COURT FILE NO.	1903 20042
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
APPLICANT	MLS PROPERTY GROUP LTD.
RESPONDENTS	1235962 ALBERTA LTD. f/k/a PERFORMANCE AG GROUP EVANSBURG LTD. f/k/a HAR-DE AGRI SERVICES INC., PERFORMANCE AG GROUP CALMAR LTD. f/k/a HAR-DE AGRI SERVICES CALMAR LTD. and HAR-DE AGRI SERVICES LTD.
DOCUMENT	**WRITTEN BRIEF OF THE APPLICANT, MLS PROPERTY GROUP LTD.**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Charles P. Russell, Q.C./ Ryan Trainer Telephone: (780) 482-9115 Fax: (780) 733-9757 Email: crussell@mross.com File No.: 193504

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PART 1 STATEMENT OF FACTS

1. The Plaintiff MLS Property Group Ltd. ("**MLS**") brings this application to lift the stay of proceedings and for appointment of a receiver and manager of 1235962 Alberta Ltd. f/k/a Performance Ag Group Evansburg Ltd. f/k/a Har-De Agri Services Inc. ("**Har-De**"), Performance Ag Group Calmar Ltd. f/k/a Har-De Agri Services Calmar Ltd. ("**Har-De Calmar**") and Har-De Agri Services Ltd. ("**Har-De Services**") (collectively the "**Debtors**").

2. On August 1, 2019, Farm Credit Corporation petitioned the Debtors into bankruptcy, appointing The Bowra Group ("**Bowra**") as Trustee in Bankruptcy. Prior to bankruptcy, the Debtors carried on business as distributors of fertilizer and related products from premises located in Evansburg, Calmar and Entwistle, Alberta.

Affidavit of Derek Petrie sworn September 30, 2019 ("**Petrie Affidavit**") at paras 8 and 10

3. On or about June 14, 2019, MLS acquired (the "**Acquisition**") from Bank of Montreal ("**BMO**") certain loans (the "**BMO Loans**") made by BMO to one or more of the Debtors together with various security instruments held by BMO as security for the Loans (the "**BMO Security**").

Petrie Affidavit at para 2

4. The BMO Security includes:

   (a) Mortgage in the principal amount of $2,077,500 granted by Har-De Agri Services Ltd. dated March 29, 2016 and Mortgage in the principal amount of $918,750 granted by Har-De Agri Services Inc. dated March 29, 2016;

   (b) Security Agreement by Har-De Agri Services Ltd. dated March 29, 2016 (the "**Har-De GSA**");

(c) Guarantee by Har-De Agri Services Inc. of obligations owed by Har-De Agri Services Calmar Ltd. dated March 29, 2016 limited to $2,030,000;

(d) Guarantee by Har-De Agri Services Ltd. of obligations owed by Har-De Agri Services Calmar Ltd. dated March 29, 2016 limited to $2,030,000;

(e) Guarantee by 942350 Alberta Ltd. of obligations owed by Har-De Agri Services Calmar Ltd. dated March 29, 2016 limited to $2,030,000;

(f) Security Agreement by Har-De Agri Services Calmar Ltd. dated March 29, 2016 (the "**Har-De Calmar GSA**");

(g) Chattel Mortgage by Har-De Agri Services Inc. dated March 29, 2016;

(h) Guarantee by Har-De Agri Services Calmar Ltd. of obligations owed by Har-De Agri Services Inc. limited to $2,098,000;

(i) Guarantee by Har-De dated March 29, 2016 of obligations owed by Har-De Agri Services Inc. limited to $2,098,000;

(j) Guarantee by 942350 Alberta Ltd. of obligations owed by Har-De Agri Services Inc. dated March 29, 2016;

(k) Security Agreement by Har-De Agri Services Inc. dated March 29, 2016 (the "**Har-De Services GSA**");

(l) Guarantee by Har-De Agri Services Calmar Ltd. of obligations owed by Har-De dated March 29, 2016 limited to $2,077,500;

(m) Guarantee by Har-De Agri Services Inc. of obligations owed by Har-De dated March 29, 2016 limited to $2,077,500;

(n) Guarantee by 942350 Alberta Ltd. of obligations owed by Har-De Agri Services Ltd. dated March 29, 2016 limited to $2,077,500.

Petrie Affidavit at para 5

5. The BMO Security has been duly registered in accordance with the laws of the Province of Alberta. Bowra has received an opinion from its independent counsel confirming the validity and enforceability of the BMO Security, and supports this application.

Petrie Affidavit at paras 6 and 20

6. In or about 2014, MLS had advanced separate loans to Harold Zibell, the principal of the Debtors and one or more of the Debtors (the "**MLS Loans**"). The Acquisition was undertaking by MLS to preserve to the collateral charged by the BMO Security.

Petrie Affidavit at para 3

7. Bowra has taken possession of the collateral charged by the BMO Security.

Petrie Affidavit at para 9

8. During the course of the Bankruptcy, MLS has been advancing funds to the Trustee to cover disbursements required for payment of rent, utilities, insurance and other necessary costs incurred in preserving the assets of the Debtors.

Petrie Affidavit at para 11

9. The equipment utilized in operation of the Borrowers' businesses is in large part integrated into the premises from which the businesses were operated. Selling the equipment separate and apart from the real property, would necessitate demobilizing the equipment, repairing any damage caused to the lands in doing so, and transporting the equipment either to a place of auction or to the ultimate purchaser should an auction of the equipment take place at the Borrowers' premises. The equipment is extensive and voluminous, and much of the equipment is affixed to the premises to at least some degree. Bowra and MLS are of the conclusion that the best way to maximize the sale of the BMO Security collateral is to sell the business assets en bloc, as a turnkey operation.

Petrie Affidavit at paras 12 and 13

10. The appointment of a receiver and manager to undertake a marketing process in the manner described above, is the most effective method by which those assets might be marketed.

Petrie Affidavit at para 13

11. In addition to benefit of marketing the collateral en bloc, a receivership will also provide Bowra an opportunity to pursue certain transactions which occurred prior to bankruptcy and to investigate allegations of fraud made by creditors against one or more of the Borrowers.

Petrie Affidavit at paras 14 and 15

12. On or about May 9, 2019, BMO issued demands for payment of the BMO Loans. As at September 26, 2019, MLS is owed $1,862,468.20 under the Loans.

Petrie Affidavit at paras 17 and 19

PART 2 ISSUES

13. The following issues are raised in the application:

A. ***Should a Receiver be appointed by the Court in the present circumstances?***

PART 3 ARGUMENT

MLS has given the Debtors Sufficient Time to Repay the Loans

14. This Court has jurisdiction to grant a receivership order pursuant to s. 13(2) of the *Judicature Act* where it is just or convenient to do so.

Judicature Act, R.S.A., c. J-2, s. 13 **[Tab 1]**

Strategic Financial Corp v 1402801 Alberta Ltd., 2012 ABQB 292, at para 12 **[Tab 2]**

15. Pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* (the "BIA"), a court may appoint a receiver on application by a secured creditor and upon the expiry of 10 days' notice to the insolvent person.

Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3, s. 243(1) **[Tab 3]**

16. A further statutory right to appoint a receiver is provided in the Alberta *Business Corporations Act* and the *Personal Property Security Act* wherein a security agreement or instrument provides for the appointment of a receiver.

Business Corporations Act, R.S.A. 2000, c. B-9, s. 99 **[Tab 4]**

Personal Property Security Act, R.S.A. 2000, c. P-7, s. 65 **[Tab 5]**

17. A court may consider the following factors in determining whether it is appropriate to appoint a receiver:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

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

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

(f) the balance of convenience to the parties;

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

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

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

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

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

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

(n) the cost to the parties;

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

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

Paragon Capital Corp. v Merchants & Traders Assurance Co., 2002 ABQB 430 at para 27 ("Paragon Capital") **[Tab 6]**

Lindsey Estate v Strategic Metals Corp, 2010 ABQB 242, at para 32-34. **[Tab 7]**

Rompsen Investment Corp v Hargate Properties Inc., 2011 ABQB 759, at para 20. **[Tab 8]**

18. Having regard to the factors listed in Paragon Capital, MLS notes:

(a) The Har-De GSA, Har-De Calmar GSA, and Har-De Services GSA authorize the appointment of a receiver and manager;

(b) The risk to MLS is significant at $1,862,468.20;

(c) The assets of the Debtors are such that judicial assistance will be required to maximize value;

(d) The appointment of a receiver and manager is necessary for preservation and protection of the Debtor's assets;

(e) The debtors are in default in payment to MLS and are in bankruptcy. The balance of convenience favours MLS;

(f) MLS has the contractual right to appoint a receiver and manager;

(g) A court appointment is necessary to enable the receiver to carry out its duties efficiently and to obtain court approval for preservation of property and eventual liquidation;

(h) The appointment of a receiver would ensure court oversight and ensure consistent treatment of all stakeholders;

(i) A court appointed receiver will guarantee maximum value and a transparent process under the court's supervision; and

(j) The extraordinary nature of appointing a receiver and manager is less essential to the court's determination, where the security document provides for the appointment of a receiver and where the Debtors are bankrupt.

Paragon Capital, at para 28 **[Tab 6]**

19. Where there was no plan to repay any of the Debtor's indebtedness and no persuasive evidence that the appointment would cause undue hardship to Debtor, a receiver should be appointed.

Paragon Capital, at para 31 **[Tab 6]**

20. Given the facts set out above, it is just and equitable for the Court to grant MLS' application to appoint a receiver and manager. The Debtors are in bankruptcy and MLS has already been funding the bankruptcy to assist with maximum recovery of assets for the estate. The expanded powers of a receivership provide the best opportunity to not only maximize the value of the assets but also allow Bowra to pursue alleged fraudulent transactions and the various transactions that were entered into prior to bankruptcy.

PART 4 REMEDY SOUGHT

21. MLS Seeks:

(a) Orders appointing Bowra as receiver and manager of the Debtors, in the form of the orders presented by MLS.

(b) Costs of these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 7 day of October, 2019.

McLennan Ross LLP

Per: _____

Charles P. Russell, Q.C., Ryan Trainer
Solicitor for the Applicant

TABLE OF AUTHORITIES

TAB 1

Alberta Statutes
Judicature Act
Part 2 — Powers of the Court (ss. 10-22)

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or 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 the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency

Alberta Current to Gazette Vol. 115:12 (June 29, 2019)

End of Document

TAB 2

2012 ABQB 292
Alberta Court of Queen's Bench

Strategic Financial Corp. v. 1402801 Alberta Ltd.

2012 CarswellAlta 1845, 2012 ABQB 292, [2013] A.W.L.D. 610, 221 A.C.W.S. (3d) 852

Strategic Financial Corp., Plaintiff and 1402801 Alberta Ltd., Defendant

T.F. McMahon J.

Heard: April 27, 2012
Judgment: May 2, 2012
Docket: Calgary 1201-03137

Counsel: Sean F. Collins, Walker W. MacLeod, for Plaintiff
Christopher D. Simard, for Defendant
Josef G.A. Kruger, Q.C., for 571764 Alberta Ltd., Newel Post Developments Ltd.
Travis Lysak, for Proposed Receiver, Price Waterhouse Cooper

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Table of Authorities
Cases considered by *T.F. McMahon J.*:
BG International Ltd. v. Canadian Superior Energy Inc. (2009), 2009 CarswellAlta 469, 2009 ABCA 127, 53 C.B.R. (5th) 161, 71 C.P.C. (6th) 156, 457 A.R. 38, 457 W.A.C. 38 (Alta. C.A.) — referred to
Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — followed
Statutes considered:
Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — considered

APPLICATION by mortgagee corporation to appoint receiver-manager for property.

***T.F. McMahon J.*:**

1 The Plaintiff, Strategic Financial Corp. ("Strategic Financial"), applies for the appointment of a Receiver-Manager for land and a building known as the Barron Building in downtown Calgary, Alberta. The building is 11 storeys in height and is vacant but for a movie theatre which is not currently operating. The Defendant, 1402801 Alberta Ltd. ("140"), owns the land and building. When it purchased the land in 2008, it assumed a first mortgage in the principle amount of $16 million. Strategic Financial now holds that mortgage by assignment from a prior holder.

2 Both Strategic Financial and 140 are controlled by one Riaz Mamdani who is also a director of both companies. 140 is separately represented on this application and, while consenting to it, does not advocate for or against the appointment of a Receiver-Manager.

3 The application is opposed by Newel Post Developments Ltd. ("Newel Post") and 571764 Alberta Ltd. ("571"). Newel Post was the previous owner of the building. It retains an encumbrance against title pursuant to a development agreement. 571

is the lessee of the theatre premises which lease is registered against the title. Both the registered instruments of Newel Post and 571 have been postponed to the first mortgage held by Strategic Financial. There are also second and third mortgages held by companies related to Strategic Financial.

4 The first mortgage of Strategic Financial is in default and remains outstanding in the approximate amount of $14.340 million as at March 1, 2012 with interest accruing thereafter. Newel Post and 571 argued that the first mortgage may not be in default but the only evidence on this application is clear. 140 is in default in making the required interest payments as well as a $5 million dollar payment in principle due January 19, 2012. As a result of that default, Strategic Financial made demand for payment of the entire amount as it was permitted to do under the terms of the mortgage. No payment was forthcoming.

5 The uncontradicted evidence is that the theatre premises have health and safety issues including asbestos being present and an absence of an operating sprinkler system. 140 has no other assets to finance remedial work which it estimated to cost $2 million.

6 There is significant litigation between the parties which has created an effective deadlock. 571 and 140 are in litigation regarding the lease and their respective obligations under it. Newel Post and 140 are in litigation regarding the encumbrance held by Newel Post against the title. Without an injection of capital, the building will remain vacant and deteriorate. Litigation costs will continue to mount.

