Court File No. CV12-9731-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

PINNACLE CAPITAL RESOURCES LIMITED in its capacity as general partner of RED ASH CAPITAL PARTNERS II LIMITED PARTNERSHIP

Applicant

- and -

KRAUS INC., KRAUS CANADA INC., STRUDEX FIBRES LIMITED and 538626 B.C. LTD.

Respondents

APPLICATION UNDER SUBSECTION 46(1) and SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, as amended

BOOK OF AUTHORITIES OF THE RECEIVER

(Motion Returnable November 7, 2012)

November 6, 2012

BLAKE, CASSELS & GRAYDON LLP
Suite 4000, Commerce Court West
199 Bay Street, Suite 4000
Toronto, Ontario M5L 1A9

Pamela Huff LSUC No.: 27344V
Tel: (416) 863-3058

Linc Rogers LSUC No.: 43562N
Tel: (416) 863-4168

Jenna Willis LSUC No.: 58498U
Tel: (416) 863-3348
Fax: (416) 863-2653

Lawyers for PricewaterhouseCoopers Inc. in its capacity as the Court-appointed Receiver of the Respondents

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TAB **CASES**

1. *Big Sky Living Inc., Re,* 2007 ABQB 249, 2007 CarswellAlta 489

2. *SA Capital Growth Corp. v. Brooks,* 2012 ONSC 2800, 2012 CarswellOnt 6330, rev'd in part on other grounds, 2012 ONCA 681, 2012 CarswellOnt 12445

3. *Battery Plus Inc., Re,* 31 C.B.R. (4th) 196, 2002 CarswellOnt 230 (S.C.J. [Commercial List])

4. *Turbo Logistics Canada Inc. v. HSBC Bank Canada,* 81 C.B.R. (5th) 169, 2009 CarswellOnt 5929 (S.C.J. [Commercial List])

5. *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.,* 2011 ONSC 3945, 2011 CarswellOnt 5613 ([Commercial List])

6. *Impact Tool & Mould Inc., Re, 41 C.B.R. (5th) 112,* 2007 CarswellOnt 9136 (S.C.J), aff'd 2008 ONCA 187, 2008 CarswellOnt 1360

7. *Terrace Bay Pulp., Re,* 2012 ONSC 4247, 2012 CarswellOnt 9470 ([Commercial List])

8. *Maxtech Manufacturing Inc., Re,* 2010 ONSC 1161, 2010 CarswellOnt 1072 ([Commercial List])

TAB **SECONDARY SOURCES**

9. Frank Bennett, *Bennett on Receiverships*, 3rd ed. (Toronto: Thomson Reuters, 2011).

TAB 1

2007 CarswellAlta 489, 2007 ABQB 249, [2007] A.W.L.D. 2012, 32 C.B.R. (5th) 74

C

2007 CarswellAlta 489, 2007 ABQB 249, [2007] A.W.L.D. 2012, 32 C.B.R. (5th) 74

Big Sky Living Inc., Re

In the Matter of The Insolvency of Big Sky Living Inc.

Alberta Court of Queen's Bench

D. Lee J.

Heard: April 10, 2007
Judgment: April 16, 2007
Docket: Edmonton BK03-97916

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Counsel: Roger C. Stephen for Applicants, Peter Leduc, Norman Seguin

J.H. Hockin for KPMG Receiver of Big Sky Living Inc., HSBC Bank Canada

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles

Cross-examination — PL and NS applied for order requiring receiver to attend for cross-examination on its filed report — Application adjourned pending further submissions — Applicants failed to provide affidavit in support, and in oral submissions failed to give particulars as to questionable conduct receiver was allegedly involved in — Cross-examination of receiver, who is officer of court, is exceptional circumstance, and receivers should not be subject to harassment for doing their job, particularly if parties against whom receivership is ordered against are using examination as fishing expedition, or are allowed to establish basis of potential lawsuits against receiver at cost of petitioning party who instituted receivership — Applicants were given time-limited opportunity to put in writing particulars of wrongdoing alleged in receivership, or alternatively, applicants could provide court with specific questions for receiver which could be answered by way of written interrogatories or through cross-examination.

Cases considered by *D. Lee J.*:

Big Sky Living Inc., Re (2007), 2007 ABQB 20, 2007 CarswellAlta 25, 28 C.B.R. (5th) 1 (Alta. Q.B.) — referred to

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Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135 (Ont. C.A.) — considered

APPLICATION for order requiring receiver to attend for cross-examination on its report.

***D. Lee J.*:**

1 The Applicants Peter Leduc and Norman Seguin seek an order requiring Tim Reid of KMPG Inc. to attend at the law offices of their solicitor Roger C. Stephens to be cross-examined on the the report of the Receiver dated and filed January 12, 2007. I originally dealt with this matter on January 9, 2007 when Mr. Leduc and Mr. Seguin applied for the following relief:

1. An Order suspending the sale of the unsold lands which remain the subject matter of this Receivership, namely, twenty-three lots (the "Lands") to Ashton Homes Ltd. ("Ashton") pending further Order of this Court;

2. An Order requiring the Receiver to provide an accounting and report to this Court respecting all sales of the lands governed by this receivership and the parties' performance under the purchase and sale agreement between the Receiver and Ashton;

3. An Order requiring the Receiver of Big Sky Living Inc., KPMG Inc., to obtain an appraisal of the Lands;

4. An Order requiring the Lands to be listed and sold on the open market to the highest bidder.

2 I declined to granted any of the relief sought in the January 9, 2007 motion, and any attempt to cross-examine the Receiver would have to await his Report. This is discussed in my written Reasons dated January 11, 2007, now reported at 2007 ABQB 20 (Alta. Q.B.).

3 Following the issuance of the Receiver's latest report, the Applicants Mr. Leduc and Mr. Seguin through their counsel Mr. Stephens submitted that the report "raises many questions with respecting the conduct of the receivership, and in particular the continued sale of lands at prices established in 2001, despite the protests of the Applicants". No Affidavit in support of this motion to cross-examine the Receiver is made either by Mr. Leduc or Mr. Seguin. The Receiver's latest report dated January 12, 2007 is quite extensive. In oral submissions Mr. Stephens is not able to give the Court many, if any, particulars as to the questionable conduct that he says the receiver is involved in.

4 Cross-examination of a Receiver, who is an officer of the Court, is an exceptional circumstance, and Receivers should not be subject to harassment for doing their job, particularly given that most Receivers in doing their

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jobs usually offend the parties against who the receivership is ordered. This is particularly so if the parties against whom the receivership is ordered against are using the examination of the Receiver as a fishing expedition, or to allow them to establish the basis of potential lawsuits against the Receiver, at the cost of the petitioning party in this case the HongKong Bank who instituted the receivership.

5 The law in this area was described in my written Reasons for Judgment in *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) and 2004 ABQB 423 (Alta. Q.B.). More recent cases from the Ontario Courts have confirmed the circumstances in which an examination of a Receiver is appropriate.

6 In *Ravelston Corp., Re*, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]) Cumming, J. of the Ontario Superior Court of Justice (Commerical List) stated the following criteria at paragraphs 37 and 38: —

> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours, Inc., Re* (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)
>
> 38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:
>
> > [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates [Re Confectionately Yours]* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

7 The Ontario Court of Appeal in 2007 ONCA 135 (Ont. C.A.) concluded that there was not reason to interfere with the motion Judge's decision in *Ravelston Corp., Re*.

Conclusion

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8 As matters presently stand, Mr. Stephens has not been able to show the Court any cogent or compelling reason why the Receiver should be subject to a cross-examination. However, I am prepared to give Mr. Stephens a further opportunity to put in writing the particulars of the wrongdoing that he is alleging in this Receivership. I am also prepared to give Mr. Stephens the opportunity, in the alternative, to provide the Court with specific questions for the Receiver, which the Receiver could answer by way of written interrogatories or through cross-examination.

9 This list of questions however must have a demonstrably valid basis and purpose, in accordance with the principles described above.

10 Any cross-examination of the Receiver, or any questions that I direct the Receiver to answer, will also have to be dealt with in a procedurally fair manner, and the costs involved in having the Receiver answer these questions or be cross-examined, has to be dealt with.

11 Mr. Stephens will have until April 24, 2007 to produce particulars as to the improprieties he believes exists in this Receivership, as well as to provide a list of questions, and the reasons the questions need to be asked and answered. Mr. Hockin will have until May 8, 2007 to respond to the arguments put forward by Mr. Stephens, to advise which questions, if any, are acceptable, and the objection that he has to the Receiver answering the remainder of the questions proposed.

Order accordingly.

END OF DOCUMENT

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TAB 2

2012 CarswellOnt 6330, 2012 ONSC 2800, 215 A.C.W.S. (3d) 635, 90 C.B.R. (5th) 241, 110 O.R. (3d) 765

SA Capital Growth Corp. v. Brooks

SA Capital Corp. (Applicant) and Christine Brooks as Executor of the Estate of Robert Mander, Deceased and E.M.B. Asset Group Inc. (Respondents) and Peter Sbaraglia (Moving Party) RSM Richter Inc. and Ontario Securities Commission (Responding Parties)

Ontario Superior Court of Justice [Commercial List]

L.A. Pattillo J.

Heard: May 9, 2012
Judgment: May 23, 2012
Docket: 10-8619-00CL

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Counsel: Kevin D. Toyne, Richard Niman for Moving Party, Peter Sbaraglia

Matthew P. Gottlieb, Shannon Beddoe for Receiver, Duff & Phelps Canada Restructuring Inc.

Jennifer M. Lynch for Ontario Securities Commission

Evan Cobb for Applicant, SA Capital Growth Corp.

Frank Lamie for Tonin & Co. LLO, Peter Tonin

Subject: Corporate and Commercial; Securities; Constitutional; Criminal; Insolvency

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Disclosure of documents — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver was appointed over debtors' assets — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — S, his wife, and their companies (C group) were thought to be involved in debtors' ponzi scheme and court issued order authorizing receiver to investigate their affairs — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership — Receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies

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and C group, pursuant to court order concerning C group only, along with deleted emails it recovered from C group's computers — Transcript and documents could then be reviewed by court to determine whether and to what extent production should be ordered, having regard to factors in Supreme Court of Canada (SCC) jurisprudence regarding production of third party records to enable accused to make full answer and defence, and issues raised by receiver and S on motion — Principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to make full answer and defence — Court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are "likely relevant" and balancing of competing interests at stake favours disclosure.

Securities --- Commissions and exchanges — Hearings and appeals — Right to fair hearing

Right to production in order to make full answer and defence — Debtors allegedly carried on ponzi scheme and misappropriated funds — Receiver was appointed over debtors' assets — Receiver compelled production of documents from certain parties with knowledge of debtors' affairs — S, his wife, and their companies (C group) were thought to be involved in debtors' ponzi scheme and court issued order authorizing receiver to investigate their affairs — Securities Commission successfully applied for appointment of receiver over C group's assets — Commission alleged that S breached Securities Act by committing fraud and misleading Commission's staff — S brought motion for disclosure of documents obtained by receiver pursuant to court ordered investigation during debtors' receivership — Receiver to have transcript made of its interviews with lawyers who acted for S and debtor, for review by court — Receiver to prepare for review documents provided by lawyer and accountant for debtors' companies and C group, pursuant to court order concerning C group only, along with deleted emails it recovered from C group's computers — Transcript and documents could then be reviewed by court to determine whether and to what extent production should be ordered, having regard to factors in Supreme Court of Canada (SCC) jurisprudence regarding production of third party records to enable accused to make full answer and defence, and issues raised by receiver and S on motion — Principles in SCC jurisprudence concerning production in such circumstances are of general application to records held by all third parties — Protections granted to court-appointed receiver in receivership to not have to generally provide information regarding receivership to others beyond what is contained in its reports cannot defeat accused's right to production to make full answer and defence — Court-appointed receiver is not prevented from having to produce its records to enable accused to make full answer and defence where such documents are "likely relevant" and balancing of competing interests at stake favours disclosure.

Cases considered by *L.A. Pattillo J.*:

Anvil Range Mining Corp., Re (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]) — referred to

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — referred to

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — referred to

Deloitte & Touche LLP v. Ontario (Securities Commission) (2003), 232 D.L.R. (4th) 1, 310 N.R. 376, 37

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B.L.R. (3d) 161, 13 Admin. L.R. (4th) 1, 2003 SCC 61, 2003 CarswellOnt 4121, 2003 CarswellOnt 4122, 179 O.A.C. 1, [2003] 2 S.C.R. 713 (S.C.C.) — referred to

Impact Tool & Mould Inc., Re (2007), 41 C.B.R. (5th) 112, 2007 CarswellOnt 9136 (Ont. S.C.J.) — referred to

R. v. McNeil (2009), 383 N.R. 1, 301 D.L.R. (4th) 1, 62 C.R. (6th) 1, 238 C.C.C. (3d) 353, [2009] 1 S.C.R. 66, 2009 SCC 3, 2009 CarswellOnt 116, 2009 CarswellOnt 117, 246 O.A.C. 154 (S.C.C.) — followed

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — followed

R. v. Stinchcombe (1991), 18 C.R.R. (2d) 210, 68 C.C.C. (3d) 1, 8 W.A.C. 161, 1991 CarswellAlta 559, 1991 CarswellAlta 192, [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 7 — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — referred to

s. 11(1) — referred to

s. 127 — considered

s. 129(1) — referred to

MOTION for disclosure of documents and information obtained by court-appointed receiver pursuant to court-ordered investigation.

***L.A. Pattillo J.*:**

Introduction

1 This motion raises the question of whether a court-appointed receiver should be required to disclose documents and information obtained by it pursuant to a court ordered investigation to one of the subjects of the investigation who is facing serious allegations by the Ontario Securities Commission's ("OSC").

2 The Moving Party, Dr. Peter Sbaraglia ("Sbaraglia"), seeks an order compelling the Court-appointed Re-

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ceiver, Duff & Phelps Canada Restructuring Inc., (formerly RSM Richter Inc.) (the "Receiver") to provide him with requested documents and information obtained by the Receiver during a court ordered investigation of Sbaraglia and others in order to assist him in responding to the OSC's allegations of securities fraud and misleading staff.

Background

3 On March 17, 2010, the Receiver was appointed receiver over the assets, property and undertaking of E.M.B. Asset Group Inc., and Robert Mander (the "Mander Debtors"). It was alleged that Mander and his company EMB were carrying on a Ponzi scheme and that Mander had misappropriated tens of millions of dollars. Mander committed suicide on the same day and the receivership was subsequently continued against his Estate.

4 Following its appointment and pursuant to orders issued by the court, the Receiver compelled production of documents from certain parties with knowledge of the affairs of Mander and his companies, including their lawyers and accountants. It also met with several individuals who had knowledge of or were involved with Mander and his companies.

5 In its Fourth Report to the Court dated July 4, 2010, the Receiver advised that, as part of its investigation of Mander and his companies, it identified numerous issues which suggested that an investigation should be undertaken of Sbaraglia, his wife, Mandy Sbaraglia, and their companies, CO Capital Growth Corp ("CO Capital") and 91 Days Hygiene Inc. (collectively the "CO Group").

6 Based on the evidence contained in the Fourth Report, the court issued an order on July 14, 2010, authorizing and directing the Receiver to commence an investigation into the business and affairs of the CO Group. The order granted broad powers to the Receiver to carry out the investigation including meeting with the CO Group, their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders and all other persons acting on their instructions and behalf and to obtain books and records relating to the business or affairs of the CO Group. The order specifically provided that Peter Welsh, the former solicitor for Mander and his companies and Tonin & Co. LLP, the accountants for Mander and his companies and CO Capital, deliver up their books and records in respect of those companies.

7 On September 9, 2010, the Receiver filed its Seventh Report to the Court summarizing its findings of its investigation of the CO Group. The Receiver stated that in preparing the Report, it relied upon, among other things, ".... documents, records and information provided by various parties, including several financial institutions, the CO Group, Tonin & Co. LLP, the former accountant to Mander and the CO Group, and Aylesworth LLP and Peter R. Welsh, former legal counsel to the CO Group." The Receiver disclaimed any opinion on the accuracy of the information obtained.

8 The Report indicated the investigation was ongoing and highlighted major issues identified by the Receiver to date, including, that Sbaraglia's testimony before the OSC in July 2009 was misleading and incomplete; that the CO Group knew or ought to have known that they were not generating returns sufficient to repay their obligations to investors; that the CO Group were insolvent based on an admission by Sbaraglia in an affidavit filed; and that the CO Group had advised they may make payments to family members in preference to other creditors. The Receiver recommended that a receiver be appointed over the CO Group.

9 The Receiver has continued to provide periodic Reports to the court concerning both the Mander Debtors receivership and the CO Capital Debtors receivership.

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The OSC Proceedings

10 On September 8, 2010, following an investigation pursuant to s. 11(1) of the *Securities Act*, R.S.O. 1990, c.S.5, as amended, (the "*Securities Act*") which began in July 2008, the OSC commenced an application to the Superior Court (Commercial List) pursuant to s. 129(1) of the *Securities Act*, for the appointment of a receiver over the business, assets and undertakings of the CO Group.

11 The CO Group strenuously opposed the OSC's application. They took the position they had done nothing wrong and were victims of Mander's fraud. Extensive materials were filed in opposition and numerous cross-examinations were conducted.

12 The OSC's application was heard by Justice Morawetz in December 2010. In lengthy oral reasons on December 23, 2010, Justice Morawetz granted the OSC's application and appointed the Receiver as receiver over the CO Group.

13 On February 24, 2011, the OSC issued a Notice of Hearing and Statement of Allegations naming Sbaraglia as the Respondent and alleging that Sbaraglia had breached the *Securities Act* by committing fraud and misleading the OSC staff.

14 As particularized in the Statement of Allegations, the OSC alleges that Sbaraglia committed fraud by:

> a) failing to do any due diligence with respect to Mander and his investment scheme and obtaining any objective evidence from Mander about the alleged investment profits;
>
> b) misleading and deceiving investors by operating CO Capital's business in a way which deviated from its purported business model by keeping approximately $6-7 million of $21 million raised from investors in CO Capital and using the funds for: (i) making payments to CO Capital investors with newly received funds from other CO Capital investors; (ii) making investments in securities, either directly in trading accounts of CO Capital or indirectly in trading accounts in the names of other companies, that resulted in significant losses; and (iii) making payments for personal expenses of the Sbaraglias; and
>
> c) using CO Capital investor monies to fund his lifestyle.

15 In respect of the allegation of materially misleading the OSC staff, the OSC alleges that during his July 9, 2009 examination by the OSC staff that was conducted under oath with counsel present, Sbaraglia failed to disclose liabilities of approximately $9.4 million owing to CO Capital investors and misled the staff about the assets that were allegedly available to satisfy CO Capital's obligations. It is also alleged that an undertaking given to the OSC by Sbaraglia on August 7, 2009 was materially misleading because it failed to identify material obligations of CO Capital in its schedule of outstanding loans.

16 The hearing in respect of the OSC's allegations against Sbaraglia, which was originally scheduled to begin on June 4, 2012, has been adjourned at Sbaraglia's request and is currently scheduled to take place beginning October 22, 2012.

17 The OSC has provided Sbaraglia with full disclosure (subject to its ongoing disclosure obligations) of all relevant documents in its possession and custody. Included in this disclosure are some of the Receiver's Reports to the court and the entire record in the OSC's application for the appointment of a receiver over the CO Group.

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18 The Receiver is not a party to the OSC's proceedings against Sbaraglia.

Sbaraglia's Motion

19 On this motion, Sbaraglia requests an order requiring the Receiver to:

> (i) produce transcripts, recordings and/or notes of interviews with 16 named individuals who met with the Receiver as part of its investigation;
>
> (ii) produce documents provided to the Receiver by the individuals;
>
> (iii) produce documents provided to the Receiver by the lawyer and accountant to both the Mander Debtors and the CO Group pursuant to Court order;
>
> (iv) produce copies of emails to and from Sbaraglia which had been deleted but subsequently recovered by the Receiver from CO Capital's computers and servers and which are referred to in the Receiver's Fourth Report to the Court;
>
> (v) prepare an index of all the documents in the Receiver's power, possession and control; and
>
> (vi) produce any additional documents that may be requested by Sbaraglia once he has had an opportunity to review the index.

The Position of the Parties

(a) Sbaraglia

20 Sbaraglia submits, given the serious allegations alleged against him by the OSC and the potential sanctions that could be levied against him if the allegations are established, he is entitled to production of the requested documentation and information in order to make full answer and defence. The documents and information sought are relevant to the matters at issue before the OSC and will assist Sbaraglia in defending himself. It is submitted that the motion is analogous to an *O'Connor* application for third party production as dealt with by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.). Sbaraglia further submits that the Receiver has an obligation to provide relevant documents to "interested parties" such as himself.

(b) The Receiver

21 The Receiver opposes Sbaraglia's motion on a number of grounds. It submits that the documents and information requested arose as a result of work done by it as an officer of the court pursuant to a court order. It cannot and should not be compelled to produce documents, including its working papers, either in the proceeding for which it was appointed or for purposes outside of it which is what Sbaraglia's request amounts to. The Receiver further submits that it is prohibited from producing documents and other evidence obtained by it from third parties for any purpose other than for use in the proceeding in which the Receiver obtained the materials based on the common law implied undertaking rule. The Receiver further submits that the test in *O'Connor* has no application on this motion and, in any event, Sbaraglia has failed to adduce cogent evidence that the sought after documents are likely relevant. Finally, the Receiver points to the estimated expense of complying with Sbaraglia's request and submits that the cost will result in a significant depletion of the Estate's remaining cash

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which is otherwise available to distribute to creditors.

(c) The OSC

22 The OSC appeared on the motion and filed a factum setting out some background information regarding its proceedings involving Sbaraglia and some of the OSC's rules of procedure. The OSC took no position on the motion.

(d) SA Capital Growth Corp.

