

TAB TWO

EIGHTEENTH REPORT OF THE RECEIVER

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF SECTION 47(1) OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990 C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

EIGHTEENTH REPORT OF
ALVAREZ & MARSAL CANADA ULC,
AS RECEIVER AND MANAGER AND CONSTRUCTION LIEN ACT TRUSTEE AND
ALVAREZ & MARSAL CANADA INC., AS INTERIM RECEIVER
OF THE ASSETS OF THE ROSSEAU RESORT DEVELOPMENTS INC.

May 2, 2011

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1.0 Introduction and Summary of Proceedings to Date¹

- 1.1 On May 22, 2009, the Ontario Superior Court of Justice (the “**Court**”) issued an order appointing Alvarez & Marsal Canada ULC (“**A&M**”) and McIntosh & Morawetz Inc. (now Alvarez & Marsal Canada Inc.) as trustee and interim receiver, respectively (collectively the “**Interim Receiver**”), pursuant to Section 68 of the *Construction Lien Act* (Ontario) (“**CLA**”) and Section 47(1) of the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) of all the property, assets and undertakings (the “**Assets**”) of The Rosseau Resort Developments Inc. (“**RRDI**” or the “**Company**”). On June 2, 2009, the Court issued an Amended and Restated Appointment Order (the “**Appointment Order**”) continuing the appointment of the Interim Receiver and appointing A&M as receiver and manager (the “**Receiver and Manager**”) pursuant to Section 101 of the *Courts of Justice Act* (Ontario) (“**CJA**”) and pursuant to the CLA of the Assets of RRDI (the Interim Receiver and the Receiver and Manager are collectively defined as the “**Receiver**”).
- 1.2 To date, the Receiver has filed seventeen reports with this Honourable Court. All background materials in respect of these proceedings, including, among other things, the Receiver’s past reports to Court and orders of the Court, can be found on the Receiver’s website at www.alvarezandmarsal.com/rosseau. Attached hereto as **Schedule “I”** is an outline of the most recent reports filed and orders obtained by the Receiver.

¹ Capitalized terms in this Eighteenth Report shall have the meanings ascribed to them in either the body of this report or in the Glossary of Defined Terms attached as **Appendix “A”**.

- 1.3 On March 3, 2011, the Receiver filed its fifteenth report (the “**Fifteenth Report**”) to advise the Court with respect to recent negotiations that had taken place between WestLB and a third party purchaser related to Maureen Fowler, the spouse of Ken Fowler (the “**Potential Purchaser**”) in respect of a potential sale transaction (the “**Potential Transaction**”) and to seek an order, among other things, authorizing the Receiver to: (a) formally terminate the Institutional Sales Process previously suspended by order of the Court dated May 18, 2010; and (b) continue to participate in the negotiations with the Potential Purchaser to determine whether the Potential Transaction could be completed, subject to approval of the Court. On March 9, 2011, the Court issued the Order in the form requested by the Receiver (the “**March 9 Order**”).
- 1.4 The purpose of this eighteenth report (the “**Eighteenth Report**”) is to advise the Court that the Potential Transaction is not proceeding, and to seek an order authorizing a sales process for the Assets to be conducted by the Receiver.
- 1.5 While the Potential Transaction is not proceeding, in the course of its negotiation, the Receiver sought and obtained agreements on a number of issues that had been reported in the Receiver’s Eleventh Report dated May 12, 2010 (the “**Eleventh Report**”) as problematic in the context of completing a transaction with any purchaser in respect of the Assets, and which had led the Receiver to suspend the previously authorized Institutional Sales Process. The Receiver pursued these agreements with a view to having those issues resolved in the event that the Potential Transaction did not proceed, in which case the Receiver planned to initiate a sales process as soon as possible thereafter. As a result, the Receiver is effectively

positioned to immediately commence a sale process for the Assets without the difficulties that had previously interfered with the Institutional Sales Process.

1.6 Accordingly, the Receiver is requesting that this Honourable Court grant an order:

- a) authorizing the Receiver to commence a sales process for the sale of the remaining Assets of RRDI on an en bloc basis (the "**Sales Process**"), in accordance with a protocol (the "**Sales Process Protocol**") attached to this report as **Appendix "B"**;
- b) approving the retention by the Receiver of CB Richard Ellis Limited ("**CBRE**") as broker to assist the Receiver in carrying out the Sales Process;
- c) sealing Confidential Appendix "1" to this Report until further order of the Court; and
- d) approving this Eighteenth Report and the conduct and activities of the Receiver as described herein.

2.0 *Terms of Reference*

- 2.1 In preparing this Eighteenth Report, the Receiver has relied on unaudited financial information prepared by the Company and the Company's consultants and advisors, the Company's books and records and discussions with certain remaining employees of the Company. The Receiver has not performed an audit or other verification of such information. An examination of the Company's financial forecasts as outlined in the Canadian Institute of Chartered Accountants Handbook has not been performed. Future oriented financial information relied on in this Eighteenth Report is based on assumptions regarding future events; actual results achieved may vary from this information and these variations may be material. The Receiver expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Eighteenth Report, or relied upon by the Receiver in preparing the Eighteenth Report. All references to dollar figures contained in the Eighteenth Report are in Canadian currency unless otherwise specified.