Respondent's position

7 The essential position of Newel Post and 571 is that the applicant Strategic Financial can not meet the just and convenient test having regard to the principles stated in authorities such as *BG International Ltd. v. Canadian Superior Energy Inc.*, 2009 ABCA 127 (Alta. C.A.). Newel Post and 571 say that they will be damaged further by the appointment of a Receiver-Manager, though just how is not clear. The Receiver-Manager will be obliged to act in the best interests of all the interest holders so far as he is able.

8 The authorities do say that a lesser remedy should be searched for. The remedy suggested by Newel Post and 571 is that the shareholder of 140 should inject additional money into the company in order to remediate the building. However that is not an appropriate remedy, though it may be a solution. A non-party shareholder can not be compelled to inject money into a corporate litigant merely to avoid the appointment of a Receiver-Manager.

9 Newel Post and 571 then say that the land could be transferred to Strategic Financial which has the wherewithal to effect repairs. Once again, however, that's not an alternate remedy to the appointment of a Receiver-Manager.

10 A main complaint raised by 571 is that its litigation with 140, if it continues, would be funded by the Receiver-Manager who would then have a priority charge against the building. I have no evidence as to the appraised value of the land and building and so have no means of determining if such a charge would jeopardize anyone.

11 Lastly, Newel Post and 571 invite this court to pierce the corporate veil and regard the Plaintiff and the Defendant as one entity, personified by their controlling shareholder. There is in my view no basis for that approach here. There is no evidence of wrong-doing or deliberate conduct to injure the respondents, or of a shareholder treating the body corporate as though its property belongs to him personally. This is merely a case of one corporation in default in its debt to a related corporation, which is secured against the debtor's property and so is subject to enforcement.

Decision

12 The Court has jurisdiction to grant this relief pursuant to section 13(2) of the Judicature Act, RSA 2000, c J-2:

> An order in the nature of a mandamus or 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 the order may be made either unconditionally or on any terms and conditions the Court thinks just.

13 As well, the First Mortgage expressly provides for the appointment of a Receiver by article 26:

> It is declared and agreed that at any time and from time to time when there shall be default under the provisions of this mortgage, the Mortgagee may at such time and from time to time and with or without entry into possession of the Land or any part thereof, appoint a receiver or a manager or a receiver and a manager of the Land or any part thereof and of the rents and profits thereof and with or without security, and may from time to time remove any receiver and appoint another in his stead and that, in making any such appointment or removal, the Mortgagee shall be deemed to be acting as the agent or attorney for the Mortgagor. Such appointment may be made at any time either before or after the Mortgagee shall have entered into or taken possession of the Land or any part hereof.

14 The Alberta Court of Appeal addressed the issues in BG International at para. 17:

> In particular, the chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. C.J. G.D.) at para. 31:
>
> > [31] With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.
>
> This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

15 Some of the factors to consider in the appointment of a Receiver have been collected and repeated by this Court in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.).

16 On the evidence before me, the disrepaired state of the building and the ongoing litigation between the interest holders strongly supports the need for a Receiver-Manager to protect and preserve the building until further court order. All those issues must be resolved before the building's value can be enhanced so the interest holders can maximize their return. It is therefore just and convenient that a Receiver-Manager be appointed to protect and preserve the property in question until further court order. The Receiver-Manager will have security for its fees and disbursements and monies properly borrowed in the course of the receivership. The parties may apply within 15 days to address the specific terms of the order if need be. Costs may also be addressed.

Application granted.

End of Document

TAB 3

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 243

s 243.

Currency

243.

243(1)Court may appoint receiver

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

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

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

(c) take any other action that the court considers advisable.

243(1.1)Restriction on appointment of receiver

In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

243(2)Definition of "receiver"

Subject to subsections (3) and (4), in this Part, **"receiver"** means a person who

(a) is appointed under subsection (1); or

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

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

243(3)Definition of "receiver" — subsection 248(2)

For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

243(4)Trustee to be appointed
Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

243(5)Place of filing
The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

243(6)Orders respecting fees and disbursements
If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

243(7)Meaning of "disbursements"
In subsection (6), **"disbursements"** does not include payments made in the operation of a business of the insolvent person or bankrupt.

Amendment History
1992, c. 27, s. 89(1); 2005, c. 47, s. 115; 2007, c. 36, s. 58

Currency
Federal English Statutes reflect amendments current to June 12, 2019
Federal English Regulations are current to Gazette Vol. 153:13 (June 26, 2019)

End of Document

TAB 4

Alberta Statutes
Business Corporations Act
Part 8 — Receivers and Receiver-Managers (ss. 93-100)

R.S.A. 2000, c. B-9, s. 99

s 99. Powers of the Court

Currency

99.Powers of the Court

On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;

(b) an order determining the notice to be given to any person or dispensing with notice to any person;

(c) an order fixing the remuneration of the receiver or receiver-manager;

(d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;

(f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

Currency

Alberta Current to Gazette Vol. 115:12 (June 29, 2019)

End of Document

TAB 5

Alberta Statutes
Personal Property Security Act
Part 5 — Rights and Remedies on Default (ss. 55-65)

R.S.A. 2000, c. P-7, s. 65

s 65. Receiver

Currency

65.Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

65(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

65(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

65(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

65(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

65(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

65(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

65(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

65(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

Currency
Alberta Current to Gazette Vol. 115:12 (June 29, 2019)

Concordance References
Personal Property Security Act Concordance 84, Receiver, receiver and manager
Personal Property Security Act Concordance CABYCONCORD1, Table of Concordance

TAB 6

2002 ABQB 430
Alberta Court of Queen's Bench

Paragon Capital Corp. v. Merchants & Traders Assurance Co.

2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95

PARAGON CAPITAL CORPORATION LTD. (Plaintiff) and MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE (Defendants)

Romaine J.

Judgment: April 29, 2002
Docket: Calgary 0101-05444

Counsel: Judy D. Burke for Plaintiff
Robert W. Hladun, Q.C. for Defendants

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.a General principles
Annotation