23 SA Capital Growth Corp., the applicant in the Mander Debtor receivership, opposed the motion on the grounds that compliance with the request will result in the depletion of the Estate's funds which should be distributed to the creditors.

(e) Tonin & Co. and Peter Tonin

24 Tonin & Co. and Peter Tonin filed no material on the motion but adopted the positions of the Receiver and SA Capital against production.

Discussion

25 The issues raised on this motion intersect principles from both insolvency law and criminal law.

26 The Receiver submits that a court appointed receiver cannot be compelled to produce documents obtained as part of its mandate in one proceeding for use in a separate proceeding.

27 There is no question that receivers, as court-appointed officers are afforded certain protections by the court in order to enable them to carry out their duties in an efficient and cost effective manner. Court-appointed receivers file reports with the court for the purpose of providing information regarding the proceeding to the court and interested parties. Beyond the information contained in the reports, a receiver is not generally required to produce the details of its investigations, either within the receivership or for a purpose outside it. Receivers are not generally subject to cross-examination on their reports except in "exceptional or unusual" circumstances. See: *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]); *Impact Tool & Mould Inc., Re* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.): and *Anvil Range Mining Corp., Re*, [2001] O.J. No. 1125 (Ont. S.C.J. [Commercial List]). A receiver is required only to respond to parties' reasonable requests for information regarding the receivership but is not required to produce all documents in its possession: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]).

28 The Receiver submits that, given the strict limits placed on the ability to compel the receiver to testify in respect of its own report in its own proceeding and the limit on the receiver to produce documents to parties relevant only to the receivership proceeding, the court ought not compel the Receiver to produce its preparatory notes and working papers in respect of a report for the purposes of a proceeding outside the receivership.

29 Based on the above, therefore, and even though Sbaraglia is an interested party in both the Mander Debtors and the CO Capital Group receiverships, he is not entitled to production of the information he seeks from the Receiver given the law relating to receiverships.

30 That however, does not end the issue. Sbaraglia submits that based on s. 7 of the Charter of Rights and

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Freedoms, he is entitled to production of the information requested in order to enable him to make full answer and defence in respect of the serious allegations that he is facing from the OSC.

31 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.), the Supreme Court of Canada held that in a criminal prosecution, the Crown has a duty to disclose to the accused all information in its possession or control unless it is clearly irrelevant or protected by a recognized form of privilege. The duty arises from the Crown's position and the accused's constitutional right as contained in s. 7 of the *Charter of Rights and Freedoms* to make full answer and defence.

32 The duty of the Crown to disclose all information in its possession and control (and its corollary, the right of an accused to make full answer and defence) applies equally to the OSC and its prosecutors in respect of proceedings under s. 127 of the Act. See: *Deloitte & Touche LLP v. Ontario (Securities Commission)*, [2003] 2 S.C.R. 713 (S.C.C.).

33 Not long after *Stinchcombe*, the Supreme Court of Canada held in *O'Connor*, supra, that production of documents in the hands of third parties not involved in the prosecution may also be required to be produced to enable an accused to make full answer and defence. The court recognized, however, that because third parties have no duty to disclose to an accused, are not involved in the proceedings and have potential privacy issues in the information sought to be disclosed, that different rules for production of third party documents should apply.

34 *O'Connor* dealt with the production of medical and therapeutic records of a complainant in a case involving numerous sexual offences. Subsequent to the decision, Parliament amended the *Criminal Code* to provide a procedure for disclosure of third party records containing complainants' personal information in sexual assault cases. Nevertheless, the principals and procedure set out by L'Heureux-Dube J., writing for the majority in *O'Connor*, have been recognized and adopted as applying to all requests by accused for production of documents in the hands of a third party who is not involved in the proceedings against the accused.

35 The procedure established by *O'Connor* essentially involves an application to the court by the accused, supported by affidavit evidence, showing that the documents or information sought are likely to be relevant in the proceeding. Notice of the application is given to the prosecutor, the person who has control of the records, the person who is the subject of the records and anyone else who might have a privacy interest in the information sought. On the return of the application, the judge is required to engage in a two-step procedure. First, he or she must determine from the evidence whether the information sought is "likely relevant" to the proceedings the applicant is facing. If the judge is satisfied the information is "likely relevant", the next step is for the court to review the documents. In that regard, the court may order production of the record for inspection by the court. Following review of the document or documents, the judge must then determine whether and to what extent, if any, production should be ordered to the applicant.

36 In establishing the procedure to be followed in permitting production to an accused of third party records in criminal cases, L'Heureux-Dube J. set out the considerations that must be borne in mind at paragraph 132 of *O'Connor*:

> **132** The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfill the right to make full answer and defence. Third, arguments urging production must rest

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upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

37 The procedure set out in *O'Connor* was considered and confirmed by the Supreme Court of Canada in *R. v. McNeil*, [2009] 1 S.C.R. 66 (S.C.C.). At paragraph 33, Charron J., on behalf of the Court, set out the meaning of "likely relevant" as referred to in *O'Connor*:

> **33** "Likely relevant" under the common law *O'Connor* regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (*O'Connor*, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (*O'Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

38 In discussing the second stage of the *O'Connor* procedure, the review and determination by the court of whether or not to order production, Charron J. stated at paragraph 35 of *McNeil*:

> **35** In *O'Connor*, this Court provided the following list of factors for consideration in determining whether or not to order production to the accused (at para. 31):
>
> > ... "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" ....
>
> The factors set out in *O'Connor* should not be applied mechanically. It should be kept in mind that *O'Connor* involved the production of the complainant's private records in proceedings for a sexual offence, an area of law subsequently overtaken by Parliament's enactment of the *Mills* regime. Some of the factors listed in *O'Connor*, in particular items 4 and 5 above, were obviously tailored to meet the exigencies in sexual assault proceedings and, consequently, are unlikely to be of assistance in other contexts. Ultimately, what is required at this second stage of the common law regime is a balancing of the competing interests at stake in the particular circumstances of the case. No exhaustive list can be crafted to suit every situation; however, I will elaborate somewhat on the balancing process.

39 In my view, the principles set forth in *O'Connor* and *McNeil* concerning the production of third party records to enable an accused to make full answer and defence are of general application to records held by all third parties, regardless of whether they are private citizens, government agencies or court officers. The protections

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granted to a court-appointed receiver in a receivership to not have to generally provide information or documents regarding the receivership to others beyond what is contained in its reports cannot operate, in my view, to interfere with or defeat an accused's right to production in order to make full answer and defence. It follows that a court-appointed receiver is not prevented from having to produce its records to enable an accused to make full answer and defence where such documents are "likely relevant" and the balancing of the competing interests at stake favours the disclosing of the record.

40 The procedure and safeguards set forth in *O'Connor* and elaborated on in *McNeil* are more than sufficient, in my view, to meet any concerns about production that the Receiver has raised in this case, including privacy and costs, while at the same time giving effect to Sbaraglia's right to make full answer and defence to the allegations he is facing before the OSC.

41 Having said that, however, in order to obtain production, it is incumbent on Sbaraglia to follow the procedure set out in *O'Connor* and establish the necessary requirements. The onus is on Sbaraglia.

Likely Relevant

42 Sbaraglia seeks the records of the Receiver arising from interviews and documents obtained by it from 16 individuals during the Mander Debtors' receivership which he submits will assist him in demonstrating that he did not know nor could he have known that Mander was engaged in fraudulent activities. Of the 16 individuals, 11 are former partners, associates, employees or clients of Mander, three are lawyers who acted for both Mander and CO Capital, one is an accountant and one is the OSC staff investigator who conducted the investigation of Sbaraglia for the OSC.

43 Sbaraglia also seeks production of certain deleted emails the Receiver has recovered as well as an index of all documents in the Receiver's possession and control from the Mander Debtors receivership and the right to request production of further documents once the index has been produced.

(a) Former partners, associates, employees or clients of Mander

44 The Receiver, in the course of its mandate in the Mander Debtors receivership, interviewed, had discussions with and communicated periodically with nine of the 11 individuals. Two of the individuals, Grant Walton and Tascha Fluke, were never interviewed or corresponded with. None of the interviews or discussions were recorded or transcribed. What exists in the Receiver's files are notes and internal memoranda concerning the discussions.

45 In addition, two of the individuals, David Amato and Thomas Obradovich, are former lenders to CO Capital and filed affidavits in the OSC's application for the CO Group receivership. They were cross-examined at length by the CO Groups' counsel during the application. They have also been examined by the OSC and the transcripts of those proceedings have been produced to Sbaraglia as part of the OSC's disclosure obligations.

46 The Receiver further indicates that it did not keep any schedule of documents received from the indi- viduals.

47 In my view, Sbaraglia has not established, based on the allegations in the OSC's Notice of Hearing and the evidence or lack thereof before me, that the information or documents provided to the Receiver by the 11 individuals who were former partners, associates, employees or clients of Mander is likely relevant to his defence

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to the OSC allegations. Sbaraglia has not established that the information requested is either logically probative to an issue before the OSC or relates to the credibility of a witness or the reliability of other evidence in the case. I have reached this conclusion for a number of reasons.

48 First, and given that the Receiver has had no communication with either of Walton and Fluke, there is no evidence that there is any record in the hands of the Receiver concerning them that is likely relevant to Sbaraglia's due diligence defence.

49 Of the nine individuals remaining, there is no evidence that any of them have refused to speak to Sbaraglia or his counsel about their dealings with the Receiver or to provide copies of the documents they provided to the Receiver, if any. In fact, Sbaraglia affidavit indicates that in the case of three of the individuals, Zurini, Auriemma and Ward, either he or his wife spoke with them after they met with the Receiver. Sbaraglia has listed the nine individuals specifically and the Receiver has confirmed that it had discussions with them. Any information or documents given to the Receiver that Sbaraglia now seeks to obtain came from the individuals and one would have thought they would be the first persons to speak to about it. It is no answer, in my view, to say that the discussions with the Receiver took place a long time ago and the Receiver's record is therefore the best evidence when no attempt whatsoever has been made to speak with these individuals in the first instance.

50 Further, some of the individuals have been cross-examined at length by Sbaraglia's counsel in the CO Group receivership application. No explanation has been provided by Sbaraglia as to why the information obtained from that proceeding about the individuals' relationship with Mander and Sbaraglia is not sufficient. In fact it was not mentioned at all by Sbaraglia in his affidavit.

51 I am mindful that in both *O'Connor* and *McNeil*, the Court noted that the onus on the applicant in an application for third party production to establish likely relevant is not high given that the applicant has no information about what's in the documentation being sought. In my view, however, where an applicant seeks records of information given by specific individuals and has not first established that the information is unavailable from the individuals, the applicant has failed to meet his or her onus.

52 The nine individuals who the Receiver spoke with and received documents from were associated with Mander, worked with him or dealt with him. To simply say, as Sbaraglia does many times in his affidavit that information concerning what the person said or gave to the Receiver is necessary to assist him in his due diligence defence is, without more, speculative and without substance. The OSC's allegation of failure to exercise due diligence is that Sbaraglia failed to do any due diligence with respect to Mander and his investment scheme and obtain any objective evidence from Mander about the alleged investment profits. I am unable to conclude, in the absence of some specific information from Sbaraglia that the relationships between the nine individuals and Mander and their dealings with him are in any way likely relevant to Sbaraglia's due diligence defence.

53 Nor has Sbaraglia established that the information sought is necessary for the credibility of witnesses or the reliability of other evidence in the case. The OSC has indicated that it intends to call two staff investigators and a number of Sbaraglia's former clients as witnesses at the hearing. There is no indication any of the nine individuals will be witnesses at the hearing. Further, the OSC staff has advised Sbaraglia on at least two occasions that it does not intend to call the Receiver as a witness at the hearing against Sbaraglia.

54 As a result, I find that Sbaraglia has failed to establish that the Receiver's records relating to its discussions with the nine individuals as part of the Mander Debtor receivership which he seeks production of are likely relevant to the OSC's allegations against him. In my view, his request for such records is nothing more than a

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fishing expedition which is clearly not permissible.

(b) The Lawyers

55 Julia Dublin and Michael Miller from Alysworth LLP, acted for Sbaraglia and Mander from approximately May 2009 to early 2010. The Receiver interviewed them with Sbaraglia's consent and recorded the interviews. No transcript of those interviews has been prepared.

56 Peter Welsh acted for both Mander and his companies and CO Capital. As noted, the July 14, 2010 order required Mr. Welsh to produce documents relating to the Mander Debtors and CO Capital to the Receiver. The Receiver met with Mr. Welsh.

57 I view Sbaraglia's request for production of information received by the Receiver from the lawyers to be different from the records requested concerning the nine individuals. The record indicates that Sbaraglia is suing the lawyers from which I infer that speaking to them about what they said or gave in the way of documents to the Receiver or what they may say to support his due diligence defence is not realistic. Accordingly I am not troubled by the fact that there is no evidence of any attempt by Sbaraglia or his lawyers to speak with the law- yers.

58 Dublin and Miller were present when Sbaraglia was interviewed by the OSC. It is that interview and some of the answers provided by the lawyers (with Sbaraglia present) that is part of the OSC's allegation that Sbaraglia misled the OSC. What Dublin and Miller told the Receiver during their interviews could likely be relevant to the allegations Sbaraglia is facing. Similarly, any documents that they provided to the Receiver concerning their representation of CO Capital may also be likely relevant.

59 I am of the same mind in respect of any documents provided by Welsh to the Receiver concerning his representation of CO Capital.

60 With respect to any discussions with Welsh, there is no transcript. I do not regard the Receiver's notes of any discussions to be likely relevant. They are the note taker's impression of the discussion and do not necessarily reflect what was said by the interviewee. Nor can they be used to impeach credibility.

(c) The Accountant

61 Also as noted, the July 14, 2010 order required Tonin & Co. LLP who acted for Mander's companies and CO Capital to produce all related documents to the Receiver. In addition, the Receiver met with Peter Tonin, the partner who was in charge of the clients.

62 There is no indication on the record why Sbaraglia or his counsel cannot speak with Tonin concerning his discussions with the Receiver. I infer, however, from the position taken by Tonin's counsel before me that any such request may not have had much success.

63 For the same reason as noted concerning Welsh, it is my view that any documents which Tonin provided to the Receiver concerning CO Capital may be likely relevant to the OSC's allegations and Sbaraglia's defence. I do not, however, consider the Receiver's notes, if any, of any discussions with Tonin to be likely relevant for the reasons sated in respect of Welsh.

(d) The OSC Staff Investigator

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64 Pursuant to paragraph 30 of the Fresh as Amended Receivership Order in the Mander Debtors receivership dated March 31, 2010 which requested, among other things that any regulatory or administrative body in Canada assist the Receiver in carrying out the Order, the OSC staff investigator and other OSC staff members met with the Receiver and provided information concerning the OSC's investigation of, among others, Mander and Sbaraglia. All of the material provided to the Receiver by the OSC has been disclosed to Sbaraglia by the OSC as part of its disclosure obligations.

65 Further, the investigator filed an affidavit in the OSC's receivership application against the CO Group and was cross-examined at some length by the CO Group's counsel.

66 In my view, Sbaraglia has not established that any records the Receiver has with respect to its meeting with the OSC investigator are likely relevant to the issues raised by the OSC. The investigator was not interviewed by the Receiver. The OSC and the Receiver to some extent conducted parallel investigations. Sbaraglia has obtained full disclosure from the OSC concerning its investigation which is all of the information provided by the OSC to the Receiver. In addition, Sbaraglia has cross examined the investigator at length in the OSC receivership application.

(e) Deleted Emails

67 As a result of the consent of CO Capital, the Receiver had access to CO Capital's computers and servers and identified email correspondence from and to Sbaraglia that had been previously deleted, including emails sent to Sbaraglia on March 24, 2010, one day prior to the Receiver attending at CO Capital's office.

68 Sbaraglia states in his affidavit that although he does not know what the deleted emails contain or whether he has copies, the Receiver's Fourth Report which refers to them gives the impression they contain relevant information and accordingly he believes that they will assist him in defending the OSC's allegations.

69 While I consider the reference to the deleted emails in the Receiver's Report was simply to note a concern that emails had been deleted, particularly in and around the time when it was appointed receiver of the Mander Debtors and is not a comment concerning their specific relevance, unlike the information requested from the nine individuals, because the deleted emails are to and from Sbaraglia, I am unable to conclude based on the information before me that they are not likely relevant to his defence of the OSC's allegations.

(f) Index of Documents and Information in the Receiver's Possession and Control

70 As noted, Sbaraglia requests that the Receiver produce an index of all documents and information in its power, possession and control. Sbaraglia believes that it will assist him in defending the OSC's allegations. He further seeks the right to request production of any document which may appear in the index.

71 There is no basis in the evidence for establishing that the Receiver should produce an index of all documents and information received by it during the two-year period of the Mander Debtors receivership. I am not prepared to find, in the absence of some specific information that such an index is likely relevant to any of the issues raised in the OSC's allegations. The Receiver indicates that no such inventory has been prepared. The documents number in the hundreds. The request in my view, is simply too bald and general to meet the test of likely relevant. In my view, it amounts to nothing more than a fishing expedition and not something the court can or will permit.

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Conclusion

72 Accordingly, for the above reasons and with the procedure set forth in *O'Connor* in mind, I direct that the Receiver have a transcript made of its interviews with Dublin and Miller for my review. The Receiver should also prepare and produce for my review the documents provided by Welsh and Tonin pursuant to court order concerning CO Capital only along with the deleted emails it recovered from CO Capital's computers and servers. I request that this be done as soon as possible and in any event by June 10, 2012 in order that I can review the transcript and documents to determine whether and to what extent production, if any, of the transcripts and documents should be ordered to Sbaraglia having regard to the factors set out in *O'Connor* and *McNeil* and the issues raised by the Receiver and Sbaraglia on the motion. If there is an issue concerning the timing I have set out, I may be spoken to.

73 I am mindful of the costs to the Mander Debtors receivership of these additional requests placed upon the Receiver. I do not think, however, that the costs of producing the requested information should be significant. They must, however, be borne by the Receiver at this stage. The Receiver should keep track of its costs in preparing and providing the requested transcripts and documentation and I will deal with them along with the costs of the motion generally upon completion of the motion.

Order accordingly.

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2012 CarswellOnt 12445, 2012 ONCA 681

SA Capital Growth Corp. v. Brooks

SA Capital Growth Corp., Applicant and Christine Brooks as Executor of the Estate of Robert Mander, deceased and E.M.B. Asset Group Inc., Respondents and Peter Sbaraglia, Moving Party (Appellant, Respondent by way of cross-appeal) and RSM Richter Inc. and Ontario Securities Commission, Responding Parties (Respondent, Appellant by way of cross-appeal)

Ontario Court of Appeal

Robert J. Sharpe J.A., E.E. Gillese J.A., David Watt J.A.

Heard: October 2, 2012
Judgment: October 10, 2012
Docket: CA C55588

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Proceedings: Reversed (in part), 2012 CarswellOnt 6330, 215 A.C.W.S. (3d) 635, 110 O.R. (3d) 765, 90 C.B.R. (5th) 241, 2012 ONSC 2800 (Ont. S.C.J. [Commercial List])

Counsel: Kevin D. Toyne, for Appellant Peter Sbaraglia

Matthew Gottlieb, Shannon Beddoe, for Respondent, RSM Richter Inc. (now Duff & Phelps Canada Restructuring Inc.)

Evan Cobb, for Applicant, SA Capital Growth Corp.

Jennifer Lynch, for Respondent, Ontario Securities Commission

Frank Lamie, for Tonin & Co. LLP, Peter Tonin

Subject: Constitutional; Corporate and Commercial; Criminal; Insolvency; Securities

Criminal law

Debtors and creditors

Securities

Per curiam:

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1 The appellant faces allegations before the Ontario Securities Commission ("OSC") related to an alleged Ponzi scheme. In an unrelated proceeding and at the suit of the respondent SA Capital Corp., a court-appointed receiver conducted an investigation of the appellant, his wife, and companies they controlled in relation to the alleged Ponzi scheme. The appellant sought and obtained from the Superior Court a third-party production order requiring the respondent, RSM Richter Inc. ("the receiver"), to produce materials the appellant claims he needs in order to make full answer and defence in the OSC proceedings.

2 The appellant appeals that order, arguing that the Superior Court judge erred by failing to order further production. The receiver cross-appeals arguing that no production should have been ordered.

3 For the following reasons, we conclude that the appeal should be dismissed, the cross-appeal allowed, and the order requiring the receiver to produce materials set aside.

Analysis

4 The appellant submits that the third-party production order was justified on two grounds:

1. the appellant is an "interested person" in the receivership and is thereby entitled to production; and

2. the Superior Court has the authority to order third-party production to protect the appellant's right to make full answer and defence before the OSC.

5 We are unable to accept either of these propositions.

1. "Interested person"

6 In our view the application judge correctly found that a court-appointed receiver cannot be compelled to produce documents obtained in the exercise of its mandate in the receivership to be used in a separate proceed- ing.

7 The application judge recognized that in some circumstances, a party involved in a receivership can insist upon the production of documents and materials that have been obtained by the receiver. Reference was made to *Bennett on Receiverships*,3rd ed. (Toronto: Thomson Reuters, 2011) at p. 232:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. The receiver must produce all documents in its possession which are relevant to the issues in the receivership.

8 The reach of the phrase "interested person" was discussed and applied by Greer J. in *Re Battery Plus* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J.), where "interested person" was held to include parties who have a direct interest in the subject matter of the receivership itself but to exclude parties who seek production of documents that do not "relate to a specific purpose" concerning the receivership itself. This approach is in line with the case law that states that receivers are not subject to cross-examination on their reports except in exceptional or unusual circumstances: see *Bell Canada International Inc. (Re)* (2003), A.C.W.S. (3d) 790 (Ont. S.C.J.); *Impact Tool & Mould Inc. (Re)* (2007), 41 C.B.R. (5th) 112 (Ont. S.C.J.), affirmed (2008), 41 C.B.R. (5th) 1 (Ont. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 220; and *Anvil Range Mining Corp. (Re)* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J.). It is also consistent with bankruptcy case law that establishes that a court officer (trustee

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in bankruptcy) will not be compelled to produce documents created and obtained as part of its duties in one proceeding for a collateral purpose: see, for example, *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of)* (2006), 79 O.R. (3d) 241 (C.A.); *GMAC Commerical Credit Corp. — Canada v. TCT Logistics Inc.* (2002), 37 C.B.R. (4th) 267 (Ont. S.C.J.).

