).

177 *Re B. Johnson & Co. (Bldrs.) Ltd.*, [1955] Ch. 634, [1955] 2 All E.R. 775 (C.A.).

178 See *Airlines Airspares, Ltd. v. Handley Page, Ltd.*, [1970] Ch. 193, [1970] 1 All E.R. 29.

179 *Royal Bank v. Harrison Airways Ltd. et al.* (1976), 71 D.L.R. (3d) 576 (B.C. S.C.), where the receiver was attempting to preserve its position pending a full investigation into the affairs of the company and was forced to make payments, but was not required to put the aircraft into airworthy condition.

180 See Chapter 5 "Status of the Receiver and Manager".