This decision canvasses the difficult issue of the appropriateness of granting *ex parte* court orders in an insolvency context. Specifically, the facts of this case revolve around the proper exercise of Romaine J.'s jurisdiction pursuant to Rule 387 of the *Alberta Rules of Court* [1] to grant an *ex parte*, without notice, order appointing a receiver over the assets of two debtor companies. This rule provides that an order can be made on an *ex parte* basis in cases where the evidence indicates "serious mischief". Such jurisdiction is also granted to courts in Ontario [2] and in the context of interim receivership orders under the *Bankruptcy and Insolvency Act.* [3] The guiding principles that govern the granting of *ex parte* orders generally were summarized in *B. (M.A.), Re* [4] where it was concluded that the court's discretion to grant such orders should only be exercised in cases where it is found that an emergency exists and where full disclosure has been provided to the court by the applicant. It is generally considered that an emergency is a circumstance where the consequences that the applicant is attempting to avoid are immediate [5] and that such consequences would have irreparable harm. [6] Insolvency situations are, by their very nature, crisis oriented. Debtors and creditors alike are typically faced with urgent circumstances and must move quickly to preserve value for all stakeholders. The special circumstances encountered in insolvency proceedings have been acknowledged by the Ontario Court of Appeal in *Algoma Steel Inc., Re* [7] where it was recognized that *ex parte* court orders and the lack of adequate notice is often justified in an insolvency context due to the often "urgent, complex and dynamic" nature of the proceedings. However, there is nonetheless a recognition that despite the "real time" nature of insolvency proceedings, the remedy of appointing a receiver is so drastic that doing so without notice to the debtor is to be considered only in extreme cases. In *Royal Bank v. W. Got & Associates Electric Ltd.*, [8] the Alberta Court of Appeal cited the following passage from *Huggins v. Green Top Dairy Farms* [9] with approval:

Appointment of a receiver is a drastic remedy, and while an application for a receiver is addressed in the first instance to the discretion of the court, the appointment ex parte and without notice to take over one's property, or property which is prima

facie his, is one of the most drastic actions known to law or equity. It should be exercised with extreme caution and only where emergency or imperative necessity requires it. Except in extreme cases and where the necessity is plainly shown, a court of equity has no power or right to condemn a man unheard, and to dispossess him of property prima facie his and hand the same over to another on an ex parte claim.

The courts in Ontario have also been mindful of this need to be extra vigilant in granting *ex parte* orders in an insolvency context. It is generally recognized that in cases where rights are being displaced or affected, short of urgency, applicants should be given advance notice. In *Royal Oak Mines Inc., Re,* [10] Farley J. stated the following:

I appreciate that everyone is under immense pressure and have concerns in a CCAA application. However, as much advance notice as possible should be given to all interested parties ... At a minimum, absent an emergency, there should be enough time to digest material, consult with one's client and discuss the matter with those allied in interest — and also helpfully with those opposed in interest so as to see if a compromise can be negotiated ... I am not talking of a leisurely process over weeks here; but I am talking of the necessary few days in which the dedicated practitioners in this field have traditionally responded. Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests. This too is a balancing question.

In light of this balancing of interests, the practice in Ontario has developed to a point that, short of exceptional circumstances, the parties affected by the applicant's proposed order, whether an order pursuant to *Companies' Creditors Arrangement Act* [11] or receivership orders, are typically given some advance notice of the pending application. This is particularly true in cases where there is a known solicitor of record for the interested party. In the present case, it is difficult to say whether sufficient and adequate evidence was proffered to demonstrate that urgent circumstances and a real risk of dissipation of assets existed. As Romaine J. indicated in her reasons, "...it [was] regrettable that the application did not take place in open chambers so that a record would be available." [12] Accordingly, in such circumstances, deference is accorded to the trier of fact. Romaine J. was in the best position to determine whether the test to grant an *ex parte* receivership order was met. Also, it is not clear from Romaine J.'s reasons why given the existence of a solicitor of record for the debtors that prior notice, of any kind, was not given to the debtors in this case. The granting of a receivership order is a serious remedy and those subject to it should, to the extent possible, have a right to due process.

Marc Lavigne *

Table of Authorities

Cases considered by *Romaine J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek, 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Urban Equities Ltd. v. Direct Action for Life, 73 Alta. L.R. (2d) 367, 68 D.L.R. (4th) 109, 104 A.R. 358, 1990 CarswellAlta 60 (Alta. Q.B.) — referred to

Edmonton Northlands v. Edmonton Oilers Hockey Corp., 147 A.R. 113, 23 C.P.C. (3d) 49, 15 Alta. L.R. (3d) 179, 1993 CarswellAlta 224 (Alta. Q.B.) — referred to

Hover v. Metropolitan Life Insurance Co., (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 237 A.R. 30, (sub nom. *Metropolitan Life Insurance Co. v. Hover)* 197 W.A.C. 30, 1999 CarswellAlta 338, 46 C.P.C. (4th) 213, 91 Alta. L.R. (3d) 226 (Alta. C.A.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 17 Alta. L.R. (3d) 23, 150 A.R. 93, [1994] 5 W.W.R. 337, 1994 CarswellAlta 34 (Alta. Q.B.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd., 1997 CarswellAlta 235, 196 A.R. 241, 141 W.A.C. 241, [1997] 6 W.W.R. 715, 47 C.B.R. (3d) 1 (Alta. C.A.) — referred to

Royal Bank v. W. Got & Associates Electric Ltd. (1997), 224 N.R. 397 (note), 216 A.R. 392 (note), 175 W.A.C. 392 (note) (S.C.C.) — referred to

Schacher v. National Bailiff Services, 1999 CarswellAlta 32 (Alta. Q.B.) — referred to

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc., 30 C.B.R. (3d) 49, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 244 — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

R. 387 — considered

APPLICATION by defendants to set aside, vary or stay order appointing receiver.

***Romaine J.*:**

INTRODUCTION

1 On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company ("MTAC") and 586335 British Columbia Ltd. ("586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

2 The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

3 On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

4 The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation ("Georgia Pacific"), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon's counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

5 The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

6 Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

7 MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

8 Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

9 It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

10 The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

11 On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the ex parte receivership order have been granted?

12 Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Hover v. Metropolitan Life Insurance Co.* (1999), 237 A.R. 30 (Alta. C.A.) at paragraph 23, referring to *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.), at 102-3; (1997), 196 A.R. 241 (Alta. C.A.); leave to appeal granted (S.C.C.).

13 The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

14 There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

15 There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

16 Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

17 There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

18 There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

19 The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex parte* order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

20 In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life*, [1990] A.J. No. 253 (Alta. Q.B.) at pages 7 and 8.

21 The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the ex parte order been precluded from acting in this case due to conflict?

22 This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

23 Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

24 The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

25 I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the ex parte order now be set aside?

26 The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.* (1993), 15 Alta. L.R. (3d) 179 (Alta. Q.B.) (paragraphs 30 and 31).

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

28 In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), paragraph 12.

29 It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

30 The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

31 The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, [1995] O.J. No. 144 (Ont. Gen. Div. [Commercial List]) at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

32 I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

33 To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

RJR-MacDonald Inc. v Canada (Attorney General) (1994), [1994] S.C.J. No. 17 (S.C.C.); *Schacher v. National Bailiff Services*, [1999] A.J. No. 599 (Alta. Q.B.).

34 On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

35 With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

36 The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

37 Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

38 I therefore decline to grant a stay, or to vary the order as granted.

39 If the parties are unable to agree on the matter of costs, they may be spoken to.

Application dismissed.

Footnotes

1 Alta. Reg. 390/68.

2 See rule 37.07(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

3 R.S.C. 1985, c. B-3. See rule 77 of the *Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368.

4 (1992), 126 A.R. 276 (Alta. Prov. Ct.) at 286.