9 The OSC proceedings are clearly separate and distinct from the receivership. The appellant does not seek production for the purpose of advancing any legal claim or interest in the receivership but rather for a purpose collateral to the receivership, namely, his defence before the OSC. Accordingly, in our view, the appellant is not an interested person as his request was made for a purpose collateral to the receivership proceeding.

10 We agree with the receiver's submission that to recognize a right to require the receiver to produce material for purposes collateral to the receivership could lead to serious mischief. A court-appointed receiver is an officer of the court, not a regular litigant. Officers of the court should be left to perform their functions and duties without the distraction, added cost and potential chilling effect on their investigations that could result from permitting open-ended access to the fruits of their investigation.

2. Full answer and defence

11 The application judge made the third-party production order on the basis that the appellant was entitled to the material he ordered produced to make full answer and defence to the allegations he faces before the OSC. The application judge applied, by way of analogy, the procedure contemplated by *R. v. O'Connor*, [1995] 4 S.C.R. 411 in criminal proceedings.

12 In our view, the application judge erred. However, in fairness, we observe that the basis upon which we reach that conclusion does not appear to have been clearly articulated before the application judge.

13 It was inappropriate for the Superior Court to make what amounted to an interlocutory procedural order in relation to a proceeding pending before the OSC.

14 Matters such as disclosure, third-party production, and other pre-hearing orders required to ensure fair process are quintessentially matters to be dealt with by the tribunal that will decide the case. Requests for third-party production give rise to issues of relevance, cost, delay and fairness, and it has long been recognized that the judge or tribunal charged with final decision-making authority is best placed to resolve such issues. In this case, it is for the OSC to determine what procedural rights should be accorded to the appellant and it is for the OSC to ensure that the appellant is accorded a level of procedural fairness commensurate with the allegations he faces. If, at the end of the day, the appellant is not accorded appropriate fairness in the OSC proceeding, the law provides him with appropriate remedies.

15 Further, resort to the courts on an interlocutory basis disrupts orderly decision-making by the tribunal. There is a long-established principle that ordinarily, neither appeals nor judicial review should be entertained until after the tribunal proceedings have come to a final conclusion. Although this application did not take the form of an appeal or application for judicial review, it was inconsistent with that basic principle.

16 In view of the conclusion we have reached, we make no comment on the merits of the appellant's assertion that he has a procedural right in the OSC proceeding to a third-party production order or on whether the documents he seeks are relevant.

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17 We are aware of the fact that before the appellant brought his application before the Superior Court, a time when he was acting in person, he brought a motion before the OSC requesting third-party production from the receiver. The receiver was not served with that motion. The motion was heard by a single commissioner who ruled that the OSC "does not have the authority to order productions from the Receiver, who is an independent officer of the Court" and observed that, as Staff counsel had submitted, the respondent was not left without a remedy. The commissioner did not specify what remedy he had in mind, but we were informed during oral argument that the OSC Staff had pointed out that the appellant could seek a summons including an order for production of the material he seeks in the OSC proceeding or he could go to the Superior Court and ask for an order for third-party production pursuant to rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

18 The appellant did not challenge that ruling but instead commenced this Superior Court application for third-party production.

19 We agree with the receiver that rule 30.10 could have no application to the appellant's request. That rule provides orders for third-party production "on motion by a party" for a document that is "relevant to a material issue in the action". The rule plainly does not confer jurisdiction on the Superior Court to make freestanding production orders for production of documents sought in relation to proceedings before agencies or tribunals such as the OSC.

20 We make no comment on whether the commissioner was right or wrong in his ruling. We observe, however, that the dismissal of the appellant's motion for third party production does not preclude the appellant from seeking an alternative remedy before the OSC. In any event, the refusal to order production within the OSC proceedings cannot confer authority on the Superior Court to make such an order if, as we find, there is no basis in law for the Superior Court to exercise that authority.

Conclusion

21 For these reasons, the appeal is dismissed, the cross-appeal is allowed, and the order of the Superior Court is set aside. We have received the receiver's bill of costs for the application before the Superior Court and for this appeal. We will entertain brief written submissions in support of that request, to be submitted within 7 days from the release of these reasons and responding submissions from the appellant within 7 days thereafter.

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TAB 3

2002 CarswellOnt 230, 31 C.B.R. (4th) 196

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2002 CarswellOnt 230, 31 C.B.R. (4th) 196

Battery Plus Inc., Re

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as Amended

In the Matter of Battery Plus Inc. and 1271273 Ontario Inc.

Application under the Bankruptcy and Insolvency Act, R.S.C. c.B-3. Section 47.1

Ontario Superior Court of Justice [Commercial List]

Greer J.

Heard: January 14, 2001
Judgment: January 23, 2002
Docket: 01-CL-4319

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Counsel: *Melvyn L. Solmon*, for Battery Plus Inc., 1271273 Ontario Inc.

Harvey Chaiton, for Interim Receiver, Deloitte & Touche Inc.

Katherine McEachern, for Laurentian Bank

Bryan Skolnik, for Domenick Bellisario, secured creditor

Subject: Insolvency; Corporate and Commercial

Receivers --- Conduct and liability of receiver — Duties

B owned all shares of numbered company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for copies of personal e-mails, voice mails and companies' computer records to be produced by receiver — Receiver ordered to produce B's personal documents, e-mail and voice mail and copies of offers for purchase of companies — B was required to provide receiver with list, description and relevance of specific documents which he required — At no time did B specify exactly which documents he required — Receiver did not owe duty to owner of shares of business in receivership to copy everything in receiver's possession — Interested party had right to documents relating to specific purpose — As B was in best position to know how companies were operated, he was not acting in good faith by not preparing reasonable list of specific documents as opposed to broad sweeping categories.

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Corporations --- Directors and officers — Fiduciary duties — Effect of receivership or winding-up

B owned all shares of number company which owned all shares of B Inc. — Interim receiver of companies was appointed at behest of major secured creditor — B and companies brought motion for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies — Motion dismissed — Directors of company in receivership had continuous obligation to shareholders and unsecured creditors to act honestly and in best interests of debtors to attain best possible price for assets — Difficult to say that as director B was acting in best interest of companies and debtors by subpoenaing representatives of prospective purchasers as witnesses — Abuse of process in receivership to subject non-parties with no knowledge about receivership, other than terms of offer being made by company they worked for, to have to attend on discovery — Order for witnesses to appear was refused.

Cases considered by *Greer J.*:

Alberta Treasury Branches v. Hat Development Ltd., (sub nom. *Hat Development Ltd., Re)* 64 Alta. L.R. (2d) 17, 71 C.B.R. (N.S.) 264, 1988 CarswellAlta 313 (Alta. Q.B.) — considered

Nash v. CIBC Trust Corp., (sub nom. *Nash v. C.I.B.C. Trust Corp.)* 6 O.T.C. 368, 1996 CarswellOnt 2185 (Ont. Gen. Div.) — considered

Royal Bank v. Vista Homes Ltd., 58 B.C.L.R. 354, 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590 (B.C. S.C.) — considered

SLP Resources Inc. v. Sorrel Resources Ltd., 65 C.B.R. (N.S.) 288, 1987 CarswellAlta 317 (Alta. Q.B.) — considered

MOTION by shareholder for production of documents by interim receiver and for leave to examine witnesses regarding documentation and information provided by receiver to prospective purchasers of companies.

***Greer J.*:**

1 Battery Plus Inc. ("Battery") and 1271273 Ontario Inc. ("127") move, together with Antoine Chahine Badr ("Badr"), the owner of all the shares of 127, which in turn owns all the shares of Battery, requiring Deloitte & Touche Inc. as Interim Receiver ("Deloitte" or the "Interim Receiver") of Battery and 127 to provide access to any and all of the documents and books and records of the two companies to November 15, 2001, the date on which Deloitte was appointed the Interim Receiver. Deloitte's was, in August 2001, appointed a Monitor of the companies, and this later became an Interim Receivership at the behest of the major secured creditor, the Laurentian Bank. ("Laurentian"). Laurentian is owed approximately $6,660,000 by Battery. Battery and 127 also ask for copies of its own E-mails and voice mails for Badr that continued to come to the companies after the appointment. They also want all computer records and data on the companies' hard drives. They further asks the Court to order Deloitte to produce time dockets for all its employees who have worked on behalf of Deloitte as Monitor and Interim Receiver and all accounts rendered by it during the period to today's date. Badr asks the Court to personally let him be in attendance with his counsel or another representative of the law firm acting for him, when the examination of all such records takes place. He further wants to be able to take copies of any and all such documents.

2 Aside from the question of how documentary evidence is to be treated and what rights these companies and their owner have in this interim receivership, the companies want Deloitte held in breach of the Order of Mr.

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Justice Spence made January 3, 2002. Lastly, they ask the Court for leave to examine five persons as witnesses with respect to the documentation and information which the Interim Receiver has made available to Laurentian and to prospective purchasers of Battery and 127, but not to the two companies in the interim receivership.

Some background facts

3 It is clear from the tenor of the documents before me, on behalf of Battery and 127, and from the scope of the relief they are asking the Court to make, that they and Badr are unhappy about the interim receivership. They do not want Deloitte's to sell the companies, although I am told by Deloitte's that it shortly hopes to move before the Court for approval of the sale of the companies.

4 On December 19, 2001, the parties appeared before Mr. Justice Spence on a 9:30 a.m. appointment. He allowed them to schedule a Motion for directions for the first available date in January, 2002. In that Endorsement, Mr. Justice Spence said the following:

> Mr. Chaiton will seek to sort out the computer copies and information access matters with the Interim Receiver so that Mr. Solmon receives what he should have.

6 Later, on January 3, 2002, Mr. Justice Spence made a further Endorsement, which reads in part:

> 1. As to documents, BPI should advise the IR promptly which of the documents copied pre Dec. 19 are required for the affidavit for the motion to remove the power of sale, and IR is to release such of those documents as it approves for that purpose promptly. BPI may move for further release of documents.

7 There were documents, referenced in this part of the Endorsement, which were copied by Badr's assistant, Williams, in the presence of a representative of Deloitte's when the interim receivership took place. Such an examination of the documents, followed by the copying of them, I am told, took the better part of a day. For the reasons set out in the various affidavits filed, Badr never received these copies and claims only to have received his personal papers. He claims that he cannot produce proper affidavits in the various Motions he and his companies intend to bring on against the Interim Receiver, including a Motion to ask the Court to remove the power of sale given to the Interim Receiver in its appointment, without this documentation. At no time, however, has Badr ever specified in writing exactly what documents he requires for the period prior to November 15, 2001.

8 It is the position of Battery and 127 that they have not been provided with copies of any such documents, nor is there a list of which had been so copied. They say that Deloitte's has not co-operated in the least, in providing them with what they need. On the other hand, these companies insist that they are entitled to examine everything and basically have copies of whatever they want. It appears, on the surface of their Motion, that they are simply on a "fishing expedition" to see everything and create problems for the Interim Receiver.

The Interim Receiver's position

9 Despite the companies' position that they are not indebted to Laurentian and that they want an order discharging Laurentian's security, and despite all the Motions that they intend to bring before the Court, it must be remembered that the Interim Receiver is appointed by the Court on evidence provided by the secured creditor. Such appointments are not made lightly. Further, the Interim Receiver is an officer of the Court and, as such, must regularly report to the Court. Those Interim Reports set out all expenses of the Interim Receiver, steps taken by it to protect assets and to market these assets for sale. The first Report of Deloitte has been presented to

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the Court. That Report indicates that an "Inventory Theft" may have occurred the night before the interim receivership was ordered. There is also an issue as to whether cheques totalling approximately $290,000 were diverted and not deposited to credit of Battery when received. All of this is set out in detail in the Interim Report.

10 Michael Baigel ("Baigel") is a Senior Manager of Deloitte and has been involved almost on an exclusive basis since its appointment on November 15, 2001, pursuant to the Order of Mr. Justice O'Driscoll, in the management and supervision of Battery's interim receivership. Deloitte's takes the position that Badr's request for each and every of his own documents, E-mails and all pre — and post receivership documents is oppressive and abusive, and is made "in furtherance of Badr's continuous attempts to prevent the sale of the business which was expressly authorized by Order of this Honourable Court." It cannot be forgotten, that when Mr. Justice O'Driscoll made the appointment, he noted in his Reasons that the cheques of Battery were being turned back by the bank, that the rent was due and unpaid, that there was a payroll to meet and that Battery had no funds from which to pay it. The appointment was not one lightly entered into by the Court.

11 Very lengthy affidavits have already been filed for purposes of the aforementioned Motions being brought on. The Interim Receiver says that Badr is refusing to put any limitation on his request for documentation. Badr has never provided the Interim Receiver with a limited list of documents he needs in order to complete his affidavits. Surely his accountant would have copies of the companies' financial statements for at least 6 years, if all other copies were on the business premises. Since Badr is the person who operated these companies, he must have some more specific idea of which documents it is necessary for him to have, in order to be able to complete the affidavits. The list attached to his counsel's letter of December 21, 2001, is so open-ended as to not have to be taken seriously. For example, counsel asks for the hard drives from the computers of 10 employees plus a copy of the main server for Battery's computer system plus nine other broad requests for information.

12 Baigel says, in his affidavit, that Deloitte has been receiving complaints from prospective purchasers that they have been receiving letters from counsel to Badr. Further, representatives of these prospective purchasers have received subpoenas to appear as witnesses on discovery, although there are no court orders authorizing this. Such tactics, in my view, are meant to discourage these prospective purchasers from bringing forward bona fide offers to the Interim Receiver. Further, Battery and 127 have steadfastly refused to inform the Interim Receiver as to how they obtained the information regarding who were prospective purchasers. That places the source of their knowledge under suspicion.

13 Baigel says in paragraph 35 of his affidavit, that the Interim Receiver changed the password to Badr's voicemail to restrict remote access to information, but that it has not intercepted or listened to Badr's voicemail or E-mail. Baigel says, contrary to Badr's position that a promise was made to him by the Interim Receiver to give him these electronic communications, the Interim Receiver made no such promise. Further, there is a dispute between the parties as to whether or not there was an agreement that the documents copied by Joanne Williams were to all be given to Badr or not. Finally, Deloitte says that there really is no need to give so many documents to Badr to help him prepare his affidavits, when any such Motions to be brought are premature, in the first place. The Interim Receiver did, however, agree in the letter of November 19, 2001 from Baigel to Badr that the Interim Receiver retained the hard drive of his computer because it contained proprietary information of Battery. The letter states that Badr told the Interim Receiver that this hard drive also contained personal information. The Interim Receiver undertook to provide him with a file listing of the contents, and to make copies "of the personal files" for him thereafter, presumably when the listing has been examined by the Interim Receiver. It appears that this did not take place, given the impossible demands for documentation, which Badr made thereafter.

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14 On December 21, 2001, counsel for the Interim Receiver wrote to one of Badr's counsel to point out that Badr had no inherent right to everything he was asking for, given that the Interim Receiver, by Order of the Court, was given:

> ...the exclusive power of management, possession and control over the assets and operations of Battery Plus. Accordingly, your client's title provides him with no right to possession or access to any of the books, records or documents of Battery Plus.
>
> Having said that, if you legitimately require access to certain documentation in order to respond to the allegations made in the various court materials, I indicated to Mr. Justice Spence and counsel that copies of the documentation you reasonably require for that purpose would be provided. At no time, however, did I indicate that all of the documentation copied by Chahine's assistant would be released; it must be necessary for the purpose of responding to the allegations made in the court materials.

15 The problem facing the Court is that Badr has made no attempt to be "reasonable" in his requests and demands. That tactic has placed the Interim Receiver in a very difficult position, having been provided with no reasonable list of documents needed to help with the affidavits Badr plans to file in support of his various Motions to be brought on.

Legal Analysis

16 Frank Bennett in *Bennett on Receiverships*, 2nd ed., Carswell Publishing, 1998, notes at p.167, that a court-appointed receiver, in its managerial capacity takes charge of the management of the debtor's assets. The directors of the company in receivership, do, however, have a continuous obligation to the shareholders and to the unsecured creditors to act honestly and in the best interests of the debtor to attain the best possible price for its assets. In the receivership before me, there is really only one shareholder. I am unsure how many unsecured creditors there are. Laurentian, however, is the key debtor. How can Badr be said, as director, to be acting in the best interests of the companies and the debtors by sending out letters to prospective purchasers to discourage them, and by subpoenaing their representatives as witnesses? This tactic is questionable. On the face of it, this appears to be both abusive and oppressive, given the circumstances of the interim receivership in question. See also, p.180 for duties of the court appointed receiver.

Bennett does say, at p.181, supra, that:

> As a fiduciary, the receiver owes a duty to make full disclosure of information to all interested persons. The receiver is obliged to respond to requests for information consistent with the position of the person making the request. If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise apply to the court for directions.

17 Who then, are these "interested persons", at law? Certainly, any prospective purchaser of the assets of the company in receivership, falls within that category. The information to be provided is financial information relating to the operations of the company, valuations such as prospective purchasers of assets and the company itself, tax information that may be relevant, information respecting leases, franchises and other matters affecting business operations. On the other hand, it is not reasonable to think that the receiver owes a duty to the owner of the shares or business in receivership, who was operating the business until the day before the interim receiver stepped in, to copy every single piece of paper that is now in the interim receiver's possession. That is an expensive folly not worth considering.

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18 In *Royal Bank v. Vista Homes Ltd.*, [1984] B.C.J. No. 2713 (B.C. S.C.), Vancouver Registry No. C832220, lien claimants in the receivership, wanted further input into the proposed sale or liquidation of the assets. The Court, there, noted that it would help these claimants better understand what was taking place, if they were to be given copies of all offers for the condominium project, if they received copies of the monthly reports of the receiver-manager, and if the receiver-manager had the services of independent counsel. In the case at bar, the only step not complied with, is that Badr be provided with copies of any offers received. The Court further points out at p.2, para.9 that the receiver-manager is obliged to respond to requests for information "...which are consistent with the position of the party making the request and the amount involved in the particular asset in question."

19 The Interim Receiver is acting in a fiduciary capacity to all parties in the proceedings. See: *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 286. Therefore, the Interim Receiver must respond to reasonable requests for information from Badr, as well as from prospective purchasers. On the other hand, the position of the party making the request, must be taken into account. No one knows more about how he operated the companies than Badr, himself. If he cannot prepare a reasonable list of specific documents, as opposed to broad sweeping categories, in order to assist him to prepare his affidavits, he is not acting in a reasonable fashion. Mr. Justice Ground speaks to the relevancy of such documents in *Nash v. CIBC Trust Corp.*, [1996] O.J. No. 1833 (Ont. Gen. Div.), DRS 96-13495. He notes at p.2, para. 6, that investors are to receive the same information as the other parties in the litigation. The Motion before Ground J., however, was a Motion to remove the solicitors of record for the Receiver, and was not a Motion on what documentation the Receiver must provide to the parties and to the owner/director.

20 In *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.), the Court points out that the directors of the company in receivership, did not have the residual power to interfere with the ability of the receiver to manage the company. Therefore, Badr had no right to cause his counsel to write directly to any of the prospective purchasers of Battery that the Interim Receiver was dealing with. Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the people involved in the receivership:

> ...does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

21 To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents musts relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

Conclusion

22 The following Orders shall issue:

1. The Interim Receiver shall produce a list to Badr of the documents on the hard drive of his personal computer, and provide him with a copy of all his personal documents found therein.

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2. Badr shall provide the Interim Receiver with a list of specific documents from the ones that were copied by Joanne Williams, or elsewhere, which are required by him to assist in him completing his affidavits. Badr shall provide a clear description of the document and state why it is relevant, and for which Motion the affidavit is being prepared in support of. ___

3. The Interim Receiver shall check the messages left on Badr's voicemail after November 14, 2001 and any E-mail messages that may still be on Badr's computer to determine if any are personal to him, and not business-related messages. A copy of such personal voicemail and personal E-mail messages shall be given to Badr, if any. If there is an issue as to which may be personal, and which may be business-related, I may be spoken to.

4. The Interim Receiver shall provide Badr with copies of all Offers received by it for the purchase of the business.

5. I refuse to order any of the so-called witnesses to appear on the subpoenas served on each of them by Badr. In my view, it is an abuse of the process, in the receivership, to subject non-parties, and persons with no knowledge about the receivership, other than what the terms of an arm's length offer is being made by the company he or she works for, to have to attend on discovery.

6. All other requests for Badr for any further information from the hard drives of company employees/executives, from the Interim Receiver about its own records, time spent and documentation involving prospective purchasers, is hereby dismissed. The companies are entitled to receive copies of all Interim Reports prepared by the Receiver.

7. The Interim Receiver is not in breach of the Order of Spence J. made January 3, 2002. Spence J. made it clear that documents to be released must relate to the affidavit in support of the Motion to remove the power of sale from the Interim Receivership's Order. The letter of Bradr's counsel dated December 21, 2001, with its all-encompassing broad list of requests, did not meet the criteria set by Spence J.

8. The balance of relief requested by Badr in hereby dismissed.

23 Given the nature of the Orders made by me respecting documentation, in my view the ordering of Costs is not appropriate.

Order accordingly.

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TAB 4

2009 CarswellOnt 5929, 81 C.B.R. (5th) 169

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2009 CarswellOnt 5929, 81 C.B.R. (5th) 169

Turbo Logistics Canada Inc. v. HSBC Bank Canada

TURBO LOGISTICS CANADA INC., 2163960 ONTARIO INC., GEORGE PERLIN, ALEX BER and 2192370 ONTARIO LIMITED (PLAINTIFFS) And HSBC BANK CANADA (DEFENDANT)

HSBC BANK OF CANADA (PLAINTIFF BY COUNTERCLAIM) And GEORGE PERLIN, ALEX BER, 2086611 ONTARIO INC., ARI YAKOBSON, VLADIMIR BOTVINNIK and BORIS SHTEIMAN (DEFENDANTS TO THE COUNTERCLAIM)

2086611 ONTARIO INC. (PLAINTIFF BY COUNTERCLAIM) and HSBC BANK CANADA and DELOITTE AND TOUCHE INC. (DEFENDANTS TO THE COUNTERCLAIM)

Ontario Superior Court of Justice [Commercial List]

Newbould J.

Heard: October 1, 2009
Judgment: October 6, 2009
Docket: CV-0800007922-00CL

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Counsel: Melvyn L. Solmon, Cameron J. Wetmore for Plaintiffs, Turbo Logistics Canada Inc., George Perlin, Alex Ber, 2192370 Ontario Limited

J. Brian Casey for Defendant, HSBC Bank Canada

Subject: Public; Torts; Civil Practice and Procedure; Corporate and Commercial

Professions and occupations --- Barristers and solicitors — Relationship with client — Conflict of interest — Lawyer acting for more than one party — Corporate or commercial matters

Plaintiffs commenced action against bank seeking declarations relieving P and B of their guarantee obligations to bank for loans to corporate plaintiffs, and bank counterclaimed against P and B and others for alleged fraud and conspiracy — Receiver of corporate plaintiffs was appointed and receiver order provided that bank's solicitors could represent and advise receiver where there was no conflict of interest — Plaintiffs moved for order removing bank's solicitors as solicitors of record for bank when solicitors refused to produce documents, and plaintiffs alleged that conflict existed in solicitors' obligations to bank and to receiver — Motion dismissed — Obligation of solicitor is to client, and solicitor for receiver does not owe duty to creditors of debtor under court-

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appointed receiver since it is receiver that owes duty to creditors — No conflict existed between bank and receiver which was not involved in action, and issues in action related to what took place prior to appointment of receiver — Solicitors did not have divided loyalties between bank and receiver in relation to action, nor were bank's interests and receiver's duties to corporate defendants potentially adverse — No principled reason existed for broad request that solicitors produce all documents relating to corporate defendants, and it appeared to be fishing expedition since relevant documents were provided — No conflict existed between solicitors' duty to bank and to receiver that required removal of solicitors from acting for bank.

Cases considered by *Newbould J.*:

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — followed

Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc. (2002), 36 C.B.R. (4th) 19, 2002 CarswellMan 378, 2002 MBCA 103, 218 D.L.R. (4th) 78, 166 Man. R. (2d) 163, 278 W.A.C. 163 (Man. C.A.) — followed

Dugas, Re (2003), 2003 NBQB 197, 2003 CarswellNB 203, (sub nom. *Dugas (Bankrupt), Re)* 261 N.B.R. (2d) 315, 685 A.P.R. 315, 41 C.B.R. (4th) 168, 32 C.P.C. (5th) 69 (N.B. Q.B.) — referred to

Engels v. Richard Killen & Associates Ltd. (2002), 2002 CarswellOnt 2435, 60 O.R. (3d) 572, 35 C.B.R. (4th) 77 (Ont. S.C.J.) — considered

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 285 W.A.C. 241, 1990 CarswellMan 233 (S.C.C.) — followed

Ostrander v. Niagara Helicopters Ltd. (1973), 1973 CarswellOnt 89, 1 O.R. (2d) 281, 19 C.B.R. (N.S.) 5, 40 D.L.R. (3d) 161 (Ont. H.C.) — followed

R. v. Neil (2002), 317 A.R. 73, 284 W.A.C. 73, 168 C.C.C. (3d) 321, 6 Alta. L.R. (4th) 1, 6 C.R. (6th) 1, [2002] 3 S.C.R. 631, 2002 CarswellAlta 1301, 2002 CarswellAlta 1302, 2002 SCC 70, (sub nom. *Neil v. R.)* 218 D.L.R. (4th) 671, [2003] 2 W.W.R. 591, 294 N.R. 201 (S.C.C.) — followed

Royal Bank v. Vista Homes Ltd. (1984), 54 C.B.R. (N.S.) 124, 1984 CarswellBC 590, 58 B.C.L.R. 354 (B.C. S.C.) — followed

SLP Resources Inc. v. Sorrel Resources Ltd. (1987), 1987 CarswellAlta 317, 65 C.B.R. (N.S.) 288 (Alta. Q.B.) — referred to

MOTION by plaintiffs seeking removal of solicitors for bank.

***Newbould J.*:**

1 The plaintiffs[FN1] moved for an order removing the law firm of Baker & McKenzie LLP ("Baker") as solicitors of record in this matter for the defendant HSBC Bank Canada ("HSBC") and for an order extending the time of delivery of their reply and statement of defence to counterclaim. The motion was heard on October 1, 2009. At the conclusion of the motion I dismissed the motion to remove Baker as solicitors for HSBC for reas-

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ons to follow and ordered that the plaintiffs' reply to the statement of defence to the counterclaim be delivered within thirty days. These are my reasons.

Factual Background

2 The plaintiffs Turbo Logistics Canada Inc. ("Turbo") and 2163960 Ontario Inc. ("216") are companies previously controlled by the plaintiffs George Perlin and Alex Ber. HSBC is the secured creditor of Turbo and 216. Turbo is indebted to HSBC for approximately $9 million and 216 is indebted to HSBC for approximately $2 million. Messrs. Ber and Perlin are guarantors.

3 In November 2008 Baker was retained by HSBC to act in connection with the enforcement of the credit facilities extended by HSBC to Turbo and 216. On December 22, 2008 the plaintiffs commenced this action against HSBC seeking, among other things, declarations relieving Messrs. Perlin and Ber of their guarantee obligations to HSBC for the loans of Turbo and 216. Subsequently HSBC counterclaimed against Messrs. Perlin and Ber and others for alleged fraud and conspiracy.

4 On December 24, 2009, shortly after the commencement of the action, HSBC brought an application to have Deloitte and Touche LLP appointed as receiver of Turbo and 216. Turbo and 216 opposed the application. On January 28, 2009 Cumming J. appointed Deloitte and Touche Inc. as receiver of Turbo and 216. Paragraph 5 of the receivership order provided that the receiver could retain Baker to represent and advise the receiver in respect of any matter where there is no conflict of interest.

5 The plaintiffs contend that as a result of what they say is a refusal by Baker to produce documents of the receiver in the civil action, Baker should be removed as solicitors for HSBC in the civil action on the grounds that there is a conflict in Baker's obligations to HSBC and to the receiver. The plaintiffs say that the receiver and Baker each owe a duty of fairness to the plaintiffs and to treat them like other creditors, which duty is said to have been breached. The plaintiffs have not moved to remove Baker from acting as solicitors for the receiver.

Request for Documents

6 On April 7, 2000 Mr. Solmon wrote on behalf of the plaintiffs to Baker and made a request to attend at Baker's office to review "all files (including without limitation all written or electronic documents) in the possession of [Baker] that are in anyway related to [Turbo] or [216] or relevant to the issues raised in the [civil action]." On April 16, 2009 Baker replied that Mr. Solmon's clients were not entitled to documentary discovery prior to the close of pleadings and that all documents produceable by HSBC which are relevant to the proceeding and not subject to claims of privilege would be produced in its affidavit of documents.

7 On March 15, 2009 Ari Yakobson, one of the defendants to the counterclaim, served a demand for particulars and request to inspect which requested copies of all documents that HSBC was relying on in the civil action in support of its allegations against the defendants to the counterclaim. On April 24, 2009 HSBC responded to the solicitors for Mr. Yakobson and stated that a CD with the requested documents would be sent, which it was. The letter was copied to other counsel, including Mr. Solmon, and stated that if other counsel would like a copy of the CD, it would be provided. The plaintiffs, represented by Mr. Solmon, did not request a copy of the CD's or the documents contained in it. The CD contained all of the documents relevant to the allegations made by HSBC in the counterclaim that were in the hands of HSBC or the receiver.

8 Mr. Solmon did not respond to the offer contained in the Baker letter of April 16, 2009 to provide the CD

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to other counsel. Instead, on May 12, 2009, Mr. Solmon on behalf of the plaintiffs brought a motion in the civil action for an order removing Baker as solicitors for HSBC or for the receiver, an order restraining Baker from acting for HSBC in the civil action, an order compelling Baker to provide access to a comprehensive list of various documents in its possession, power or control in any way related to Turbo or 216 or relevant to the issues raised in the civil action. Subsequently on May 22, 2009, Mr. Solmon delivered an amended notice of motion which removed the request for an order removing Baker from acting for the receiver and removed the request for an order that Baker produce the documents requested in the original notice of motion. Thus the amended notice of motion simply seeks an order removing Baker as solicitors for HSBC in the civil action and an order restraining Baker from acting for HSBC in that action.

9 On May 25 Baker wrote to Mr. Solmon and enquired whether his clients were prepared to restrict their request to all non-privileged information and to pay the costs of the receiver in assembling and preparing it. Baker pointed out that the plaintiffs' request was not limited to documents relevant to the civil action and that there were many documents s in the hands of the receiver that had not been provided to Baker or HSBC. Mr. Solmon did not respond to that letter.

10 On May 29, 2009 Baker wrote to Mr. Solmon and enclosed a copy of the CD that had previously been provided and offered to him.

Legal Principles

11 The general rule is that a lawyer may not represent one client whose interests are directly adverse to the immediate interest of another current client, even if the two mandates are unrelated, unless both clients consent after receiving full disclosure and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other. See *R. v. Neil*, [2002] 3 S.C.R. 631 (S.C.C.).

12 In determining the presence of a conflict of interest, a court must balance three factors, being i) the maintenance of the high standards of the legal profession and the integrity of the judicial system, ii) the right of litigants not to be deprived of their counsel without good cause and iii) the desirability of permitting reasonable mobility in the legal profession. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.).

13 A court appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under the control of the receiver. See *Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.* (2002), 36 C.B.R. (4th) 19 (Man. C.A.); *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (Ont. H.C.); *Royal Bank v. Vista Homes Ltd.* (1984), 54 C.B.R. (N.S.) 124 (B.C. S.C.).

14 It is asserted on behalf of the plaintiffs that the obligations of a court-appointed receiver to treat creditors equally is an obligation that applies equally to the solicitors for the receiver and relies upon the followings statements of Wilson J. in *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572 (Ont. S.C.J.) at paras. 49 and 54:

> [49] The trustee and his or her counsel must be neutral and evenhanded with all classes of creditors, and with the bankrupt.
>
> [54] The duties and obligations of trustees in bankruptcy apply equally to their counsel. Counsel, too, are officers of the court. They are not ordinary counsel representing one litigant entitled to wage war with the bankrupt, or to prefer one creditor over another utilizing all of the artillery of the adversary system. They

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are obliged to act neutrally and fairly throughout, to all creditors and to the bankrupt.

15 In *Dugas, Re* (2003), 41 C.B.R. (4th) 168 (N.B. Q.B.) these statements of Wilson J. were adopted.

16 I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or court-appointed receiver.

17 With respect to the requirement to produce privileged documents, a court-appointed receiver is in no different position than any other person seeking legal advice and advice given by the solicitor to the receiver in confidence is entitled to solicitor and client privilege. The fact that a receiver has a fiduciary relationship with the creditors does not give the creditors the right to have access to all documents that come into the hands of a receiver manager. See *Houlden & Morawetz, Bankruptcy and Insolvency Analysis, L§39*; *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.).

18 The fact that a receiver owes fiduciary duties to the stakeholders does not entitle a stakeholder to go on a fishing expedition for documents. See *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) at para. 21.

Analysis

19 I do not see any conflict between HSBC and the receiver of Turbo and 216. The action by Turbo and 216 was stayed in the order of Cumming J. of January 28, 2009 appointing the receiver, and no one has moved to seek leave to continue the action on their behalf. The litigation is essentially amongst HSBC and the guarantors of the loans made by HSBC and others who are alleged to have engaged in fraudulent activities harming HSBC. The receiver is not involved in the civil action and the issues involved in the action relate to matters that took place prior to the appointment of the receiver. Thus this is not a situation in which Baker has divided loyalties between HSBC and the receiver in relation to the civil action, nor is it a situation in which the interests of HSBC and the receiver's duties to the stakeholders of Turbo and 216 are potentially adverse.

20 It seems to me, moreover, that even if there were a conflict between the positions of HSBC and the receiver, the appropriate step would be to remove Baker from acting for the receiver in connection with that conflict. The plaintiff's assertion of a conflict between HSBC and the receiver is founded on the duty of a receiver to deal evenly with all creditors, which it says has been breached because of the failure of Baker to produce documents. If that assertion of a conflict were correct, the logical step, and one that would be consistent with the order of Cumming J. authorizing Baker to act for the receiver where there is no conflict of interest, would be to move to have Baker removed from acting for the receiver rather than for HSBC. A litigant is not to be deprived of the counsel of its choosing without good cause - See *MacDonald Estate v. Martin, supra.*

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21 With respect to the issue of the production of documents that has been raised by Mr. Solmon, his request for documents on behalf of Messrs. Perlin and Ber and 2192370 Ontario Ltd. was directed to Baker to produce all of the requested documents in the possession of Baker. The request appears to have been purely tactical. The request was not made to have the documents in the possession of the receiver produced. Ordinarily, if Mr. Solmon's clients were looking for documents relating to the litigation, a request would be made to HSBC's solicitors to have those documents produced by HSBC. Mr. Solmon asserted in his letter of request that his clients were creditors of Turbo and that Baker as solicitors for the receiver owed a fiduciary duty to them. Presumably that was stated to support the request for all written or electronic documents in the possession of Baker in any way related to Turbo or 216. One would have thought that if it was a request for documents in the possession of the receiver, the request would have been made to Baker to have the receiver produce such documents. It appears to me clear that Mr. Solmon was in the process of setting up a motion to remove Baker as solicitors and that this letter was the opening salvo. Removal litigation brought to remove solicitors in order to gain a tactical advantage by delaying delivery of pleadings should not be permitted.

22 In argument, Mr. Solmon contended that in response to his letter Baker should have responded by saying that as the solicitor for the receiver he was providing everything the receiver knows about HSBC's case against Mr. Solmon's clients. As a practical matter, Mr. Solmon has received those documents. He has been provided with all documents relevant in the civil litigation that were in the possession of HSBC or the receiver. Baker sent the CD containing these documents to Mr. Solmon on May 29, 2009 in the correspondence relating to production in the civil litigation. If Mr. Solmon's clients wanted to take the position that there were other documents that should be produced, or that for some reason privileged documents should be produced, the appropriate step would have been for a motion requiring their production. No such motion has been brought.

23 Mr. Solmon asserted in argument that the receiver has given privileged documents to Baker in Baker's capacity as solicitor for the receiver and that as Baker acts for HSBC, the privilege has been lost. Therefore he asserts such documents should be delivered by Baker to his clients. One problem with this argument is that Mr. Solmon readily acknowledges that he has no knowledge of what HSBC has received from the receiver. Another is that no motion for production of any documents has been made. Even if Mr. Solmon were right in his contention, his clients would be able to move for documents in the possession of Baker even if Baker were removed as solicitors for HSBC. It would be no basis to remove Baker from acting for HSBC.

24 With respect to the broad request that Baker produce all of the documents in its possession relating to Turbo or 216, there is no principled reason provided as to why Messrs. Perlin and Ber and their company 2192370 Ontario Limited, even if they are creditors of Turbo or 216, would be entitled to all such documents. It appears to be a fishing expedition in the extreme. Baker acts for the receiver in connection with a number of matters typical in a receivership involving attempts by the receiver to obtain assets of various kinds. If there is any legitimate reason for creditors to have access to documents in the hands of a court-appointed receiver, one would expect a request to be made to the receiver and to identify what documents were being sought. I agree with the following statement of Greer J. in *Battery Plus Inc., Resupra*, that a creditor is not entitled to go on a fishing expedition with a receiver. She stated:

> Further, in *SLP Resources Inc. v. Sorrel Resources Ltd* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the people involved in the receivership:
>
> ... does not in my view automatically entitle creditors or people in the position of SLP Resources and

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> Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.
>
> To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition.

25 In summary, I find that there is no conflict between Baker's duty to HSBC and to the receiver that would require the removal of Baker from acting as solicitor for HSBC.

Extending time for delivery of pleading

26 In the plaintiffs' motion they requested an order extending the time for delivery of a reply and defence to counter-claim for 30 days after final determination of whether Baker should be removed as solicitors for HSBC. Neither in their factum nor in oral argument was any reason given why the pleading should be delayed until the motion to remove Baker was finally determined, nor is any reason apparent why that should be. In the circumstances I ordered at the conclusion of the motion that the pleading be delivered within 30 days.

Motion dismissed.

FN1 The action by the plaintiffs Turbo Logistics Canada Inc. and 2163960 Ontario Inc. has been stayed by the receiving order of Cumming J. of January 28, 2009. My reference to the plaintiffs in these reasons is to the remaining plaintiffs George Perlin, Alex Ber and 2192370 Ontario Limited.

END OF DOCUMENT

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TAB 5

2011 CarswellOnt 5613, 2011 ONSC 3945, 79 C.B.R. (5th) 229

Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.

The Manufacturers Life Insurance Company (Applicant) and Juno Developments (North Bay) Limited (Defendant)

Ontario Superior Court of Justice [Commercial List]

D.M. Brown J.

Heard: March 9, 2011
Judgment: June 27, 2011[FN*]
Docket: 05-CL-5926

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Proceedings: additional reasons at *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.* (2011), 2011 ONSC 3945, 2011 CarswellOnt 8154 (Ont. S.C.J. [Commercial List])

Counsel: D. Boswell for Applicant

M. Solmon for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Evidence

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client priv- ilege

Debtor owned shopping mall subject to mortgage — Mortgage was not paid and receiver was appointed, first privately and then by court order — Receiver, who used same counsel as secured creditor, collected payments from mall tenants for taxes and maintenance as per lease agreements — Debtor and receiver engaged in litigation regarding sale opportunity — Sale by court order occurred — Receiver did not make reports available — Trial in respect to passing of accounts initiated — Debtor brought motion for disclosure of files relating to receivership from mortgagee, receiver and solicitor, receiver brought motion for directions regarding overpayments — Motion for disclosure granted in part, overpayments ordered returned to tenants or held until discharge — - Motion was completed after five year delay, which was lengthy and uncalled for — Documents subject to solicitor client privilege not ordered disclosed — Fact that one party to joint retainer was court appointed receiver did not alter nature of privilege — Secured counsel and receiver retaining counsel together should be discouraged — Court appointed receiver is officer of court and acts in fiduciary capacity — Joint interest privilege did not arise — Counsel for trustee in bankruptcy or court appointed receiver does not owe any duty to creditors, rather, obligation of solicitor is to his or her client — Fact that receiver owes fiduciary duties to stakeholders does not entitle stakeholders to go on fishing expeditions for documents.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Documents prepared

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in contemplation of litigation

Debtor owned shopping mall subject to mortgage — Mortgage was not paid and receiver was appointed, first privately and then by court order — Receiver, who used same counsel as secured creditor, collected payments from mall tenants for taxes and maintenance as per lease agreements — Debtor and receiver engaged in litigation regarding sale opportunity — Sale by court order occurred — Receiver did not make reports available — Trial in respect to passing of accounts initiated — Debtor brought motion for disclosure of files relating to receivership from mortgagee, receiver and solicitor, receiver brought motion for directions regarding overpayments — Motion for disclosure granted in part, overpayments ordered returned to tenants or held until discharge — - Motion was completed after five year delay, which was lengthy and uncalled for — Court appointed receiver may assert litigation privilege, although statutory framework of litigation must be recognized — Many documents at issue related only to day to day management of assets and not conduct of litigation, and therefore were not subject to privilege — Correspondence relating to litigation including court attendances were subject to solicitor client privilege, which had been in some instances been conflated with litigation privilege — Drafts of legal documents regarding receiver's duties were protected if subject to legal advice privilege but were otherwise producible — Documents regarding sale of property were protected by legal advice privilege to extent they contained confidential communications but were otherwise producible — Creditor did not assert litigation privilege on its own behalf over any documents.

Debtors and creditors --- Receivers — General principles — Miscellaneous principles

Debtor owned shopping mall subject to mortgage — Mortgage was not paid and receiver was appointed, first privately and then by court order — Receiver and secured creditor had same counsel — Receiver collected payments from mall tenants for taxes and maintenance as per lease agreements, which resulted in overpayments — Debtor and receiver engaged in litigation regarding sale opportunity — Sale by court order occurred — Receiver did not make reports available — Trial in respect to passing of accounts initiated — Debtor brought motion for disclosure of files relating to receivership from mortgagee, receiver and solicitor, receiver brought motion for directions regarding overpayments — Motion for disclosure granted in part, overpayments ordered returned to tenants or held until discharge — - Motion was completed after five year delay, which was lengthy and uncalled for — Receiver had excess amount from collection of taxes and maintenance fees — Receiver ordered to repay overpayments where payors could be found — Further protocol for litigating each individual claim was not necessary — Funds which could not be disbursed to be dealt with as part of discharge — Disclosure of further materials including general ledger was not warranted — Given extensive disclosure to date, request for further disclosure was fishing expedition and disproportionately onerous.