5 *John Doe v. Canadian Broadcasting Corp.*, [1993] B.C.J. No. 1875 (B.C. S.C.).

6 *Imperial Broadloom Co., Re* (1978), 22 O.R. (2d) 129 (Ont. Bktcy.).

7 (2001), 25 C.B.R. (4th) 194 (Ont. C.A.) at 196.

8 (1997), [1997] A.J. No. 373 (Alta. C.A.) at para. 21.

9 (1954), 273 P.2d 399 (Id. S.C.) at 404.

10 [1999] O.J. No. 864 (Ont. Gen. Div. [Commercial List]) at para. 6.

11 R.S.C. 1985, c. C-36.

12 Para. 20.

* Associate in the Insolvency and Restructuring Group of Torys LLP. The author wishes to thank Sean Keating, student-at-law, for his invaluable research assistance in the preparation of this annotation.

TAB 7

2010 ABQB 242
Alberta Court of Queen's Bench

Lindsey Estate v. Strategic Metals Corp.

2010 CarswellAlta 641, 2010 ABQB 242, [2010] A.W.L.D. 2495, [2010] A.W.L.D. 2496, 186 A.C.W.S. (3d) 988, 67 C.B.R. (5th) 88

Ann Nosratieh as Executrix on behalf of the Estate of Robert Laird Lindsey, and Helmut and Eugenie Vollmer, as Representative Plaintiffs (Applicants) and Strategic Metals Corp., Capital Alternatives Inc., The Institute for Financial Learning, Group of Companies Inc., Milowe Allen Brost, Gary Sorenson, Graham Blaikie, Heinz Weiss, True North Productions LLC, Merendon de Honduras S.A. de C.V., Merendon Mining (Nevada) Inc., Merendon Mining (Colorado) Inc., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A., Arbour Energy Inc., Syndicated Gold Depository S.A., Base Metals Corporation, Evergreen Management Services LLC, 3Sixty Earth Resources Ltd., Ward Capstick, Thayer Jackson, Kristina Katayama, Quatro Communication Corporation, ABC Corp 1 to 9 and John Doe 1 to 9 and Jane Doe 1 to 9 and other entities and individuals known to the Defendants (Respondents)

G.C. Hawco J.

Heard: December 14, 2009
Judgment: April 9, 2010 *
Docket: Calgary 0801-08351

Counsel: Frank R. Dearlove, Michael D. Mysak for Applicants
Kenneth J. Warren, Q.C., Tanya A. Fizzell for Respondents, Gary Sorenson, Merendon Mining Corporation Ltd., Merendon de Honduras S.A. de C.V., Merendon de Venezuela C.A., Merendon de Peru S.A., Merendon de Ecuador S.A.
Victor C. "Dick" Olson, Christopher Archer for Respondent, Arbour Energy Inc.
Richard Glenn for Respondent, Milowe Brost

Subject: Corporate and Commercial; Securities; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Table of Authorities
Cases considered by *G.C. Hawco J.*:
Alberta (Securities Commission) v. Brost (2008), 2008 ABCA 326, 2 Alta. L.R. (5th) 102, 2008 CarswellAlta 1325, 440 A.R. 7, 438 W.A.C. 7 (Alta. C.A.) — considered

APPLICATION by investors for receivership and attachment orders.

G.C. Hawco J.:

Introduction

1 This is another episode in the efforts of the Applicants (and others) to attempt to locate and salvage assets acquired by a number of the Respondents using monies obtained from the Applicants and other investors.

2 On September 25, 2008, I appointed Michael J. Quilling as Receiver of Strategic Metals Corp. ("Strategic"). The Applicants now seek to have the same Receiver appointed over the assets and undertakings of The Institute for Financial Learning, Group of Companies Inc. ("IFFL"), Arbour Energy Inc. ("Arbour"), Merendon Mining Corporation Ltd. ("MMCL") and Syndicated Gold Depository S.A. ("SGD"). In addition, the Applicants seek an order granting the Receiver an Attachment Order or Mereva Injunction against Gary Sorenson ("Sorenson").

3 Mr. Quilling is appointed Receiver over all of the above named companies.

4 Mr. Quilling is granted an Attachment Order against Mr. Sorenson.

Background

5 By way of brief background, in May and June of 2006, a hearing took place before the Alberta Securities Commission ("ASC") against Milowe Allen Brost, one of two Respondents, and others, with respect to allegations of misrepresentations and fraud, relating to Strategic and investors in Strategic. On February 16, 2007, the ASC found that Strategic and a number of their representatives, specifically Edna Forrest, Carol Weeks, Bradley Regier and Mr. Brost, were responsible for false or misleading statements in an Offering Memoranda and that all of those parties engaged in a course of conduct that amounted to a fraud on the shareholders of Strategic. Mr. Sorenson was not a named party to the ASC hearing and did not appear, but was featured prominently in the deliberations and findings of the ASC.

6 What appears to be fairly clear from the ASC hearings is that Mr. Brost and Strategic were involved in a massive fraudulent scheme whereby the Applicants and other investors were induced to trust Mr. Brost and his associates with large amounts of money to be invested on their behalf. The information which was provided to the investors has been determined to be false. The total amount of money received by Mr. Brost and his associates was upward of $500 million. None has been recovered.

7 The decision of the ASC was appealed to our Alberta Court of Appeal. On October 3, 2008, the Court dismissed the appeals by Mr. Brost, Strategic and others. *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (Alta. C.A.).

8 In paragraph 20 and 21 of the Court of Appeal's decision, it stated:

> 20. The Commission summarized the fraudulent scheme, and the roles of each of the Appellants played in that scheme as follows (at para. 13 of the *Sanctions Decision):*
>
> > ... Brost was at the centre of the activities of Strategic and alternatives and ... when he developed Strategic and his business plan, he had in mind the involvement of Gary Sorenson ("Sorenson") and Art (Arthur) Wigmore ("Wigmore") [neither of whom were involved in the proceedings before the Commission] and the funding of mining ventures of either or both of them (as indeed incurred in respect of ventures within the Merendon orbit).... [The] plan was to lure public investor (with promises of high returns and safety along with tantalizing references to gold) into putting money into securities of Strategic - essentially a shell of a company whose main (but undisclosed) function was to finance Sorenson's mining ventures. ...
>
> 21. The Commission described the materials that Alternatives put out to market Strategic shares as "highly promotional", "factually weak" and "clearly designed to entice investors." It noted blatant untruths and

> misrepresentations in those materials. For example, it noted that Strategic's shares were touted as being secured by precious metals when that clearly was not the case. The Commission was convinced that Strategic investors would not see the returns they expected to realize on their investments and was doubtful that they would recover much of the money they paid.

9 In paragraph 42, the Court concluded that it was reasonable for the ASC to conclude that each of the Appellants engaged in conduct that amounted to regulatory fraud. It went on to say, at para. 47:

> We are of the view that there was evidence upon which the Commission could reasonably conclude, on a balance of probabilities, that Brost was responsible for making false and misleading statements to, and participating in a fraud on, investors.