Cases considered by *D.M. Brown J.*:

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — con- sidered

Blank v. Canada (Department of Justice) (2006), 2006 CarswellNat 2704, 2006 CarswellNat 2705, 47 Admin. L.R. (4th) 84, 40 C.R. (6th) 1, 2006 SCC 39, (sub nom. *Blank v. Canada (Minister of Justice))* 352 N.R. 201, 270 D.L.R. (4th) 257, 51 C.P.R. (4th) 1, (sub nom. *Blank v. Canada (Minister of Justice))* [2006] 2 S.C.R. 319 (S.C.C.) — considered

Canadian Commercial Bank v. Pilum Investments Ltd. (January 16, 1987), Doc. 3929/85 (Ont. C.A.) — considered

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — considered

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Dugas, Re (2003), 2003 NBQB 197, 2003 CarswellNB 203, (sub nom. *Dugas (Bankrupt), Re)* 261 N.B.R. (2d) 315, 685 A.P.R. 315, 41 C.B.R. (4th) 168, 32 C.P.C. (5th) 69 (N.B. Q.B.) — considered

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 124 O.A.C. 356, 45 O.R. (3d) 321, 38 C.P.C. (4th) 203, 1999 CarswellOnt 2898 (Ont. C.A.) — referred to

Turbo Logistics Canada Inc. v. HSBC Bank Canada (2009), 2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List]) — followed

Ziegler Estate v. Green Acres (Pine Lake) Ltd. (2008), [2009] 3 W.W.R. 135, 2008 ABQB 552, 60 C.P.C. (6th) 229, 96 Alta. L.R. (4th) 349, 456 A.R. 244, 62 B.L.R. (4th) 268, 2008 CarswellAlta 1341 (Alta. Q.B.) — referred to

Statutes considered:

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

s. 246 — referred to

s. 246(3) — referred to

s. 248(2) — referred to

MOTION by debtor for disclosure of documents; HEARING regarding directions for trustee on money collected from tenants of property.

***D.M. Brown J.*:**

I. Nature of these far too old motions regarding the activities of a court-appointed Receiver

1 Fine wines improve with age; lawsuits do not. On March 9, 2011, I was asked by the defendant, Juno Developments (North Bay) Limited, to hear the "continuation" of the motion first brought by it before Lederman J. on December 8, 2005. That is not a typo. Five and one-half years ago part of this motion was heard by this Court; the balance of it has lingered ever since. I will comment on that delay later in these reasons, but I query why courts must spend time dealing with matters which the litigants are not prepared to move along with reasonable dispatch. I am especially displeased that matters involving a court-appointed officer - a receiver - have dragged on for so long following the conclusion of the major part of the receiver's mandate.

2 Technically two matters are before. First, Juno seeks the production of documents over which the court-appointed receiver, Centrecorp Management Services Inc., and the secured creditor, The Manufacturers Life Insurance Company ("Manulife"), assert privilege (the "Disclosure Issue"). Second, the Receiver seeks the advice and direction of the Court regarding the payment of monies it holds on account of certain adjustments in favour of tenants at the Property (the "CAM and Taxes Issue").

II. The procedural background to these motions concerning the Disclosure Issue and the CAM and Taxes Issue

3 Juno owned a shopping mall in North Bay, Ontario (the "Property"). In 1994 it obtained a $6.6 million mortgage from Manulife. Some years later the mortgage went into default. In February, 2003, Manulife appointed Centrecorp as a private receiver. By order of Swinton J. made October 10, 2003, the private receivership was converted into a court-appointed interim receiver of the Property.

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4 In 2005 litigation exploded between Juno and the Receiver. Juno had sought out a potential purchaser for the Property — Rosten/MVD — and was dissatisfied with the Receiver's response to that opportunity. On April 5, 2005, the Court made an order allowing Rosten to conduct due diligence, on terms, and directing the Receiver to report within two weeks.

5 Then, by order made May 13, 2005, Greer J. approved the sale of the Property from Juno to Rosten. Her order included several other provisions relevant to the issues before me:

> (i) Two days prior to the closing of the Property sale the Receiver was to deliver a final discharge statement to Juno for the mortgage. The discharge statement was to:
>
> > account for all principal and interest of the mortgage outstanding as well as all costs, legal fees and disbursements for which Manulife or the Interim Receiver seeks reimbursement from the proceeds of the sale including an additional allowance for the fees of the Interim Receiver and its counsel after the date of the Final Discharge Statement to a maximum of $50,000.00.
>
> (ii) Juno was permitted to redeem the indebtedness owed to Manulife from the sale proceeds. Greer J. specified that the purchaser, Rosten, was to "pay sufficient funds from the purchase price to the Manulife in accordance with the Final Discharge Statement to be delivered on closing." From the balance of the sale proceeds, $150,000.00 was to be paid to Gowlings, in trust, and the remainder to be paid as Juno might direct.
>
> (iii) Greer J. ordered that the $150,000 to be held in trust by Gowlings would stand:
>
> > As security for the Interim Receiver in accordance with the order of [Swinton J. made October 10, 2003] in place of the Property including but not limited to the potential fees for the passing of accounts of the receiver and the assessment of the accounts of the solicitors for the Interim Receiver not to be released until the consent of the parties in writing or as ordered by the Court...
>
> (iv) However, Greer J. added a proviso to her order concerning the payments of the Final Discharge amount and the $150,000 to Gowlings in trust:
>
> > provided that such payments are without prejudice to any of the rights of Juno with regard to the accounting provided or to be provided by the Manulife and with regard to any of the issues that may be raised on the passing of accounts or the assessment of the legal fees and without prejudice to any claims that Juno may have as against Manulife and Centrecorp as private receiver and Interim Receiver, related to this Property.

6 The sale to Rosten closed on June 13, 2005, with Rosten nominating MVD Properties Inc. to take title to the Prop- erty.

7 The Receiver did not deliver its final report within 30 days.

8 Juno brought contempt proceedings against the Receiver. In a July 22, 2005 order Cumming J. required the Receiver to deliver up by the end of August "a complete and accurate accounting of all financial activity from the date of appointment as the private receiver until the date of closing, June 13, 2005" including certain specified documents. The Receiver was ordered to deliver all material it intended to rely upon in support of its passing of accounts and discharge by August 30, 2005. A date in September was set for the hearing of a motion by Juno to seek disclosure of documents from the Receiver. Juno was to deliver a notice of objections to the Receiver's accounts within 90 days thereafter. A trial

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of the passing of accounts was to take place in February, 2006. I should note that the order of Cumming J. made no reference to the issue of privileged documents in the hands of the Receiver or the need for any motion in that regard.

9 By the end of August the Receiver and its counsel, Gowlings, had delivered affidavits in support of claimed receiver's and legal fees. The Receiver claimed fees totaling $197,269.50 for the period February 26, 2003 until August 31, 2005. The legal fees of its counsel, Gowlings, approximated $104,000.00.

10 The Receiver also filed its Third Report dated August 30, 2005 in support of its application to pass its accounts and secure its discharge.

11 Just stopping here, it is clear from the orders made by Greer J. and Cumming J. that this Court had ordered the Receiver to file materials in support of its passing of accounts and discharge, had ordered Juno to file a notice of objections, and had ordered both parties to proceed to a trial of the passing accounts in February, 2006. Such a timetable made sense. The Receiver was receiver of the Property. The Property had been sold in June, 2005. There was nothing further for the receiver to do, with one exception, which was described by Receiver's counsel in his letter of September 15, 2005 to Juno's counsel:

> With respect to your suggestion that your client's actions have had no effect on the Interim Receiver's ability to provide a final report under s. 246 of the *Bankruptcy and Insolvency Act*, the Interim Receiver continues to assert the clear position set out in the Second Report of the Interim Receiver and in the correspondence we exchanged in July. In short, your client's demand that adjustments for common area maintenance expenses and property tax payments should not be paid to tenants has prevented conclusion of the Interim Receiver's administration.

I shall refer to the common area maintenance expense and property tax payments issue as the CAM and Taxes Issue.

12 The timetable imposed by Cumming J. reflected the general principle that where a person requires the receiver to pass its accounts, the passing of accounts should occur in a timely fashion so that the court can review the activities of the receiver and then proceed to consider the discharge of the receiver. In the case of receivers governed by Part XI of the *Bankruptcy and Insolvency Act*, sections 246(3) and 248(2) contemplate that judicial review of a receiver's final accounts will occur within six months of the receiver's preparation of its final report and statement of accounts.

13 Did the trial in respect of the Receiver's passing of accounts then proceed in February, 2006 as ordered by Cumming J.? Of course not. That would be too simple a course of action for anyone to take in this proceeding.

14 In correspondence dated November 3, 2005, Juno's counsel advised the Receiver that his client wanted to review all documents in the possession of the Receiver, including correspondence between solicitor and client, and asserted the position that by reason of Gowlings retainer by both Manulife and the Receiver no solicitor-client privilege protected communications between Gowlings and the Receiver and all such documentation must be produced.

15 On December 7, 2005, Juno's counsel delivered a 37-page letter to the Receiver's counsel posing some 340 ques- tions:

> This letter contains the questions that my client wishes me initially to pose to your firm and your clients, to obtain documentation, as reflected in, or that may exist, as a result of the contents of the three reports of the interim receiver that have been delivered and related to the passing of accounts of [the Receiver] and the assessment of legal fees.

16 The next day, December 8, 2005, the parties appeared before Lederman J. to deal with Juno's motion seeking orders compelling Manulife, the Receiver, and Gowlings "to produce for inspection the entirety of their files relating to the

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private receivership, the court appointed receivership, including without limitation the attempts to market and sell the Property in whole or in part (which took place during the course of the private receivership and the court-appointed receivership)..." Lederman J. did not decide the motion. Instead, the parties reached a partial settlement which Lederman J. incorporated into the following endorsement:

> [1] Centrecorp will respond to the questions in the letter of SRG dated December 7, 2005 within 120 days and produce documentation related thereto except those documents objected to and listed pursuant to para. 2;
>
> [2] Centrecorp will provide a list of documents that it objects to produce including:
>
> a/ The reason why (relevance or privilege and the nature of privilege claimed or other to be specified);
>
> b/ The nature of the document;
>
> c/ The date of the document;
>
> d/ The parties to the document (sender, recipient, cc, bcc) within 120 days;
>
> [3] Centrecorp will produce all documents not objected to, for inspection by Juno, and will be made available for inspection whether at Gowling's office or Centrecorp's office in Markham after 120 days from today, on a date to be arranged by counsel for the parties;
>
> [4] The balance of the motion is adjourned to a date to be agreed to by counsel and fixed by the court (Commercial List Office).

17 On April 6, 2006 the Receiver's counsel sent to Juno lists of those documents it did not object to producing, as well as a list of those that it did. Shortly thereafter, on April 21, 2006, the Receiver's counsel wrote to Juno (i) providing 33 pages of responses to the questions posed on December 7, 2005 and (ii) enclosing a DVD containing electronic versions of all documents the Receiver was prepared to produce, which numbered close to 15,000.

18 Over a year later, by Notice of Return of Motion dated August 23, 2007, Juno sought to bring back on the balance of its disclosure motion adjourned by Lederman J. in late 2005 and to seek an order requiring the Receiver to pay over to it approximately $470,000 held in respect of the CAM and Taxes Issue. In support of that motion Juno's solicitor, Jay Teichman, filed a lengthy affidavit dated August 23, 2007 particularizing many of Juno's complaints about the Receiver's administration of the Property, including: (i) the failure to perform timely roof repairs; (ii) engaging in undisclosed negotiations with a potential anchor tenant (which were disclosed to the Court in the Receiver's First Report); (iii) the failure to market the Property for sale; (iv) the Receiver's failure to co-operate in the Rosten sale; (v) dealings with certain tenants; (vi) the payment of leasing commissions to non-arm's length parties; (vii) the expenditure of monies after the Rosten deal went firm, that purchase being on an "as-is, where-is" basis; and, (viii) the holdback of CAM and Taxes funds.

19 In late September, 2007, the Receiver initiated its motion seeking advice and directions on the CAM and Taxes Issue. In support of its motion it filed its Fourth Report dated September 28, 2007.

20 The motions brought by the Receiver and Juno proceeded in a desultory manner. An adjournment was granted on December 5, 2007. A representative of Rosten (Vince DeRosa) swore an affidavit in April, 2008, and representatives of Manulife (David Belch) and the Receiver (Steven Bishop) swore affidavits in May, 2008. Mr. Teichman swore a further affidavit in May, 2008. Juno conducted a Rule 39.03 examination of Wendy Goldup, a real estate consultant with Ab-

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raxas who had provided assistance to Manulife in relation to the management and sale of the Property, in August and October, 2008. Further adjournments were granted on July 11, 2008 and October 6, 2008. Juno cross-examined Steven Bishop in October, 2008. The plaintiff cross-examined Mr. Teichman in October, 2008, and Mr. De Rosa in April and August, 2009.

21 A full-day on December 9, 2008 assigned to hear the motions was reduced, on consent of the parties, to an argument over the applicable rate of interest payable on the withheld funds, with the balance of the motion to be rescheduled on a date set by counsel. From my review of the materials in the court file, it does not appear that any motion was argued on December 9, 2008.

22 As best as I can tell from the court file, at that point the Disclosure and CAM and Taxes motions went cold, only to be revived at a 9:30 appointment on December 17, 2010, where the March, 2011 date before me was set.

III. The Disclosure Issue

A. General comments

23 The July, 2005 Order of Cumming J. contemplated the following process: the issuance of an accounting by the Receiver, the filing by the Receiver of all materials in support of its passing of accounts application, a possible disclosure motion relating to productions by the Receiver, delivery of a Notice of Objections, and a trial of the passing of accounts/discharge application.

24 Juno takes the position that it cannot prepare a Notice of Objections without access to the documents over which the Receiver claims privilege.

25 I do not accept that position.

26 In April, 2006 the Receiver delivered some 15,000 documents to Juno and responded to some 340 questions. In 2007 and 2008 Mr. Teichman, Juno's solicitor, swore affidavits which particularized Juno's complaints about the Receiver's administration of the Property. Why, in view of Juno's possession of that volume of information, it could not craft a Notice of Objection is beyond my comprehension.

27 A Notice of Objection identifies the activities of a receiver to which an interested party objects and for which it seeks judicial scrutiny. Such a notice must point to acts which the receiver performed or acts which the receiver failed to perform. It is not necessary to know what legal advice a receiver may have obtained about how it should act in order to fashion a notice complaining about how a receiver in fact acted.

28 In the fall of 2005 Juno informed the Receiver of its demand to view documents over which the Receiver asserted privilege. Juno received the list of privileged documents in April, 2006. Yet it did not bring its motion back on until March of this year, some five years later. Such a delay was unreasonable in the extreme. It unreasonably delayed the termination of the receivership proceeding. I will take Juno's delay into account when considering the costs of its disclosure motion.

29 Let me turn now to the merits of Juno's disclosure motion.

B. Positions of the parties

30 Juno advances two arguments in support of its position that the Receiver cannot assert any solicitor-client priv-

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ilege over communications it had with its counsel, Gowlings:

> (i) First, Juno argues that that because Manulife, the secured creditor, and the Receiver retained the same counsel, Gowlings, there can be no confidentiality as between them in respect of solicitor-client communications and, therefore, the Receiver cannot claim privilege in respect of its communications with Gowlings
>
> (ii) Second, Juno contends that as a court-appointed officer the Receiver owes a duty to treat all persons with an interest in the Property equally and, accordingly, to disclose to Juno any information to which Manulife became privy, including solicitor-client communications with Gowlings.

31 In response, Manulife and the Receiver submit that:

> (i) Their joint retainer of Gowlings was authorized by Swinton J. in her order appointing the Receiver and therefore they may assert solicitor-client privilege over communications against any person who was not a party to the joint relationship;
>
> (ii) The fact that one party to the joint retainer was a receiver does not alter that conclusion; and,
>
> (iii) In any event, Juno already has received adequate discovery to enable it to fashion a notice of objections and to order additional disclosure would go beyond the proper scope of the examination of a receiver's conduct on an application to pass accounts and to secure a discharge.

C. Analysis

C.1 The documents at issue

32 Let me start my analysis by setting out what documents have been produced by Manulife and the Receiver and over which documents they are claiming privilege. In his affidavit sworn May 23, 2008, David Belch, a mortgage officer with Manulife, deposed that the plaintiff "has produced the vast majority of documents it has in its possession, power or control, comprising over 15,000 documents", but claimed privilege over "a small number of documents created or received during the course of the receivership", which Manulife identified in detail on an Exhibit "B". Manulife claims privilege over roughly 580 documents, both on the basis of solicitor-client privilege and litigation privilege.

33 The documents over which Manulife asserts litigation privilege were, according to Mr. Belch, "created throughout the Court Appointment by individuals at either Manulife, Abraxas or Gowlings for the dominant purpose of this litigation".

34 Mr. Belch acknowledged that some of the documents over which Manulife claimed privilege are documents over which both the Receiver and Manulife claim joint privilege. He deposed that the documents were created after the appointment order and the documents "were disclosed only as between Centrecorp, Manulife (and/or its agent Abraxas) and Gowlings." Mr. Belch deposed that to the best of his knowledge "none of the documents listed in Schedule B were disclosed to any third parties at any time" and "at no time did Manulife, or to my knowledge and belief Centrecorp, waive any privilege attaching to them."

35 Stephen Bishop swore an affidavit dated May 26, 2008 on behalf of the Receiver. The list of documents over which the Receiver claims privilege is the same as that used by Manulife. Mr. Bishop deposed that: (i) the Receiver has produced the vast majority of the documents in its possession (about 15,000); (ii) the Receiver claims both solicitor-cli-

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ent and litigation privilege over about 580 documents which were created during the court appointment; (iii) some documents are ones in respect of which it claims joint privilege with Manulife; and (iv) the latter documents were only disclosed as amongst the Receiver, Manulife and Gowlings and were not disclosed to third parties.

C.2 Solicitor-client privilege and court-appointed receivers

36 Sopinka, Lederman & Bryant, in *The Law of Evidence in Canada, Third Edition*, summarized the principles regarding privilege surrounding the joint retainer of a lawyer:

> Joint consultation with one solicitor by two or more parties for their mutual benefit poses a problem of relative confidentiality. As against others, the communication to the solicitor was intended to be confidential and thus is privileged. However, as between themselves, each party is expected to share in and be privy to all communications passing between either of them and their solicitor, and, accordingly, should any controversy or dispute subsequently arise between the parties, then, the essence of confidentiality being absent, either party may demand disclosure of the communication.[FN1]

37 Does the fact that one party to the joint retainer is a court-appointed receiver alter the principle that as against others, communications in a joint retainer are privileged and not compellable for production? In my view it does not, for two reasons.

38 First, the practice of a secured creditor and court-appointed receiver jointly retaining counsel should be discouraged. As Anderson J. noted in *Canadian Commercial Bank v. Pilum Investments Ltd.*,[FN2] the practice contains a latent vice: the potential conflict of interests. However, in the present case a joint retainer was permitted by the appointment order. The October 10, 2003 order of Swinton J. provided, in paragraph 8:

> 8. THIS COURT ORDERS that the Interim Receiver shall be at liberty to retain Gowling Lafleur Henderson LLP as legal counsel, to advise it in connection with any matter associated with its appointment, the performance of its duties and the exercise of its powers hereunder.

As was apparent from the Order, Gowlings was acting as solicitor of record for Manulife. The appointment order contained no suggestion that anything other than the normal solicitor-client privilege would attach to communications between the Receiver and Gowlings. In my view, the most reasonable interpretation to place on paragraph 8 of the Appointment Order is that the Court authorized the Receiver to retain the same counsel as the secured creditor was using and that the normal principles of privilege attaching to a joint retainer would apply in those circumstances. Express language to the contrary in the order would be required to conclude that no privilege would attach to communications between the Receiver and its counsel.

39 Second, it is well-established that a court appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all parties interested in the assets under the control of the receiver.[FN3] From this uncontroversial principle, however, Juno in effect argues that a form of joint interest privilege arises between the fiduciary/receiver and all interested parties in the assets, with the result that neither party may assert privilege as against the other regarding communications coming into existence at the time the joint interest subsisted. In contrast to joint retainer privilege, joint interest privilege arises where, even though the parties6 have not jointly retained a lawyer, they have a joint interest in the subject matter of the communication at the time that it comes into existence. One condition necessary to invoking joint interest privilege is that the joint interest exist at the time of the communication.[FN4]

40 I think a complete answer to Juno's argument is found in the decision of Newbould J. in *Turbo Logistics Canada*

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Inc. v. HSBC Bank Canada.[FN5] That case also involved an appointment order which permitted the receiver to retain the same counsel as the secured creditor. Although in that case the plaintiff debtors brought a motion to remove the joint counsel as solicitor of record for the secured party, the argument advanced by the debtor plaintiffs — who were represented by the same counsel as is representing Juno in this proceeding — to justify the removal of the joint counsel is the same argument as advanced by Juno on this motion to secure production of privileged documents in the hands of the receiver and the secured creditor. As summarized by Newbould J. in his reasons:

> It is asserted on behalf of the plaintiffs that the obligations of a court-appointed receiver to treat creditors equally is an obligation that applies equally to the solicitors for the receiver and relies upon the followings statements of Wilson J. in *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3rd), 572 at paras. 49 and 54:
>
> > [49] The trustee and his or her counsel must be neutral and evenhanded with all classes of creditors, and with the bankrupt.
> >
> > [54] The duties and obligations of trustees in bankruptcy apply equally to their counsel. Counsel, too, are officers of the court. They are not ordinary counsel representing one litigant entitled to wage war with the bankrupt, or to prefer one creditor over another utilizing all of the artillery of the adversary system. They are obliged to act neutrally and fairly throughout, to all creditors and to the bankrupt.

In *Dugas, Re* (2003), 41 C.B.R. (4th) 168 (N.B. Q.B.) these statements of Wilson J. were adopted.[FN6]

41 Newbould J. rejected the proffered argument, writing as follows:

> I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or court-appointed receiver.
>
> With respect to the requirement to produce privileged documents, a court-appointed receiver is in no different position than any other person seeking legal advice and advice given by the solicitor to the receiver in confidence is entitled to solicitor and client privilege. The fact that a receiver has a fiduciary relationship with the creditors does not give the creditors the right to have access to all documents that come into the hands of a receiver manager. See *Houlden & Morawetz, Bankruptcy and Insolvency Analysis, L[s]39*; *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288.
>
> The fact that a receiver owes fiduciary duties to the stakeholders does not entitle a stakeholder to go on a fishing expedition for documents. See *Re Battery Plus Inc.* (2002), 31 C.B.R. (4th) 196 at para. 21.[FN7]

42 I adopt and apply the reasoning of Newbould J., and I dismiss Juno's motion seeking an order that the Receiver, Manulife, and Gowlings produce for inspection solicitor-client privileged documents in their possession relating to the

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receiverships.

C.3 Litigation privilege and court-appointed receivers

43 The Supreme Court of Canada, in *Blank v. Canada (Department of Justice)*,[FN8] explained the difference between solicitor-client - or legal advice - privilege, and litigation privilege. The former seeks to protect the "full, free and frank communication between those who need legal advice and those who are best able to provide it."[FN9] Solicitor-client privilege applies only to confidential communications with the client and exists any time a client seeks legal advice from his solicitor whether or not litigation is involved.[FN10] The privilege is a long-enduring one: "once privileged, always privileged".[FN11]

44 Litigation privilege, by contrast, seeks to ensure the efficacy of the adversarial process - and not to promote the solicitor-client relationship - by creating a "zone of privacy" in relation to pending or apprehended litigation.[FN12] It applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature, but applies only in the context of litigation itself and operates even in the absence of a solicitor-client relationship.[FN13] Litigation privilege attaches to documents created for the dominant purpose of assisting in litigation, contemplated or underway.[FN14] As to the duration of litigation privilege, it is time-limited: once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose and therefore its justification.[FN15]

45 Juno submitted that a court-appointed receiver cannot assert litigation privilege. I disagree. I see no reason in principle why a court-appointed receiver should not be permitted to assert litigation privilege over documents created for the dominant purpose of litigation. That said, one must recognize that court-appointed receivers are appointed at the request of one party to a piece of litigation and, as a result, in a certain sense everything which a receiver does in respect of the assets subject to its administration takes place within an over-arching framework of litigation — the lawsuit between the creditor and the debtor. As well, a receiver labours under obligations to report on its activities to the court. In a manner of speaking, all documents created by a court-appointed receiver come into existence in a piece of litigation and relate to the subject-matter of the litigation — the assets subject the security.

46 Nevertheless, if a receiver creates a document relating to its on-going obligations to manage the assets — e.g. a letter to a contractor inquiring about the cost of repairing a roof — I do not see how a receiver could assert litigation privilege over the document simply on the basis that temporally it was created during extant litigation between the creditor and debtor in which the receiver was appointed. A receiver's litigation privilege must have a much narrower scope. One must distinguish between documents created by a receiver for the purpose of its ordinary course administration of assets, and a much smaller set of documents created for the dominant purpose of the conduct of litigation.

47 One sees an illustration of the necessarily narrow scope of such litigation privilege in motions by receivers for the approval of certain aspects of sales plans — e.g. listing agreements — or the approval of sale agreements. Such documents normally would be disclosable to all interested parties, but receivers usually seek sealing orders from the court to protect the commercially sensitive information contained in such documents until the transaction in issue has closed.

48 Mr. Bishop, in his May 26, 2008 affidavit, deposed that the documents identified on his Exhibit "B" as subject to litigation privilege were created "for the dominant purpose of this litigation". However, upon a cursory review of Exhibit "B", it is clear that many of the documents simply relate to the day-to-day management of the assets under the control of the Receiver. Such documents are not cloaked with litigation privilege since they do not relate to the conduct of litigation by the Receiver; they relate to the Receiver's administration of the assets.

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49 Counsel did not ask me to conduct at the hearing a document-by-document review of those documents for which the Receiver claims litigation privilege. Nonetheless, in paragraph 8 of his affidavit Mr. Bishop grouped the litigation privileged documents into five categories:

> Category 1: Management of the Property, including advice regarding refunds, expenditures, offsets of rents, tenant allowances, tenant defaults, terminations, leases and repairs;
>
> Category 2: Drafts of legal documents prepared by Gowlings with respect to Centrecorp's duties pursuant to the Court Appointment;
>
> Category 3: Correspondence between Centrecorp and Gowlings relating to this litigation, including reporting regarding court attendances;
>
> Category 4: Discussions and the provision of advice regarding obligations with respect to Juno and their continued involvement with the sale of the Property; and,
>
> Category 5: Discussions and the provision of advice with respect to obligations regarding and due diligence of prospective purchasers of the Property.

50 As is apparent from the Receiver's description of these categories, as well as from a review of Exhibit "B", in the case of some documents the Receiver appears to conflate solicitor-client privilege with litigation privilege. I have ruled that the Receiver is entitled to maintain solicitor-client privilege and, to the extent any such documents were misdescribed as ones subject to litigation privilege - such as those in Category 3 - solicitor-client privilege continues.

51 However, I have difficulty in seeing how the subject-matter of documents falling into Category 1 or 5 would attract litigation privilege. Those documents appear to deal with the on-going administration of the assets. That administration came to an end in 2005 when the Property was sold, so even if some litigation privilege attached before that time, it has come to an end. I do not regard the prospect of a passing of accounts hearing as the type of litigation which would cloak documents relating to the day-to-day management of assets with litigation privilege. The Receiver therefore must produce the documents which fall into Categories 1 and 5 on Exhibit "B".

52 As to Category 2, the description is quite vague. To the extent the documents contained confidential advice from Gowlings to the Receiver, they are cloaked with legal advice privilege and need not be produced. Similarly, I saw references in Exhibit "B" to drafts of the Receiver's reports to the Court. Those enjoy litigation privilege and, since the Receiver has not yet been discharged and has applied to the court for approval of its conduct, the litigation in respect of which those documents were created has not come to an end; the privilege continues. Otherwise, the documents must be produced. The Receiver bears the onus of establishing the privilege; any vagueness in its description of the documents must work against it.

53 Finally, regarding Category 4, to the extent the documents contained confidential communications between the Receiver and its counsel, they are protected by legal advice privilege. Otherwise, the documents in that category must be produced because they relate to the sale of the Property, which long ago closed.

54 The Receiver must deliver to Juno's counsel copies of those documents over which it claims litigation privilege — either on its own behalf or jointly with Manulife — that I have ordered produced no later than July 29, 2011.

C.4 Juno's claim for documents over which Manulife claims litigation privilege

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55 According to Exhibit "B" to Mr. Belch's affidavit, Manulife does not assert litigation privilege in respect of any document on its own behalf — Exhibit "B" only lists documents for which the Receiver itself asserts litigation privilege or asserts such a privilege jointly with Manulife. Therefore, no evidence exists before me of any document over which Manulife alone claims litigation privilege. That is a sufficient basis to dismiss Juno's motion in respect of that category of documents.

56 In any event, I would not have granted an order against Manulife. The orders of Cumming J. and Lederman J. required the Receiver, not Manulife, to make production of documents. Understandably so. The issue of production arose in the context of *the Receiver's* motion to pass its accounts. In the ordinary course, a secured party who applied for the appointment of a receiver is not required to produce documents for the purpose of the receiver's application to pass its accounts.

C.5 Juno's claim for further non-privileged documents

57 Juno also seeks an order that Manulife, the Receiver, and Gowlings "produce for inspection the balance of their files and documents, electronic or hard copy, which have not already been produced and delivered..." By letter dated September 12, 2005, Juno's counsel wrote to Gowlings stating:

> In order to attempt to reduce the scope of the proposed motion to be brought by Juno for better production of documents, we would ask that you provide to us a list of all of the documents in the possession of the Interim Receiver and the mortgagee which your clients are not adverse to disclosing as well as copies of all of those documents. We also ask that you provide a list of documents which your clients are unwilling to disclose.

58 Juno filed two affidavits following the extensive disclosure of documents made by the Receiver and Manulife in April 2006: the Teichman affidavit of August 23, 2007, and the DeRosa affidavit of April 25, 2008. Only the former dealt with the Disclosure Issue. As I read Mr. Teichman's affidavit, although the Receiver has "delivered thousands of daily banking transactions which they have supported with thousands of pieces of information regarding receipts and cheques", Juno is of the view that unless the Receiver produces its "complete general ledger" Juno will not be able to "verify the accuracy of the transactions" so that it "can keep track and maintain its records, and file proper tax returns". Mr. Teichman also asserted that "no full proper accounting was received from Manulife and no accounting was received from Gowling's trust account or general account ledger with regard to the Private Receivership and the Court-Appointed Receivership carried out by Centrecorp."

59 Juno's request for additional documents must be assessed in the context of the purpose of a passing of accounts application. In *Confectionately Yours Inc., Re*[FN16] the Court of Appeal described the respective purposes of a receiver's report to the court on its activities and a receiver's application to pass its accounts:

> A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.
>
> The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it

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> can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed. [FN17]

60 The Court of Appeal observed that a passing of accounts "allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions."[FN18] Although no prescribed process exists for a receiver's passing of accounts, the Court of Appeal noted that the case law provides guidance about the appropriate process:

> The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered...The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.[FN19]

A receiver's accounts and a solicitor's accounts should be verified by affidavit.[FN20]

61 From my review of the record, the Receiver has filed the statements of account and affidavits supporting receiver's and legal fees usually seen on applications by receivers to pass accounts. The Receiver attached an extensive appendix to its Third Report dated August 29, 2005 detailing receipts and disbursements for the period February 26, 2003 until August 24, 2005. In addition, Mr. Bishop swore an affidavit attesting to the fees charged by the Receiver, and a lawyer from Gowlings swore an affidavit verifying the legal fees charged to the Receiver. Some eight months later the Receiver produced 15,000 additional documents and the Receiver has deposed that it has produced all documents save for those over which privilege has been claimed.

62 Juno has not referred me to any case in which the court has ordered a receiver to file its general ledger, in addition to the standard form accounts and affidavits of verification.

63 In *Battery Plus Inc., Re*,[FN21] the debtors moved to require a court-appointed receiver to provide them with access "to any and all of the documents and books and records of the two companies" prior to the date of the receiver's appointment. The Court rebuffed the debtors' request. The Court's reasoning in *Battery Plus*was quoted with approval by Newbould J. in the following passage of his judgment in *Turbo Logistics*:

> With respect to the broad request that Baker produce all of the documents in its possession relating to Turbo or 216, there is no principled reason provided as to why Messrs. Perlin and Ber and their company 2192370 Ontario Limited, even if they are creditors of Turbo or 216, would be entitled to all such documents. It appears to be a fishing expedition in the extreme. Baker acts for the receiver in connection with a number of matters typical in a receivership involving attempts by the receiver to obtain assets of various kinds. If there is any legitimate reason for creditors to have access to documents in the hands of a court-appointed receiver, one would expect a request to be made to the receiver and to identify what documents were being sought. I agree with the following statement of Greer J. in *Re Battery Plus Inc. supra*, that a creditor is not entitled to go on a fishing expedition with a receiver. She stated:
>
> > Further, in *SLP Resources Inc. v. Sorrel Resources Ltd.* (1987), 65 C.B.R. (N.S.) 288 (Alta. Q.B.), the Court pointed out that the fiduciary relationship created in such situation between the receiver-manager and with the

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people involved in the receivership:

> ... does not in my view automatically entitle creditors or people in the position of SLP Resources and Societe Generale access to all of the documents which come into the hands of the receiver-manager and, in particular, legal opinions relating to the receiver's position and the validity, or otherwise, of various securities.

To allow all people involved in this Interim Receivership to automatically be entitled to access to all of the documents which came into the Interim Receiver's hands could cause the interim receivership to waste untold hours for no purpose. I am satisfied that, while there is a right of an interested party to certain relevant documents, these documents must relate to a specific purpose. That right does not entitle Badr to go on a fishing expedition. [FN22]

64 I regard Juno's motion for the further production of non-privileged documents, including the Receiver's general ledger, as a fishing expedition and a disproportionately onerous request given the extensive productions made to date. First, as noted, the Receiver has made broad disclosure: normal-form statements of account, affidavits of verification of fees, and a further 15,000 documents including, according to Juno's solicitor, records concerning thousands of banking transactions. Second, notwithstanding this massive amount of documentary disclosure, Juno has not served even a preliminary notice of objections, although Mr. Teichman's 2007 affidavit seems to identify Juno's main complaints against the Receiver. Third, in his 2007 affidavit Mr. Teichman tied the perceived need for the general ledger to Juno's internal accounting and tax reporting requirements. Such purposes are beside the point on this motion where the only issue is the adequacy of documentary production by the Receiver in respect of its application to pass its accounts for the period ending August 24, 2005. In the circumstances of this case, I am satisfied that the Receiver has made adequate production for the purposes of its passing of accounts and discharge application, and I dismiss Juno's motion seeking further production of non-privileged documents.

D. Next steps on application to pass accounts

65 Cumming J. set down a very precise timetable for the conduct of the Receiver's passing of accounts. The parties have ignored that timetable; the process set out in it therefore has gone by the board. I am seizing myself of this proceeding and I intend to case manage the Receiver's passing of accounts application and develop a new process for a hearing in the near future. As a first step I make the following orders:

(i) The Receiver must deliver to Juno's counsel copies of all documents in respect of which I found that litigation privilege did not exist no later than July 29, 2011;

(ii) Juno shall serve and file its Notice of Objections no later than August 31, 2011. The Notice must be filed both in the Commercial List Office and directly with my office c/o Judges' Administration, 361 University Av- enue;

(iii) Juno's Notice of Objection shall include a table entitled "Objections Issues List" in the form set out in Schedule "A" to these Reasons;

(iv) The Receiver shall paste on to Juno's Notice of Objection the additional columns shown on Schedule "B" to these Reasons and serve and file the enlarged table no later than October 15, 2011. The table shall be filed both in the Commercial List Office and directly with my office c/o Judges' Administration, 361 University Avenue;

(v) I will review both documents and then issue further directions regarding the conduct of the passing of ac-

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counts application, which will include the holding of a case conference;

(vi) No party may bring any further motion in relation to the passing of accounts application without first attending a 9:30 appointment before me.

66 I also order that in the event either Juno or the Receiver appeals my rulings on legal advice privilege, litigation privilege, or the production of further non-privileged documents, Juno must still file a Preliminary Notice of Objections, drawing on the already produced documents, by August 31, 2011 in the form I have stipulated. This matter has gone on far too long. There is no reason Juno cannot produce a preliminary Notice of Objections.

IV. The CAM and Taxes Issue

A. The directions sought

67 In its Fourth Report dated September 28, 2007, the Receiver reported that some tenants at the Property had overpaid common area maintenance expenses ("CAM") and realty taxes during the course of the receivership. The overpayments arose because under the leases the tenants paid CAM and Taxes based on estimates of projected annual expenses, subject to adjustment once the actual amounts were known.

68 In her May, 2005 order Greer J. ordered the Receiver to provide Juno with a final discharge statement just prior to the closing of the sale to Rosten. The discharge statement of June 10, 2005 included, as a payment due to Manulife out of the sale proceeds, an "allowance for payment to Receiver under indemnity as per statement attached". According to that statement, it was estimated that $464,276.66 was required to be held back to cover estimated refunds to tenants for 2003, 2004 and 2005 CAM and Taxes.

69 The Receiver provided a breakdown of the CAM and Tax adjustment amounts on a tenant-by-tenant basis as part of its Fourth Report — Appendix "C".

70 On June 29, 2005 Juno's counsel wrote to the Receiver taking the position that the Receiver should not distribute any monies to third parties until the final passing of accounts had been completed.

71 In its 2007 Fourth Report the Receiver stated:

16. Juno has now served the August 2007 Motion in which it seeks an order requiring the Interim Receiver or Manulife to pay to Juno the CAM and Tax Adjustment Amount.

17. The Interim Receiver requires the direction of this Honourable Court as to whether the CAM and Tax Adjustment Amount should be paid to tenants or to Juno.

72 In its September, 2007 Notice of Motion the Receiver sought an order that it pay the CAM and Tax Holdback to tenants in accordance with the tenant-by-tenant schedule it had attached to its Fourth Report.

73 Juno first raised the CAM and Tax issue with the Receiver in the summer of 2005, almost six years ago. The Receiver initiated its motion over three years ago. I understand that the MDV motion intervened thereafter. Nevertheless, receivers are not powerless in the face of opposing positions which they may think are ill-founded. More importantly, a court-appointed receiver must act with reasonable dispatch to complete the administration of its mandate. The Property was sold in June of 2005. Here we are six years later dealing with a "loose-end" adjustment. I consider the Receiver's

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delay in bringing back on its motion for directions unreasonable in the extreme; it has delayed the termination of the receivership proceeding. I will take the Receiver's delay into account when considering the costs of its motion for direc- tions.

74 A month prior to the argument of this motion the Receiver finally got around to drafting notices to those who were tenants of the Property during the time of the receivership informing them of their potential entitlement to refunds of CAM and Tax amounts. The Receiver sent a draft of the notice to Juno's counsel for comment. Juno's counsel advised that their client had not yet had an opportunity to review the draft, but they would respond the next day. They did not. Juno's failure to respond speaks volumes about the merits of the position they have taken on this issue.

75 The Receiver has received a number of responses from former tenants. Those tenants who responded took a common position — give us back the money we overpaid! In some cases the notices were returned to the Receiver because the recipient could not be found at the specified address — not a surprise after the lapse of close to six years!

B. Juno's position

76 Juno takes the position that the monies overpaid by the tenants for CAM and Taxes during the course of the receivership belong to Juno and that any responsibility for repayment to the tenant rests with the purchaser of the Property. In support of its position Juno relies on section 36 of the Agreement of Purchase and Sale with Rosten which provided that Rosten purchased the Property in an "as is, where is condition". Juno also contended that amounts owed to the tenants could be subject to set-off and other defences that could be asserted by the landlord.

77 Juno requested that the Court put in place "a protocol to deal with each Tenant individually so that the claims of each Tenant and the defences or other claims of the landlord can be properly and wholly adjudicated." Juno submitted that it should run the claims adjudication process.

C. Analysis

78 I see no merit in Juno's position. The undisputed evidence is that during the course of the receivership, prior to the sale of the Property to Rosten, the Receiver collected from tenants amounts in respect of CAM and Taxes. The amounts collected were based on estimates; later adjustments to reflect actuals were required. To the extent that the court-appointed receiver collected and retained monies from the tenants for CAM and Taxes in excess of the actual amounts the tenants were required to pay during the course of the Receiver's administration of the Property, then the court-appointed receiver became obligated to account to the tenants for such overpayments and to return the tenants' monies to them. The sale of the Property to Rosten on an "as is, where is" basis did not alter that obligation; on the contrary, it merely reinforced the Receiver's obligation to settle its outstanding liabilities to the tenants in respect of overpayments received during the course of the receivership.

79 Juno suggests that a protocol should be put in place to, in effect, litigate each claim. With respect, I see no need for further litigation on this matter and further litigation would only benefit the lawyers, not those whose money has been withheld from them for almost six years. It is the duty of the Receiver to review and determine claims by tenants for overpayments. It has done so and provided its assessment in Appendix "C" to its Fourth Report. I therefore order the Receiver to pay the CAM and Tax holdbacks to eligible tenants in accordance with the schedule attached as Appendix "C" to the Receiver's Fourth Report.

80 To the extent that the Receiver is unable to disburse the entire holdback because of difficulties in locating entitled tenants, the Receiver is to hold the undisbursed funds until such time as the court disposes of its application for a dis-

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charge. Given the further fees and legal expenses the Receiver is likely to incur by reason of the continued litigation by Juno over the receivership, I see no basis upon which to release the undisbursed funds to Juno until the court ascertains the Receiver's final entitlement, if any, to fees and disbursements.

V. Costs

81 The parties shall serve and file with my office written cost submissions, together with Bills of Costs, by July 15, 2011. The parties may serve and file with my office responding written cost submissions by July 29, 2011. The costs submissions shall not exceed five pages in length, excluding the Bill of Costs.

Schedule "A" — Objections Issues List

	A *Precise statement of Juno's objection*	*B* *Amount as stated in Receiver's accounts to which objection is taken*[FN23]	*C* *Amount of Reduction sought by Juno*	*D* *Precise statement of the Reasons for Juno's position*	*E* *Witness(es) Juno intends to call (if any) to testify on issue*	*F* *List of Documents upon Juno will rely* [FN24]
1.						
2.						
3.						
4.						
Etc.						
—						

Schedule "B" — Receiver's Response to Objections List

Objection	*G* *Witness(es) Receiver will call in response*	*H* *Documents Receiver will rely upon in support of response*[FN25]	*I* *Reasons for Receiver position*
1.			
2.			
3.			
—			

Order accordingly.

FN* Additional reasons at *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.* (2011), 2011 ONSC 3945, 2011 CarswellOnt 8154 (Ont. S.C.J. [Commercial List]).

FN1 Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, Third Edition*, §14.50

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FN2 (Ont. C.A.).

FN3 See the cases cited in *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009) (Ont. S.C.J. [Commercial List]), para. 13.

FN4 *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, [2008] A.J. No. 1081 (Alta. Q.B.).

FN5 (Ont. S.C.J. [Commercial List]).

FN6 *Ibid*, paras. 14 and 15.

FN7 *Ibid.*, paras. 16 to 18.

FN8 [2006] 2 S.C.R. 319 (S.C.C.).

FN9 *Blank v. Canada (Department of Justice)*, para. 26.

FN10 *Ibid.*, para. 28.

FN11 *Ibid*, para. 37.

FN12 *Ibid.*, para. 34.

FN13 *Ibid.*, paras. 27, 32 and 38.

FN14 *Ibid.*, para. 60; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.), para. 140.

FN15 *Ibid.*, para. 34.

FN16 (2002), 219 D.L.R. (4th) 72 (Ont. C.A.).

FN17 *Ibid.*, paras. 34 and 35.

FN18 *Ibid.*, para. 36.

FN19 *Ibid.*, para. 37.

FN20 *Ibid.*, para. 38.