The Court went on to dismiss the Appeals.

10 Pursuant to a Notice of Hearing dated May 17, 2009, the ASC has commenced proceedings against Arbour, Brost, IFFL, Sorenson, MMCL and a number of additional parties. The Notice of Hearing alleges, among other things, that the Respondents engaged in a course of conduct relating to the securities of Arbour that perpetrated a fraud on Alberta investors. That hearing is on-going.

Receivership

11 As mentioned, Strategic has been placed into receivership. Mr. Quilling has delivered two reports. The Applicants and others are, or were, investors who allege that the Respondents conspired and acted jointly together to defraud them of funds through the use of an investment scheme that operated in the same way as the investment scheme alleged and referred to in the ASC hearing in 2006 and in the Strategic action.

12 The hearing before the ASC and the matters heard by this Court and our Court of Appeal concerned Strategic and Mr. Brost. Mr. Sorenson and his companies (collectively referred to as the Merendon Companies) were not parties to those proceedings. Neither was Arbour a party.

13 The Applicants allege that Mr. Sorenson, the Merendon companies and Arbour are complicit in the fraud perpetrated by Mr. Brost. They seek to have Mr. Quilling appointed as Receiver of the Respondent companies and seek to have an injunction or attachment order against Mr. Sorenson.

14 Mr. Sorenson states that he was not a party to the original ASC hearings and denies even having anything to do with Mr. Brost's investment schemes. He admits to having been involved in "arm's length business dealings with Mr. Brost and certain of his corporate entities" but denies having been in business with Mr. Brost. I must assume he means that he has not conducted any nefarious business with Mr. Brost.

15 Mr. Sorenson objects to the evidence of Mr. Quilling being received because Mr. Quilling relies upon certain findings of the ASC. He argues that the ASC was not bound by the rules of evidence. Contrary to those rules, the ASC received and relied upon hearsay evidence. As neither Mr. Sorenson nor his companies were parties to that proceeding, the evidence ought not be relied upon. Nor should any of the ASC reasoning or findings be relied upon.

16 The argument of the Applicants is that their case is not founded upon any hearsay evidence which may be found in Mr. Quilling's affidavit, but rather upon the evidence of the financial documents which had been placed before the ASC and which have been examined by Mr. Quilling, as well as the affidavit of Mr. Sorenson and his cross-examination upon that affidavit.

17 What must be born in mind is that the Court of Appeal of this province has considered the decisions of the ASC in some detail and has upheld those decisions with respect to its findings relating to false and misleading statements and misrepresentations of Mr. Brost and others involved with Strategic and the related corporate vehicles. The ASC found that the Offering Memoranda "conveyed a thoroughly misleading picture of what investors were buying into and what was happening with their money". The ASC further found that fraud had been perpetrated on the investors, who include the Applicants.

18 The Court considered the grounds of appeal of Mr. Brost and the others and, in its analysis referred to the arguments of the Appellants which included the objection to the admission of the hearsay evidence. In paragraph 34, the Court stated:"The Commission acknowledged that transcripts of investigative interviews are not the same as live testimony in that hearsay evidence can be problematic. It treated the impugned hearsay evidence with caution when assessing its value and reliability." In paragraph 36, the Court concluded that the Appellant's arguments (including its arguments to exclude the hearsay evidence) were without merit.

19 Clearly, Mr. Sorenson was not involved directly, as a party, in the previous proceedings before the ASC. Just as clearly, however, his Merendon companies and Arbour were the subject of investigation in view of the flow of monies that went through Mr. Brost, Strategic and his related companies including IFFL and Capital Alternatives. Mr. Brost was the principle of Strategic, Capital Alternatives, IFFL and Merendon Mining (Colorado). These companies and Mr. Sorenson's Merendon companies, and Arbour were involved in the receipt and transfer of tens of millions of dollars which flowed freely between Mr. Brost's companies and Mr. Sorenson's companies.

20 MMCL received over $26 million from Mr. Brost's company - IFFL. MMCL purchased a mine in Tulameen, British Columbia for $1 million and sold it shortly after to Strategic for $9.6 million. That mine was held out by Strategic to be a prime property. It was information and belief of Sgt. Fuller that it was a sham. That appears to be confirmed from Mr. Quilling's investigation.

21 Arbour went from an insolvent company to one loaning $39 million in investors funds in a matter of months to MMCL. Mr. Sorenson claims that MMCL extinguished its obligation to Arbour by selling back to Arbour 25% interest in Tar Sand Recovery Limited. Nothing has been presented by Mr. Sorenson to justify Tar Sand's worth.

22 SGD was another Brost/Sorenson company which received money from Strategic and then directed huge sums of money (over $50 million) to MMCL. Again, no accounting is offered by Mr. Sorenson. Mr. Sorenson simply says that these were monies lent to MMCL and that the debt was retired. The documentation as to how it was retired and the documentation with respect to the value of any assets transferred is sadly lacking. There is simply no evidence put forward by Mr. Sorenson to lend any credence to his position that he was conducting a legitimate business at arm's length with Mr. Brost. There is evidence which suggests the contrary.

23 Mr. Quilling's report of August 26, 2008 states that as a result of information he has received, the Merendon Mining operation in Honduras is a sham as well. I have already determined that the Tulameen mine is basically a sham.

24 Both Mr. Brost and Mr. Sorenson were shareholders of SGD which provided funds to MMCL. Mr. Sorenson was aware that funds were being provided to MMCL through SGD and that they were being sourced from IFFL.

25 SGD existed for the sole purpose of channelling tens of millions of dollars of IFFL members' money to MMCL in exchange for no discernable value.

26 Mr. Sorenson argues he is being tarred by Mr. Brost's brush yet says that he does not have to disprove what is alleged. He continues to argue that he had no involvement in Strategic. Yet, it was Mr. Brost's evidence that Mr. Sorenson initially agreed to, and did become, a director of Strategic.

27 Mr. Sorenson continues to assert that the Honduran mine is continuing to produce gold while the evidence of Mr. Quilling, as fully set out in his report, is that the mine is a sham.

28 Serious allegations have been made against Mr. Sorenson and his companies in these proceedings. Mr. Sorenson has filed an affidavit and has been cross-examined on it. However, he has failed to produce any documentation which would speak to the value of any companies owned by him or that would answer in any manner the allegations of either fraud or dissipation of assets within the companies. Indeed, neither Mr. Sorenson nor MMCL have put forth any independent or reliable evidence of legitimate operations or value in MMCL or any of its subsidiaries or to account for any of the tens of millions of dollars

of investors funds that Mr. Sorenson admits that his companies received. His position is that "only" $26 million went to his companies through Mr. Brost and that these were arm's length transactions which were legitimately retired.

29 I am satisfied that Mr. Sorenson and his companies have indeed received over $50 million directly or indirectly from Mr. Brost and his companies. There is no accounting for any of these monies. Mr. Sorenson's explanation of repaying the $26 million loan lacks credibility.