FN21 [2002] O.J. No. 261 (Ont. S.C.J. [Commercial List]).

FN22 *Turbo Logistics*, *supra.*, para. 24.

FN23 Identify the precise location in the Accounts where the item can be found

FN24 Cross-reference to the specific document in a prepared Document Brief

FN25 Cross-reference to the specific document in a prepared Document Brief

END OF DOCUMENT

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TAB 6

H

2007 CarswellOnt 9136, 41 C.B.R. (5th) 112

Impact Tool & Mould Inc., Re

In the Matter of the Bankruptcy of Impact Tool & Mould Inc., of the City of Windsor, County of Essex

In the Matter of the interim receivership of Impact Tool & Mould Inc., carrying on business in the City of Windsor, County of Essex, Province of Ontario

Ontario Superior Court of Justice

J.H. Brockenshire J.

Judgment: June 26, 2007[FN*]
Docket: Estate No. 35-107853, 03-CV-107853OC

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Proceedings: affirmed *Impact Tool & Mould Inc., Re* (2008), 2008 ONCA 187, 2008 CarswellOnt 1360 (Ont. C.A.)

Counsel: None given

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — By trustee

Debtor business manufactured injection moulds — Debtor owed $4.9 million to several creditors, and had 210 unsecured creditors — Secured shareholder creditor offered to buy assets of business for outstanding debt — Offer approved by court — New company started with assets failed — New business petitioned into bankruptcy — Unsecured creditor who was also competitor appointed its financial advisor as trustee — Before bankruptcy, financial information was given to competitor creditor on court approval in very general terms for fear information would be misused — On appeal, full disclosure ordered for competitor creditor — Trustee brought motion to examine receiver — Receiver brought motion to dismiss examination and vary sale order — Motions dismissed — Four years had passed since sale approved — Receiver had already responded to to questions and had provided more information than reasonable.

Cases considered by *J.H. Brockenshire J.*:

Anvil Range Mining Corp., Re (2001), 21 C.B.R. (4th) 194, 2001 CarswellOnt 908 (Ont. S.C.J. [Commercial List]) — referred to

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — re-

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ferred to

Confectionately Yours Inc., Re (2001), 25 C.B.R. (4th) 24, 2001 CarswellOnt 1784 (Ont. S.C.J. [Commercial List]) — referred to

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — referred to

Statutes considered:

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

s. 163(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.14 — referred to

R. 59.06(1) — referred to

MOTION by trustee to examine receiver; MOTION by receiver to dismiss examination and vary order of sale.

***J.H. Brockenshire J.*:**

1 This all day series of motions concerned firstly, a motion by the Trustee in Bankruptcy, represented by Mr. Frank Bennett of Bennett & Company of Toronto, secondly a cross-motion by the Interim Receiver of Impact Tool & Mould Inc. ("Impact") represented by Bennett Jones LLP through Justin Fogarty, A. Mitchell and R. Brosseau, and thirdly a motion brought on behalf of Robert King, the former president of Unique Tool & Gauge Inc. ("Unique") represented by Mr. John Leslie of Miller, Canfield, Paddock & Stone LLP of Windsor, to quash a notice of examination served on Robert King by Bennett Jones.

2 The first motion, by the Trustee, was for an order either declaring that the Trustee does not require court leave to examine the Interim Receiver, or alternately an order granting leave for such an examination, and for the production of all books and records, documents, etc., in the Receiver's possession or control.

3 The second motion, by Bennett Jones, was on behalf of Doyle Salewski Inc., the Interim Receiver ("Receiver") to dismiss the Trustee's motion to examine the Receiver and also dismiss a motion by the Trustee to vary my own order of April 23, 2003, under which I had approved the sale of the assets of Impact by the Receiver. The exact wording of the second motion, also brought by Mr. Bennett, was not before me, but I understood it to be essentially an attack on paragraph 15 of my order, which provided that the sale approval and vesting provisions of the order would not be void or voidable at the instance of creditors and claimants, and shall be binding on the Trustee in Bankruptcy.

4 At the start of the proceedings Mr. Fogarty advised that his motion to examine Mr. King was brought solely as protection, in the event that an order went permitting the examination of the Receiver, and would be withdrawn if Mr. Bennett's motion to so examine failed. At the end of the day I advised Mr. Leslie, who had continued in attendance, that he would not be needed.

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5 The essential facts, which emerged during the day of argument, were that Impact was in the business of making injection moulds to be used in the manufacture of plastic parts. There had been a downturn in the industry and Impact was in financial difficulties. It had roughly 4.9 million outstanding to secured creditors. The largest secured creditor was National Bank, which was becoming increasingly concerned, and was pressing toward liquidation. Two of the shareholders of Impact were also secured creditors, for about $860,000.00. There were around 210 unsecured creditors, with claims totaling some 2.6 million. The largest unsecured creditor was Unique, which was also in the injection mould business, and a competitor of Impact. It held a judgment for around $590,000.00, arising from an acrimonious battle over an employee who left Unique to go to Impact. Unique was allegedly attempting to steal customers from Impact, or interfere with Impact getting new work, both before and during the receivership, causing concern over Unique having details of the financial situation of Impact.

6 Impact operated out of rented premises (the landlord being a related corporation). Its assets consisted of machinery and vehicles, work in progress and receivables, which per three appraisals would produce about 1.4 million.

7 Those figures indicate to me that if liquidation took place, the secured creditors would get about $.30 on the dollar, and there was absolutely no hope of the unsecured creditors receiving anything. This seemed to be very obvious to the unsecured creditors, because none of them except for Unique involved themselves in any way in the process.

8 The two secured creditors that were shareholders and officers of Impact, then stepped forward with an offer to buy the assets for, in general terms, the amount outstanding to the secured creditors, in trust for a new company to be incorporated. This offer was made with professional advice, and was looked at by the buyers as a "reorganization". With Impact limping along, filling pre-existing orders, with National Bank on a day by day forbearance arrangement, and pressing for liquidation, and with no reasonable hope, in view of the appraisals received, of getting any other offer anywhere close to the one being put forward, the Receiver recommended accepting the offer of the shareholders. The matter came before me in 2003 for approval of the sale, on notice to all of the secured shareholders and to Unique. Unique did not appear. Neither did any of the secured creditors. On the facts as presented, I approved the sale. The shareholders incorporated a new company — Impact Tool & Mould Windsor Inc., completed the purchase by a payout of the National Bank and assumption by the new corporation of the secured debts of the old Impact, with payment terms and personal guarantees, and in effect carried on the business. Unfortunately, although freed from the previous unsecured debt, the new Impact was unable to make a go of it and eventually collapsed.

9 Once the sale was approved and completed, the Receiver petitioned Impact into bankruptcy. Unique stepped forward and selected as the Trustee its financial advisor in its previous battle in the courts with Impact, and I was advised, guaranteed the Trustee's fees. During the receivership and early stages of the bankruptcy, Impact was represented by a Toronto firm (not Mr. Bennett's) who made inquiries of the law firm of the Receiver and received information as to the validity of the security of the secured creditors, etc. Before the bankruptcy, the Receiver, because of concerns that Unique was looking for, and would use, information as to the details of the financial situation of Impact, prepared reports for the creditors in very general terms, with ancillary reports that provided details, but did not go to Impact. This was supported by orders of the bankruptcy registrar and a judge. Unique then changed lawyers to Mr. Bennett, who firstly appealed those decisions to the Court of Appeal, which ordered that Unique was entitled to full information, but was not entitled to use such information to advance its competitive position against Impact. The position of the Receiver's counsel was that even before this,

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books, records, including full computer records of Impact were made available to the Trustee. After the Court of Appeal order, much more information was made available to the Trustee. Finally the Receiver and Mr. Fogarty on the Receiver's behalf refused to provide any further answers to questions posed by Mr. Bennett, leading to Mr. Bennett's motion, which was brought under s. 163(1) of the Act to examine under oath "...any person reasonably thought to have knowledge of the affairs of the bankrupt...." The Trustee had authority from the inspectors in the bankruptcy, and Mr. Bennett's position was that the Trustee had to examine the Receiver in order to obtain information so as to be able to administer the estate. He denied the allegations of Mr. Fogarty, that he was in fact acting as counsel for Unique, which was directing this quest for examinations for its own purposes. He characterized this receivership and bankruptcy as extraordinary and most unusual, and characterized paragraph 15 of the order I had signed in 2003 in the same way.

10 Mr. Fogarty denied the allegations of lack of disclosure, disputed the necessity of any further inquiries by the Trustee, characterized Mr. Bennett's motion as a fishing expedition, and pointed out that paragraph 15 of my order of 2003 was in fact standard general wording, used in all orders authorizing sales, and approved as part of a form used in the commercial list.

11 I have considered this matter.

12 The four years that have gone by in itself, in my view, provides ample reason to dismiss Mr. Bennett's motion. I agree with Mr. Bennett that initially there was a lack of information made formally available to the creditors, because of the concerns about Unique's competitive position, but I also accept Mr. Fogarty's submission, that informally information was provided to Unique even before the sale took place. I note that Unique did not appear in court to oppose the sale. I note that the secured creditors all apparently accepted the payments or arrangements provided to them by the shareholders that bought the assets, and further note that it was completely obvious, from the very beginning that there was absolutely no hope of the unsecured creditors receiving anything. The search for more and more information was therefore somehow motivated by something other than a hope of producing a better result for the unsecured creditors.

13 Mr. Bennett characterized the sale as unusual or indeed extraordinary. My own experience is that it is fairly common for shareholders or employees of a bankrupt business to be prepared to pay well over the objective appraised values of the assets in the hopes that they can turn the situation around, while objective third parties would only be interested in acquiring the assets at below appraised value.

14 I agree that the initial information provided generally to the creditors was vague and sketchy. However, since the Court of Appeal order, and Mr. Bennett's persistent questioning, the Receiver, through further reports and supplementaries has, in my view, now been given much more information than unsecured creditors, hoping to receive something from the bankruptcy, could reasonably expect. I note further that Mr. Bennett has succeeded in getting confidential information from the National Bank, and accept Mr. Fogarty's suggestion that the Trustee may now know more than the Receiver about Impact.

15 While s. 163(1) of the *Bankruptcy and Insolvency Act* gives broad powers to a trustee to carry out examinations, that power is directed primarily against the bankrupt and then other persons. What is sought here is an order for the examination of a court appointed receiver. The case law, quoted by counsel on both sides, of *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]), *Confectionately Yours Inc., Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]) and *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]), all decisions of Farley J., plus the appeal decision in *Con-*

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fectionately Yours Inc., Re at (2002), 36 C.B.R. (4th) 200 (Ont. C.A.), all make it clear that a court appointed receiver is an officer of the court, whose reports are to be accepted and do not have to be supported by affidavit except in the most unusual of circumstances, and that such court officer is, again except in the most unusual circumstances not to be subjected to an examination. The one exception is when the Receiver's own accounts for fees and disbursements are brought before the court. The Receiver is then not acting in the general interest of the estate, and should support the claim by affidavit and with leave, be subject to examination. I see nothing exceptional in the circumstances here, and was not pointed to any area in which Mr. Bennett could point to a lack of information or a refusal to provide information which would in any way support his application. I rule that a court appointed receiver cannot be examined except by leave, which leave should only be granted in the most unusual of circumstances, which have not been demonstrated here.

16 The further motion, raised orally by Mr. Bennett, to amend my 2003 order, fails for delay, per rule 37.14, and for not establishing any error or omission, per rule 59.06(1).

17 I therefore deny the motion by Mr. Bennett for me to amend my order of 2003, deny the motion for a declaration that the Receiver can be examined without leave, and deny the application for leave to examine the Receiver. The effect of this is to grant the cross-motion brought on behalf of the Receiver, and to dismiss, except for a claim for costs by Mr. King's counsel, the motion by the Receiver to examine Mr. King.

18 There is left the application by the Receiver to accept the Receiver's several reports and to in effect discharge the Receiver, the issue of the Receiver's fees and disbursements, and the issue of costs on these motions. If these matters cannot be resolved among counsel, a further date can be obtained from the trial coordinator.

Motions dismissed.

FN* Affirmed by *Impact Tool & Mould Inc., Re* (2008), 2008 ONCA 187, 2008 CarswellOnt 1360, 41 C.B.R. (5th) 1 (Ont. C.A.).

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2008 CarswellOnt 1360, 2008 ONCA 187, 41 C.B.R. (5th) 1, 234 O.A.C. 377

Impact Tool & Mould Inc., Re

In the Matter of the Bankruptcy of Impact Tool & Mould Inc., of the City of Windsor, County of Essex

And In the Matter of the Interim Receivership of Impact Tool & Mould Inc., carrying on business in the City of Windsor, County of Essex, Province of Ontario

BDO Dunwoody Limited, Trustee of the Estate of Impact Tool & Mould Inc., a bankrupt (Applicant / Appellant) and Doyle Salewski Inc., in its capacity as Court-Appointed Interim Receiver of Impact Tool & Mould Inc. (Respondent / Respondent)

Ontario Court of Appeal

K. Feldman, S.E. Lang, J. MacFarland JJ.A.

Heard: February 27, 2008
Judgment: March 14, 2008
Docket: CA C47464

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Proceedings: affirming *Impact Tool & Mould Inc., Re* (2007), 2007 CarswellOnt 9136 (Ont. S.C.J.)

Counsel: Frank Bennett for Appellant

Justin R. Fogarty, Renée Brosseau for Respondent

David Moore for Moving Party, Windsor Precision Gundrill Inc.

Subject: Civil Practice and Procedure; Insolvency

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — By trustee

Debtor business manufactured injection moulds — Debtor owed $4.9 million to several creditors, and had 210 unsecured creditors — Secured shareholder creditor offered to buy assets of business for outstanding debt — Offer approved by court — New company started with assets failed — New business petitioned into bankruptcy — Unsecured creditor who was also competitor appointed its financial advisor as trustee — Before bankruptcy, financial information was given to competitor creditor on court approval in very general terms for fear information would be misused — On appeal, full disclosure ordered for competitor creditor — Trustee's motion to examine receiver was dismissed, receiver's motion to dismiss examination and to vary sale order was dismissed — Trial

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judge found four years had passed since sale approved — Trial judge found receiver had already responded to questions and had provided more information than reasonable — Trustee appealed — Appeal dismissed — Trial judge made no error — All information was provided — Varying vesting order would be improper, and would constitute seeking reversal on appeal by way of variation.

Cases considered:

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — referred to

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of) (2006), 2006 CarswellOnt 1523, 20 C.B.R. (5th) 220, (sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 208 O.A.C. 133, (sub nom. *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 79 O.R. (3d) 241, (sub nom. *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 266 D.L.R. (4th) 192 (Ont. C.A.) — referred to

Pearson v. Inco Ltd. (2005), 2005 CarswellOnt 826, 195 O.A.C. 77, 21 C.E.L.R. (3d) 270 (Ont. C.A.) — referred to

R. v. Palmer (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) — followed

Statutes considered:

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

s. 163 — referred to

s. 163(1) — referred to

s. 164 — referred to

s. 187(5) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

APPEAL by trustee from judgment reported at *Impact Tool & Mould Inc., Re* (2007), 2007 CarswellOnt 9136, 41 C.B.R. (5th) 111 (Ont. S.C.J.), dismissing motion by trustee for examination for discovery of receiver, and dismissing motion by trustee opposing order and requesting variation of sale document.

***Per curiam*:**

1 This is an appeal by the trustee in bankruptcy from the decision of Brockenshire J., which dismissed the trustee's motion to examine the court-appointed interim receiver under ss. 163 and 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). The trustee's motion had also sought to vary the sale approval and

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vesting order made by Brockenshire J. on April 23, 2003, approving the interim receiver's sale of the assets of Impact Tool and Mould Inc. The basis for the trustee's motion was its stated concern regarding the propriety of selling Impact's assets to a new company formed by two of Impact's former principals.

2 As a preliminary matter on the appeal, Windsor Precision Gundrill Inc. sought to review the order of LaForme J.A. dated February 13, 2008, which dismissed its motion to intervene in this appeal. Following oral argument, we dismissed the motion for review. We agree with LaForme J.A. that the proposed intervener would add nothing to the argument to be made by the trustee: *Pearson v. Inco Ltd.* (2005), 195 O.A.C. 77 (Ont. C.A.) at para. 6.

3 The trustee also applied to admit fresh evidence. Following oral argument, we dismissed that application because the proposed evidence does not meet the test in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.).

4 The motion judge dismissed the trustee's motion to examine the interim receiver for two reasons: first, because four years had passed since the sale was approved and implemented; and second, because the interim receiver had already responded to the trustee's questions, providing "much more information than unsecured creditors, hoping to receive something from the bankruptcy, could reasonably expect." The motion judge also took into account the fact that the trustee had succeeded in obtaining confidential information from the National Bank, another of Impact's secured creditors, so that the trustee "may now know more than the Receiver about Impact."

5 The three legal issues raised by the trustee on the appeal are: (1) whether a trustee in bankruptcy is entitled to examine a court-appointed receiver as of right under s. 163(1) of the *BIA*, (2) alternatively, if leave of the court is required for such an examination, whether the unusual circumstances of this sale justify granting leave; and (3) whether paragraph 15 of the sale approval and vesting order should be varied.

6 Dealing with issues (1) and (2) together, we do not need to decide whether there is an absolute right for a trustee to examine a court-appointed receiver, or whether leave is required, because we see no error in the motion judge's conclusion that, through the informal question and answer process, the interim receiver has provided all the information requested and required by the trustee. As the motion judge said, the trustee was not able to "point to a lack of information or a refusal to provide information which would in any way support his application." Counsel for the trustee was given the further opportunity to point to any area of deficiency in the interim receiver's responses on oral argument of the appeal, but was unable to do so. Accordingly, we would dismiss the trustee's appeal on these issues.

7 Turning to issue (3), paragraph 15 of the sale approval and vesting order reads as follows:

> THIS COURT ORDERS that, notwithstanding:
>
> (a) the pendency of these proceedings;
>
> (b) the bankruptcy of Impact Tool & Mould Inc.; and
>
> (c) the provisions of any federal or provincial statute,
>
> neither the Purchase Agreement and the Transactions nor the vesting provisions of this Order will be void or voidable at the instance of creditors and claimants and do not constitute nor shall they be deemed to be settlements, fraudulent preferences, assignments, fraudulent conveyances or other reviewable transactions un-

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> der the *Bankruptcy and Insolvency Act* or any other applicable federal or provincial legislation, and they do not constitute conduct meriting an oppression remedy and shall be binding on the trustee in bankruptcy of the Estate of Impact Tool & Mould Inc.

8 The motion judge refused to vary this paragraph on the basis of delay and because the trustee failed to establish any error or omission in the order. We see no error in the motion judge's conclusions. Under s. 187(5) of the *BIA*, a party may move to vary an order. However, that section cannot be used purely for the purpose of bringing an appeal out of time: *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), at 102-103. That is essentially what the trustee was attempting to do in this case. No appeal was taken from the sale approval and vesting order issued on April 23, 2003, although the trustee was appointed within a month of that date. In an earlier matter on this bankruptcy that came before this court in 2006, the court noted that no appeal had been taken from the sale approval and vesting order: (2006), 79 O.R. (3d) 241 (Ont. C.A.) at para. 19. The trustee is now seeking to appeal the order under the guise of a variation. Eliminating a critical paragraph of a vesting order four or five years after the transaction took place is not a variation, and cannot be accomplished under s. 187(5) of the *BIA* or the *Rules of Civil Procedure*.

9 Accordingly, the appeal is dismissed. The interim receiver is entitled to partial indemnity costs as claimed against Gundrill in the amount of $9,498.30, inclusive of disbursements and G.S.T. The interim receiver is entitled to partial indemnity costs of $5,000, inclusive of disbursements and G.S.T., against the trustee for the trustee's fresh evidence application. The interim receiver is entitled to costs of the appeal in the amount of $15,000, inclusive of disbursements and G.S.T. The costs against the trustee are awarded against the trustee personally because it was acknowledged that this is currently a no-asset bankruptcy.

Appeal dismissed.

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TAB 7

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2012 CarswellOnt 9470, 2012 ONSC 4247, 92 C.B.R. (5th) 40, 218 A.C.W.S. (3d) 488

Terrace Bay Pulp Inc., Re

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

In the Matter of a Plan of Compromise or Arrangement of Terrace Bay Pulp Inc. (Applicant)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: July 16, 2012
Judgment: July 19, 2012
Docket: CV-12-9566-00CL

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Counsel: Pamela Huff, Marc Flynn, Kristina Desimini for Applicant, Terrace Bay Pulp Inc.

Alec Zimmerman, James Szumski for Birchwood Trading, Inc.

M. Starnino for United Steelworkers

Alan Merksey for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko for Monitor, Ernst & Young Inc

Jacqueline L. Wall for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg for Skyway Canada Ltd.

Fred Myers for Township of Terrace Bay

Peter Forestell, Q.C. for Aditya Birla Group and AV Terrace Bay Inc.

Subject: Insolvency; Public; Property

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

T Inc. operated pulp mill — T Inc. sought protection of Companies' Creditors Arrangement Act — Initial order

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was granted — Court approved process for sale of T Inc.'s mill assets — Purchaser submitted bid to purchase T Inc.'s mill assets for $2 million plus $25 million concession from Province of Ontario — Deadline for bids passed — After deadline, Chinese company sought to bid $35 million — T Inc. brought motion for, inter alia, approval of sales transaction with Purchaser — Motion granted — Approval and vesting order granted — Reasonable attempts were made to market opportunity to participate in sales process in international markets, including China — Based on information available at time Purchaser's offer was accepted, including risks associated with non-binding offer at that point in time, consideration in transaction was not so unreasonably low so as to warrant court entering into sales process by considering competitive bids — Receiver made sufficient effort to get best price, and did not act improvidently — In arriving at recommendation to seek approval of transaction, T Inc. and Monitor considered interests of all parties, including Province, impact on township and employees — There had been no unfairness in working out of process.

Municipal law --- Subdivision control — Severance of land — Miscellaneous

T Inc. operated pulp mill — T Inc. sought protection of Companies' Creditors Arrangement Act — Initial order was granted — Court approved process for sale of T Inc.'s mill assets — T Inc. brought motion for, inter alia, approval of sales transaction in which Purchaser would purchase T Inc.'s mill assets, and for declaration that subdivision control provisions contained in Planning Act do not apply to vesting of title to real property in Purchaser and that such vesting is not, for purposes of s. 50(3) of Planning Act, conveyance by way of deed or transfer — Motion granted on other grounds — Order to issue approving transaction — Granting of vesting order is not, for purposes of s. 50(3) of Planning Act, conveyance by way of deed or transfer — However, it was not necessary to comment on or to issue specific declaration that subdivision control provisions contained in Planning Act do not apply to vesting of title.

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — considered

Lama v. Coltsman (1978), 20 O.R. (2d) 98, 1978 CarswellOnt 1454 (Ont. Co. Ct.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

724597 Ontario Inc. v. Merol Power Corp. (2005), 2005 CarswellOnt 6445, 37 R.P.R. (4th) 191 (Ont. S.C.J.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 36 — considered

s. 36(3) — considered

Planning Act, R.S.O. 1990, c. P.13

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Generally — referred to

s. 50(3) — considered

MOTION by T Inc. for approval of sales transaction and other relief.

Morawetz J.:

1 Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

2 The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

3 Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

4 Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

5 Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

6 On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

7 With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

8 The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

9 Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

10 The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

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11 Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

12 Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

13 Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

> (a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;
>
> (b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;
>
> (c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;
>
> (d) employment of approximately 75 additional employees, plus the existing management of the mill;
>
> (e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

14 Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) has not been met.

15 Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

16 For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

Facts

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17 The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monit- or.

18 On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

19 The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

20 The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

21 The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

22 After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

23 Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

24 Four parties expressed an interest in Terrace Bay after the Bid Deadline.

25 The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

26 The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan,

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as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

27 It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

28 As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

29 The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

30 In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

> (a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;
>
> (b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;
>
> (c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;
>
> (d) the Sales Process Terms provide no bid protections for the potential Purchaser;
>
> (e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;
>
> (f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;
>
> (g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;
>
> (h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

31 As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

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32 The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

33 The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

34 The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

35 The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

36 The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

37 In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and

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that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

38 The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

39 The Monitor also provided in the Supplemental Report an update with respect to the position of the Pur- chaser.

40 The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

41 The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

42 The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

Law and Analysis

43 Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

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(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

44 I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

45 In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

46 In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

47 The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number

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of parties expressed interest and a number of parties did put forth binding offers.

48 Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

49 I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

50 It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

51 Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

52 In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

53 It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

54 I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

55 I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act im-

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providently.

56 The second point in the *Soundair* analysis is to consider the interests of all parties.

57 On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

58 The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

59 I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

60 At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], at p. 109:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

61 In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

62 The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

63 There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

64 I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

65 In all respects, I am satisfied that there has been no unfairness in the working out of the process.

66 In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

67 In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

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68 I have concluded that the Approval and Vesting Order should be granted.

69 I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

70 The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

71 The authorities cited, *Lama v. Coltsman* (1978), 20 O.R. (2d) 98 (Ont. Co. Ct.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp.*, [2005] O.J. No. 4832 (Ont. S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

72 For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

73 The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

Disposition

74 In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

Motion granted.

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TAB 8

2010 CarswellOnt 1072, 2010 ONSC 1161, 64 C.B.R. (5th) 239

Maxtech Manufacturing Inc., Re

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF MAXTECH MANUFACTURING INC. (Applicants)

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985 C.B-3, AS AMENDED

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: January 28, 2010
Judgment: February 23, 2010
Docket: 09-CL-8352

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Counsel: Alissa Mitchell for Receiver, Tim Gleason

Tim Gleason for United Steel Workers of America

Brett Harrison for Export Development Canada

Fred Myers for Maple Trade Finance Inc.

Ian Aversa for VLM Finance Ltd.

George Benchetrit for General Electric

Jonathan Wigley for Alpha Sitered Metals Inc.

Jane Dietrich for Tenneco Automotive

Jeffrey J. Simpson for Kacee Visudeva, Maxtech Consumer Products Limited, Maxtech Manufacturing Inc., 12600976 Ontario Limited

Subject: Insolvency

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Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Sale of assets by receiver — Receiver wished to sell assets of insolvent business, and solicited offers — Highest offer was withdrawn before it could be accepted — Receiver negotiated with another offeror and reached agreement better than previous agreement — Offeror of original highest offer submitted another bid, which was not accepted — Receiver brought motion for approval of sale — Motion granted — Sale approved — Cash component of offer was higher, and was payable earlier — Offeror of original highest offer's ability to service debt assumption was suspect — Process was fair — Creditors with first ranking charge over assets at issue approved of sale — No evidence of what bid other offerors wished to make, and if they could provide deposit interest of guarantor was not prejudiced — Appendices contained confidential information and were sealed.

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Romspen v. 6176666 Canada Ltee. (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

MOTION by receiver for approval of sale of assets.

***Morawetz J.*:**

1 At the conclusion of the motion on January 28, 2010, I endorsed the record as follows:

> Motion granted. Transaction with Alpha Sitered approved. Sealing Order granted. Second Report approved. Reasons will follow. Order to go in form presented as amended.

2 The following are the reasons.

3 Grant Thornton Limited, in its capacity as Receiver of Maxtech Manufacturing Inc. (the "Receiver") brought this motion to approve the transaction as contemplated by an asset purchase agreement (the "Agreement") between the Receiver, as Seller and Alpha Sitered Metals, Inc., as Purchaser ("Alpha" or the "Pur- chaser").

4 The Receiver also sought an order to seal certain appendices annexed to its Second Report and for an order approving the actions and activities of the Receiver as described in the Second Report and the Supplementary Report.

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5 The motion was supported by Export Development Canada ("EDC") and General Electric ("GE"). Counsel to Maple Trade did not oppose the motion on the basis that there was no other offer.

6 The motion was opposed by counsel on behalf of Mr. Kacee Vasudeva, Maxtech Consumer Products Limited, Maxtech Manufacturing Inc. ("Maxtech") and 1260976 Ontario Limited.

7 At the outset of argument, Mr. Simpson on behalf of Mr. Vasudeva, Maxtech and related companies brought a motion to adjourn the motion to February 3, 2010 in order that his clients could put forward a further and better offer that complied with requirements previously set forth by the Receiver. The adjournment request was supported by counsel to Maple Trade.

8 I did not grant the adjournment. Separate reasons were provided.

9 The Receiver was appointed on November 23, 2009 by order of Pepall J. [2009 CarswellOnt 7318 (Ont. S.C.J. [Commercial List])] (the "Appointment Order"). The Appointment Order authorized the Receiver to commence a marketing and sale process.

10 The Receiver implemented the marketing process and identified and contacted prospective buyers and investors.

11 The Receiver received six offers to purchase (the "Offers") by December 14, 2009.

12 The record establishes that the Receiver considered the Offers. The Receiver asked each offeror to provide their "best" offer.

13 On December 21, 2009, after receipt of its increased offer and after express inquiry from the Receiver, the Receiver was informed by one of the six offerors its increased offer was final (the "Final Bali Offer"). No deposit accompanied the Final Bali Offer. The Final Bali Offer was submitted by an entity related to Mr. Vasudeva.

14 By early January 2010, the Receiver determined that it was imperative that the sales process be completed as there was a demand for additional cash in order to continue operations on a cash-neutral basis and no additional sources of cash had been identified.

15 The Receiver, in consultation with the secured lenders, decided to accept the most favourable "asset based" offer. However, on January 7, 2010, before the Receiver was able to accept such offer, it was withdrawn.

16 The Receiver undertook further negotiations with another of the "asset based" offerors, Alpha and on January 8, 2010, the Receiver reached an agreement in principle with Alpha. The Receiver is of the view that Alpha's offer was more favourable than the withdrawn offer, the Final Bali Offer, or any of the other Offers. The Alpha Offer was accompanied by the requisite deposit.

17 Within hours of accepting the Alpha Offer on January 8, 2010, a further Bali Offer was received (the "Amended Bali Offer"). No deposit accompanied the Amended Bali Offer.

18 On January 11, 2010, with the support of GE and EDC, the Receiver formally accepted the Alpha Offer subject only to court approval.

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19 The Receiver indicates in its Report that, despite the Amended Bali Offer being late, it was considered and it remains the Receiver's opinion that the Alpha Offer is a more favourable offer than the Amended Bali Of- fer.

20 The Receiver provided the following reasons for its opinion:

> (a) the cash component of the Alpha Offer is higher;
>
> (b) the cash payable in the Alpha Offer was due on closing whereas the Amended Bali Offer deferred payment beyond closing;
>
> (c) based upon the lack of support of Maxtech's remaining key customers, the Receiver did not expect sufficient future business on a "going concern" basis to support the cash flow required to service the debt assumption component of the purchase price proposed in the Amended Bali Offer;
>
> (d) the Alpha Offer was obtained through a fair and equitable process and reflects an offer which respected that process; and
>
> (e) GE and EDC supported the Receiver's recommendation. The assets being sold are comprises largely of assets in respect of which GE and EDC appear to hold a first-ranking charge.

21 In opposition to the motion, Mr. Simpson submitted that the Alpha Offer should not be approved in the face of representations that his client could put forward a further and better offer that complied with the requirements previously set forth by the Receiver. However, as I noted in my reasons for refusing the adjournment request, Mr. Simpson's clients had taken no steps to put anything on the record which would substantiate the submissions made by counsel.

22 Mr. Simpson's clients provided no evidence of what offer they wanted to submit. There was no evidence as to why they needed additional time. There was no evidence that they could submit a deposit and they provided no evidence that they would be in a position to consummate the transaction.

23 The test on a motion to approve a sale by a receiver is set out in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) which was later adopted by the Court of Appeal in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.):

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

24 In this case, I have concluded that the Receiver has acted properly. Indeed, there is no evidence to the contrary.

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25 The Receiver implemented the sales process which had been approved by the court. There is ample evidence to support the Receiver's contention that the Alpha Offer represents the best bid.

26 To the extent that the submissions were being made on behalf of Mr. Vasudeva in his capacity as guarantor, his affidavit sworn January 28, 2010 states that his interests as a guarantor have been ignored throughout the receivership process and, if the proposed transaction is approved, he may be one of the largest unsecured creditors of Maxtech, with no ability to collect. Accordingly, he states that his interests will be prejudiced by the sale.

27 I am satisfied that the Receiver conducted the sales process in an acceptable manner and obtained a fair and reasonable price for the assets in the circumstances. The interests of Mr. Vasudeva have, in my view, not been prejudiced by the sales process nor the actions taken by the Receiver. The fact that he may be a large unsecured creditor results from other factors. In my view, the opposition expressed by Mr. Vasudeva is not such that the transaction should not be approved.

28 In the result, I am satisfied that it is appropriate to approve the Agreement.

29 The Receiver also requested an order sealing the confidential appendices to the Second Report pending further order. In considering this request, I am guided by the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order.

30 I reviewed the confidential appendices to the Second Report. I am satisfied that the appendices contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that it is appropriate to grant the requested sealing order.

31 Finally, counsel to the Receiver advises that there has been no adverse comment received in respect of the actions and activities of the Receiver insofar as they relate to the sales transaction including the acceptance of the Purchaser's offer described in the Second Report and the Supplementary Report and, in my view, it is appropriate to approve the actions and activities of the Receiver as described in the Second Report and the Supplementary Report on this basis.

32 Finally, it is noted that issues relating to allocation of proceeds are not being dealt with at this time. This has been reflected in the modified language to paragraph 13 of the order.

33 An order shall issue to give effect to the foregoing.

Motion granted.

END OF DOCUMENT

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TAB 9

BENNETT

on

RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

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One Corporate Plaza
2075 Kennedy Road
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The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. The receiver is a trustee and fiduciary of the realization proceeds for all the stakeholders.[125] This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation.[126] As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions.[127] The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.[128]

In setting the standard of care, the court-appointed receiver must act with meticulous correctness,[129] but not to a standard of perfection.[130] As a fiduciary, the

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rectitude": *Bank of Montreal v. Steel City Sales Ltd.* (1983), 57 N.S.R. (2d) 396, 47 C.B.R. (N.S.) 15 at p. 29, 148 D.L.R. (3d) 585 (N.S. T.D.).

125 A court-appointed receiver is a trustee and fiduciary: *Alberta Treasury Branches v. Invictus Financial Corp.* (1986), 42 Alta. L.R. (2d) 181, 61 C.B.R. (N.S.) 238, 1986 CarswellAlta 434 (Alta. Q.B.), appeal dismissed (1986), 47 Alta. L.R. (2d) 94, 61 C.B.R. (N.S.) 254, 1986 CarswellAlta 435 (C.A.).

Apart from a claim for fees and disbursements, a court-appointed receiver is a trustee of all the proceeds it receives from the realization of assets for the benefit of the stakeholders: *Toronto-Dominion Bank v. Usarco Ltd.* (1997), 50 C.B.R. (3d) 127, 1997 CarswellOnt 1958 (Ont. Gen. Div.), appeal dismissed (2001), 24 C.B.R. (4th) 303, 196 D.L.R. (4th) 448, 2001 CarswellOnt 525 (Ont. C.A.), leave to appeal refused (2001), 2001 CarswellOnt 3408 (S.C.C.).

126 *T.D. Bank v. Fortin et al.*, [1978] 2 W.W.R. 761, 85 D.L.R. (3d) 111, 26 C.B.R. (N.S.) 168 (B.C. S.C.). However, it appears that this duty does not extend to creditors who have a higher interest than the receiver. In *Chambers v. Verbrugge* (1990), 45 B.C.L.R. (2d) 169, 1990 CarswellBC 81 (B.C. C.A.), also cited as *Chambers v. Tretex Developments Ltd.* (1990), 68 D.L.R. (4th) 443 (B.C. C.A.), the receiver sold a shopping centre property to a purchaser on which there was an advertising sign. The majority of the court held that the receiver did not owe a fiduciary duty to the owner of the sign as the owner was a prior encumbrancer nor did the receiver have an obligation to require the purchaser to assume responsibility for the sign agreement.

127 *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160, 9 D.L.R. 476, 1912 CarswellOnt 770 (Ont. P.C.). This is one of the leading cases on court-appointed receivers. It has been applied and referred to in many Canadian cases; see, for example, *Re Philip's Manufacturing Ltd.* (1992), 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161 (B.C. C.A.), dismissing an appeal from (1992), 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537, 91 D.L.R. (4th) 105 (B.C. S.C.); *Hongkong Bank of Canada v. Caproco Corrosion Prevention Ltd.* (1991), 85 Alta. L.R. (2d) 306, 10 C.B.R. (3d) 190, 1991 CarswellAlta 297 (Alta. C.A.), dismissing an appeal from (1990), 79 C.B.R. (N.S.) 217, 1990 CarswellAlta 253 (Alta. Q.B.), additional reasons at (1990), 80 C.B.R. (N.S.) 285, 1990 CarswellAlta 259 (Alta. Q.B.); *B.C. Central Credit Union v. Metro Co-operative Services* (1982), 37 B.C.L.R. 94, 137 D.L.R. (3d) 341, 43 C.B.R. (N.S.) 97 (B.C. C.A.); *Lundigrans Ltd. (Receiver of) v. Bank of Montreal* (1996), 146 Nfld. & P.E.I.R. 252, 142 D.L.R. (4th) 100 (Nfld. C.A.).

128 *Canadian Imperial Bank of Commerce v. Morrison* (1985), 69 N.S.R. (2d) 335, 57 C.B.R. (N.S.) 319 (note), 1985 CarswellNS 41 (N.S. T.D.), appeal allowed on other grounds (1986), 75 N.S.R. (2d) 406, 33 D.L.R. (4th) 132, 1986 CarswellNS 140 (N.S. C.A.).

A court-appointed receiver is "an officer of a court of justice" and, as such, the officer is ineligible to serve as a juror and therefore is exempt from jury duty: *Re Page* (2002), 38 C.B.R. (4th) 241, 2002 CarswellOnt 3892 (Ont. S.C.J. [Commercial List]) where the above paragraph in the second edition was cited.

129 *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280 (Alta. C.A.) allowing an appeal from (1989), 80 C.B.R. (N.S.) 84 (Alta. Q.B.); followed in *Toronto-Dominion Bank v. Usarco Ltd.* (1997), 50 C.B.R. (3d) 127 (Ont. Gen. Div.), appeal dismissed (2001), 24 C.B.R. (4th) 303 (Ont. C.A.) where the receiver breached this standard in failing to pay outstanding municipal taxes; *Re Regal Constellation*

receiver owes a duty to make full disclosure of information to all interested persons including prospective purchasers. The receiver is obliged to respond to requests for information consistent with the position of the person making the request.[131] The receiver must produce all documents in its possession which are relevant to the issues in the receivership.[132] In acting in a fair and even-handed manner, the receiver cannot give one party some documents and other parties different ones. All parties are entitled to receive the same information.[133] If the cost of responding is excessive in the circumstances, the receiver can fix a fee for that cost, or otherwise it can apply to the court for directions.[134] The court-appointed receiver owes no specific duty to any individual creditor who may attempt to interfere in the receivership.[135] In the leading Canadian case of *Parsons v. Sovereign Bank of Canada,*[136] the court set out the classic statement of the receiver's position:

> A receiver and manager appointed . . . is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him; duties which in the present case extended to the continuation and management of the business.

As an officer of the court, the receiver's fiduciary duty extends to a high standard of care in the operation of the business comparable to the "reasonable care, supervision and control as an ordinary man would give to the business were it his own".[137] But, as indicated above, that does not mean a standard of perfection in making

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Hotel Ltd. (2004), 50 C.B.R. (4th) 253 (Ont. S.C.J.), appeal dismissed (2004), 71 O.R. (3d) 355, 50 C.B.R. (4th) 258, 242 D.L.R. (4th) 689 (Ont. C.A.).

130 *Continental Bank v. Maple Leaf Helicopters* (1983), 50 C.B.R. (N.S.) 265 (B.C. S.C.).

131 *Re Battery Plus Inc.* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). For example, a prospective purchaser will want to review information relating to the operations, valuations, tax information, lease information and other matters affecting operations.

132 *Nash v. C.I.B.C. Trust Corp.*, [1996] O.J. No. 1833, 6 O.T.C. 368 (Ont. Gen. Div.).

133 *Corporation of the County of Simcoe v. Matthew Co-Operative Housing Inc.* (2011), 2011 ONSC 1264 (CanLII) (Ont. S.C.J.).

134 *Royal Bank of Canada v. Vista Homes Ltd. et al.* (1984), 54 C.B.R. (N.S.) 124 (B.C. S.C.).

135 See *Bank of N.S. v. MacCulloch & Co.* (1983), 49 C.B.R. (N.S.) 251 (N.S. T.D.). See Chapter 10 "1. Reports—Duty to Account".

136 [1913] A.C. 160 at p. 167 (P.C.). See also *Panamericana de Bienes y Servicios, S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280 (Alta. C.A.), allowing an appeal from (1989), 75 Alta. L.R. (2d) 185, 80 C.B.R. (N.S.) 84 (Alta. Q.B.) and *Re Philip's Manufacturing Ltd.* (1992), 69 B.C.L.R. (2d) 44, [1992] 5 W.W.R. 549, 92 D.L.R. (4th) 161 (B.C. C.A.), dismissing an appeal from (1992), 68 B.C.L.R. (2d) 162, [1992] 5 W.W.R. 537, 91 D.L.R. (4th) 105 (B.C. S.C.).

137 *Plisson v. Duncan* (1905), 36 S.C.R. 647, 1905 CarswellNWT 132 (S.C.C.). This case has been referred in many cases: *Re Ursel Investments Ltd.* (1992), 97 Sask. R. 170, [1992] 3 W.W.R. 106, 89 D.L.R. (4th) 246 (Sask. C.A.), allowing an appeal from (1990), 2 C.B.R. (3d) 260, 1990 CarswellSask 34 (Sask. Q.B.); *Lac des Mille Lacs First Nation v. Day Caddo Viherjoki*, [1996] 3 C.N.L.R. 100, 1996 CarswellOnt 436 (Ont. Gen. Div.).

In a court appointment, both a receiver and a receiver and manager owe the same standard of care of reasonable prudence to the creditors: *Willows Golf Corp. (Receiver of) v. International Capital Corp.* (1995), 134 Sask. R. 81, [1995] 9 W.W.R. 1, 34 C.B.R. (3d) 82 (Sask. C.A.), affirming (1994), 122 Sask. R. 75, 16 C.L.R. (2d) 206, 1994 CarswellSask 292 (Sask. Q.B.).

Referred to in *Astra Credit Union Ltd. v. Protos International Inc.* (2006), 25 C.B.R. (5th) 83, 2006 MBQB 174 (CanLII), 2006 CarswellMan 266 (Man. Q.B.).

PINNACLE CAPITAL RESOURCES LIMITED in its capacity as general partner of RED ASH CAPITAL PARTNERS II LIMITED PARTNERSHIP	**-and-**	Court File No. CV-12-9731-00CL **KRAUS INC., KRAUS CANADA INC., STRUDEX FIBRES LIMITED and 538626 B.C. LTD.**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE RECEIVER

BLAKE, CASSELS & GRAYDON LLP
Suite 4000, Commerce Court West
199 Bay Street, Suite 4000
Toronto, Ontario M5L 1A9

Pamela Huff LSUC No.: 27344V
Tel: (416) 863-3058

Linc Rogers LSUC No.: 43562N
Tel: (416) 863-4168

Jenna Willis LSUC No.: 58498U
Tel: (416) 863-3348
Fax: (416) 863-2653

Lawyers for PricewaterhouseCoopers Inc. in its capacity as the Court-appointed Receiver of the Respondents