30 With respect to Arbour, Mr. Brost was its directing mind. Arbour and Strategic shared an address and had at least one common director. Arbour received $820,000.00 from Strategic and has accounted for none of it. Arbour was used as a flow-through to send investment funds to Mr. Sorenson's company, MMCL. Arbour appears to be insolvent at this time. It is not carrying on business presently. It has been the recipient of at least $28 million from the Applicants and other investors. It gave that to MMCL. I have already referred to the transfer by MMCL to Arbour of an interest in Tar Sands Recovery Limited. This is another example of failure to document or establish in any manner a value. There has been no accounting for funds received.

31 The only assets which Mr. Sorenson claims to have comprises mining properties in Honduras and Equator which, according to Mr. Quilling's report, have no value. He claims that his house in Honduras is in his wife's name. He had been receiving $50,000 per month from MMCL until September 2009. However, he refuses to disclose any bank accounts or any information relating to any assets which he might have anywhere.

32 In determining whether it is just and convenient to appoint a Receiver, a Court should consider various factors such as:

a. whether irreparable harm might be caused if no order is made;

b. the risk to the parties;

c. the risk of waste debtor's assets;

d. the preservation and protection of property pending judicial resolution; and

e. the balance of convenience.

33 There is a real risk of irreparable harm in the wasting of the proposed receivership companies' assets. The proposed receivership companies are experienced at transferring money. The Applicants' evidence is that over $80 million was transferred to corporations controlled by Mr. Brost, Mr. Sorenson and others. None of the companies has accounted for any of the monies received. None of the companies has given this Court assurances that assets will not be transferred. All of the assets of MMCL and the Merendon companies are in Central and South America, outside the ability of this Court to supervise absentee appointment of a Receiver. The purpose of this action is the recovery of funds for investors. Without protection in place, I am satisfied that the ability to manage the affairs of and further investigate the proposed companies, there is a real risk that very little, if any, recovery will be possible.

34 The appointment of a Receiver will allow assets to be preserved. Given the nature of the claim, the preservation of the assets is essential. On Mr. Sorenson's evidence, neither MMCL nor any of the Merendon companies have any operations or assets in North America. Absent Court supervision through a Receiver, they may freely dissipate and shield assets from the investors/creditors.

35 With respect to the balance of convenience, I am of the view that it favours the placement of a Receiver. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. His investigative power is essential. Tens of millions of dollars have been raised from investors. The whereabouts of the money is unknown. Large flows of funds between a number of the companies have been identified but the ultimate uses to which those funds have been put have not been identified.

36 I am simply not satisfied that any of the on-going business activities which the companies might be involved will be thwarted by the appointment of a Receiver. I see no evidence of any harm to these companies by the placement of a Receiver. A receivership order will therefore issue, appointing Mr. Quilling as the Receiver.

Attachment Order/Mereva Injunction

37 In order to obtain an Attachment Order, the Applicants must show that there is a reasonable likelihood of success at trial.

38 Mr. Sorenson appears to have gone to great lengths to make himself judgment-proof. He claims that he has not dissipated assets yet refuses to answer specific questions on his cross-examination with respect to asset dissipation or the presence of any bank accounts he may have.

39 I am satisfied that Mr. Sorenson and his companies have received somewhere between $50-80 million in investor funds from SGD, Strategic, Arbour and IFFL. There has been no accounting with respect to those funds. Mr. Sorenson simply denies that he was a cohort of Mr. Brost and argues that he has to prove nothing. He is correct with respect to the latter statement, but when forced with rather over-whelming evidence of Mr. Quilling and the conclusions of the ASC, together with the statements of Mr. Brost, Mr. Sorenson must do more than simply say that he never had any contact with these Applicants and that he did not solicit funds from them directly. When I looked at the conclusions of the ASC there is little doubt but that Mr. Sorenson and his companies were a key element in the raising and dissipation of those funds. He appears to have been a key element in the fraud perpetrated by Mr. Brost.

40 In the end result, I am satisfied that an Attachment Order is appropriate and such Order will issue together with the Receivership Order as indicated.

Application granted.

Footnotes

* Affirmed at *Lindsey Estate v. Strategic Metals Corp.* (2010), 2010 CarswellAlta 1049, 2010 ABCA 191 (Alta. C.A.).

TAB 8

2011 ABQB 759
Alberta Court of Queen's Bench

Romspen Investment Corp. v. Hargate Properties Inc.

2011 CarswellAlta 2133, 2011 ABQB 759, [2012] A.W.L.D. 1141, 209 A.C.W.S. (3d) 843, 86 C.B.R. (5th) 49

Romspen Investment Corporation (Plaintiff) and Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd., 1333183 Alberta Ltd., Bellavera Green Condominium Corp. and Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick and Chateau Lacombe Capital Partners Ltd. (Defendants)

Donald Lee J.

Heard: November 15, 25, 2011
Judgment: December 2, 2011
Docket: Edmonton 1103-17749

Counsel: Schuyler V. Wensel, Q.C. for Plaintiff
Andrew Chamberland for Defendants
Scott Stevens for Receiver, D. Manning & Associates Inc.
Lindsay Miller for Second Mortgagee, Allied Hospitalities Services Inc.
Atul Omkar for Dr. Singh

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Table of Authorities
Cases considered by *Donald Lee J.*:
General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265, 282 O.A.C. 345 (Ont. Div. Ct.) — followed
Paragon Capital Corp. v. Merchants & Traders Assurance Co. (2002), 2002 CarswellAlta 1531, 2002 ABQB 430, 316 A.R. 128, 46 C.B.R. (4th) 95 (Alta. Q.B.) — considered
WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc. (2009), 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]) — followed
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 244(1) — referred to
Land Titles Act, R.S.A. 2000, c. L-4
Generally — referred to

MOTION by plaintiff to include newly discovered corporation in receivership order.

***Donald Lee J.*:**

1 The Plaintiff Romspen Investment Corporation ("RIC") is a corporation incorporated pursuant to the laws of the Province of Ontario, registered extra-provincially in the Province of Alberta. The Defendant companies are bodies corporate incorporated pursuant to the laws of the Province of Alberta. The Defendant Kevyn Ronald Frederick also known as Kevyn Frederick, Kevin Frederic, Kevyn Sheldon Frederick or Kevin Frederick ("Frederick"), is alleged to be the officer, director, shareholder and controlling mind of the Defendants.

2 In accordance with the terms of certain loan transactions alleged, RIC advanced $32,000,000 to Hargate Properties Inc. ("Hargate") and 1410973 Alberta Ltd. ("1410973") in 2010. The amount due and owing under the Loan Commitment from Hargate and 1410973 to RIC as of November 7, 2011 is submitted to be $32,743,923.42 with per diem interest thereafter at $8,746.66.

3 In addition to the Commitment by Hargate and 1410973 to repay the principal and interest, there was also additional security for the loans issued pursuant to the Commitment. Hargate and 1410973 executed and delivered to RIC a *Land Titles Act* mortgage dated May 28, 2010 which was registered with the Land Titles Office for the Alberta Land Registration District on August 10, 2010 whereby Hargate and 1410973 mortgaged in favour of RIC two distinct parcels of land. One title hereafter referred to as the "Hotel Lands" is the downtown location upon which the Chateau Lacombe Crown Plaza Hotel is situated; and the second parcel of land consists of 20.07 acres located on the south end of Edmonton on which a Church is located, hereinafter referred to as the "Church Lands".

4 It is submitted that these two parcels of land secured the payment of the principal sum of $32,000,000 together with interest on all amounts remaining unpaid, both before and after default at an interest rate of 10% per year. It is alleged that default has been made pursuant to the terms of the mortgage and as described previously as of November 7, 2011 the sum of $32,743,923.42 plus interest is due and owing. It was an express term of the Commitment, Mortgage as well as a further General Security Agreement ("GSA") dated May 28, 2010 that all indebtedness owing to RIC was repayable on demand.

5 By demand in writing made October 11, 2011 RIC made demand for repayment of the Indebtedness pursuant to the Commitment, the Mortgage and the GSA, however it is alleged that Hargate and 1410973 have refused or neglected to pay. On October 11, 2011 a Notice of Intention to Enforce Security pursuant to Section 244(1) of the *Bankruptcy and Insolvency Act* was delivered to all of the Defendants.

6 It is also alleged that there is a continuing unlimited Guarantee in writing dated March 28, 2011 in effect that was made in consideration of RIC making the loan to Hargate and 1410973 in which Voipus Canada Ltd. ("Voipus"), 1333183 Alberta Ltd. ("1333183"), Bellavera Green Condominium Corp. ("Bellavera") and Frederick all unconditionally guaranteed on a full indemnity basis any money and charges incurred by RIC in recovering the Indebtedness.

7 On November 15, 2011 with respect to the Church Lands consisting of 20 acres, counsel for Dr. Singh appeared submitting that his client should be appointed the Receiver with respect to those lands, separate and apart from any application being made by D. Manning and Associates to be appointed receiver of the Hotel Lands and the hotel operation. Although taxes have not been apparently paid on the Church Lands to the City of Edmonton, the Church on the 20 acres of land pays rent of approximately $24,000 a year. Foreclosure proceedings have apparently been commenced by Dr. Singh with respect to those lands, and his appointment as Receiver was sought with respect to the Church Land rentals.

8 Remaining counsel present on November 15, 2011 took the position that an independent professional receiver should be appointed with respect to the Church Lands as opposed to Dr. Singh, who may also be engaged in other litigation with respect to the securitisation of the RIC loan in the future. It was proposed that D. Manning and Associates Ltd. be appointed receiver for the Church Lands as well.

9 Counsel for Dr. Singh was concerned about the costs involved in having a professional receiver appointed for such a simple series of transactions with respect to collecting rentals on the Church Lands.

10 An Order was eventually issued appointing D. Manning and Associates Ltd. to be the Receiver/Manager for both lands on the understanding that certain limiting set fees would be charged with respect to the Church Lands. All parties were generally in agreement with respect to the ultimate Receivership Order that was signed on November 15, 2011 containing the standard template provisions with two amendments which read as follows:-

> (a) Allowed the Receiver to engage the hotel management services of Allied Hospitalities Services Inc.;
>
> (b) Allowed the Receiver to make payments to secured and other creditors including RIC, to ensure the ongoing operations of the debtor.

11 After this application for a Receivership Order was heard and granted on November 15, 2011, an Amended Statement of Claim was filed on November 21, 2011 adding as a Party the Defendant Chateau Lacombe Capital Partners Ltd. ("CLCPL"), and an Order was sought to include CLCPL within the definition of "Debtor" in the initial Receivership Order.

12 It is alleged that following to the Receiver/Manager Order of Hargate granted on November 15, 2011, the Receiver/Manager took possession of all of the Property as defined in that Order on November 15, 2011. The Receiver/Manager then discovered the existence of CLCPL for the first time. It was determined that all of the 120 unionized employees, and all 60 to 70 non-union employees of the Hotel were employed and contracted by CLCPL, allegedly contrary to the terms of the Commitment, Mortgage and GSA.

13 The Receiver Manager also determined that contrary to the terms of those three securitisations, that all of the revenue from the use and operation of the Hargate Property and the Hotel Lands had been diverted to CLCPL and deposited to CLCPL's operating accounts with the HSBC Bank of Canada (the "Operating Accounts").

14 At the time of the granting of the original November 15, 2011 Order, it is alleged that the Operating Accounts had a balance of $295,000 but that on the morning of the granting of the Order on November 15, 2011, Frederick caused $145,000 to be transferred from the Operating Accounts to his own personal account with RBC Securities.

15 The Receiver Manager is also alleging from his review of the records of Hargate and CLCPL that the Canada Revenue Agency ("CRA") issued a Requirement to Pay to the CRA account of CLCPL dated September 21, 2011 in the amount of $513,340.07; and that the balance outstanding for GST Remittances due as of October 31, 2011 is $407,624.40.

Conclusion

16 The creation and existence of CLCPL as a separate entity for the operation of the hotel business known as Crown Plaza Chateau Lacombe Hotel makes it central to the effective operation of that hotel in combination with the Hotel Lands, the property of Hargate, and the employees. CLCPL apparently receives all of the revenues from the Hotel's business operations, and employs all of the employees.

17 It is proposed that the Receiver/Manager have control over all of the property of both Hargate and CLCPL as Receiver/Manager. Given CLCPL's central role in operating the hotel business, that its existence may be in breach of the Loan Documents, and CLCPL appears to be in significant arrears to the CRA, I conclude that it is just and convenient that the Receiver/Manager have control of all of the property of both Hargate and CLCPL.

18 *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 6182, 59 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), at paragraph 37 is applicable in the present circumstances:-

> 37 As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the Courts of Justice Act. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with

companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*

[Underlining Added]

19 Similarly in *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 CarswellOnt 8054, 2011 ONSC 4704 (Ont. Div. Ct.), the appointment of an investigative receiver over a company has occurred in circumstances where the company is intrinsically involved with the companies already in receivership, and where it is necessary to review and ascertain the transactions that have taken place within the network of companies.

20 The additional appointment of a Receiver for CLCPL is consistent with the factors a Court may consider in determining whether it is appropriate to appoint a receiver as described by my colleague Romaine J at paragraph 27 in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 CarswellAlta 1531, 2002 ABQB 430 (Alta. Q.B.)

27 The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

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

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

f) the balance of convenience to the parties;

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

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

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

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

k) the effect of the order upon the parties;

l) the conduct of the parties;

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

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

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

21 I conclude that it would be appropriate to amend the November 15, 2011 Order to include within the definition of "debtor" CLCPL. Accordingly all the terms of the original November 15, 2011 Order shall apply to CLCPL from the date of that Order. Furthermore I will seize myself with all future applications in this matter.

Motion granted.