3.0 The Potential Transaction

Background to the Suspension of the Institutional Sales Process

- 3.1 As more fully detailed in the Fifteenth Report, the Receiver commenced an Institutional Sales Process in January 2010, in accordance with an Institutional Sales Process Protocol approved by the Court in its Order dated December 21, 2009.
- 3.2 During March and April 2010, the Receiver received 64 Notices of Dispute from Unit Owners who disputed the calculation of distributions to Unit Owners pursuant to the New RPMA. The dispute created a significant impediment to the ability of the Receiver to continue the Institutional Sales Process.
- 3.3 In addition, a number of unresolved disputes with neighbouring properties (the **“Outstanding Neighbouring Property Issues”**), posed complications to the completion of any transaction in accordance with the Institutional Sales Process. These Outstanding Neighbouring Property Issues were described in detail in the Eleventh Report:
 - a) The sewage treatment plant for the Hotel is located on neighbouring property owned by Wallace Marine, and is the subject of a lease between Wallace Marine and RRDl (the **“STP Lease”**) as well as perpetual easements over the property granted by Wallace Marine. The Eleventh Report disclosed that Wallace Marine had taken the position that the STP Lease was in default, and that it was at risk.
 - b) In addition, the Receiver had encountered issues with The Rock regarding the joint supply of water to the Hotel and the golf course (owned and operated by

The Rock), through the use of a water taking system located on RRDI's lands. A Water Taking Permit issued to RRDI by the Ministry of the Environment of Ontario ("MOE") for the taking of water from Lake Rosseau for use by the Hotel and The Rock expired in August 2009. RRDI had applied to the MOE to renew the permit. The Rock objected to a permit being issued only in the name of RRDI. The Receiver was seeking to resolve this objection by negotiating a commercially reasonable agreement for the continued supply of water to The Rock, while at the same time seeking to resolve the issues over the STP Lease.

- c) In addition, the Receiver reported difficulties in respect of the Red Leaves Resort Association with respect to the scope of the Association's intended services and the fees payable to it. The Receiver reported that it was concerned that there was a statutory obligation regarding membership and fees related to the Association, but that it had no clear governance, budget, purpose or mandate. The Receiver wished to clarify the role of the Association and any obligations a potential purchaser may have to it. The Receiver reported that it had commenced discussions with the Association in that regard.

3.4 As a result of the difficulties encountered by the Receiver, on the grounds as set out in its Eleventh Report, the Receiver sought and obtained the authorization of the Court on May 19, 2010 (the "**May 19 Order**") to suspend the Institutional Sales Process.

3.5 The foregoing issues, among others, as more fully outlined in its previous reports, remained unresolved as of the time of the Receiver's Fifteenth Report, although

progress towards resolution had been made through negotiations. The Receiver is now able to report that the pursuit of the Potential Transaction has resulted in a resolution of those issues which will assist the Receiver in undertaking a sale.

Negotiations with Ad Hoc Committee and Independent Directors

- 3.6 The Receiver also obtained the authorization and direction of the Court on May 19, 2010 to enter into discussions with the Ad Hoc Committee and the Independent Directors of the Condominium Corporation with respect to the potential acquisition of the commercial operations of the Hotel by the Condominium Corporation, as a means of instituting a restructuring of the rental pool operations of the Hotel. The Receiver believed that such a restructuring could potentially enhance the value of the Assets and resolve the RPMA Dispute. The Receiver advised the Court at that time that it would return to Court with a recommendation as to how to proceed upon the conclusion of these negotiations.
- 3.7 As more fully detailed in the Fifteenth Report, the Receiver conducted negotiations with the Ad Hoc Committee and the Independent Directors as directed by the May 19 Order. Notwithstanding the Receiver's efforts to pursue a transaction with the Condominium Corporation in an expeditious and timely manner, these negotiations were discontinued because WestLB ultimately concluded that it was not prepared to support such a transaction.

Potential Transaction

- 3.8 In its Fifteenth Report, the Receiver advised the Court that WestLB had been approached by the Potential Purchaser in respect of the Potential Transaction, and that there had been negotiations in that regard. The Receiver sought and obtained the

authorization of the Court in the March 9 Order to continue to participate in those negotiations to determine if the Potential Transaction could be completed, subject to approval of the Court.

- 3.9 In accordance with the March 9 Order, WestLB and the Receiver continued negotiations with the Potential Purchaser and concluded a purchase agreement, which was executed by the parties on March 18, 2011 (the "**Purchase Agreement**"), subject to Court approval and other conditions which had to be met before the Receiver would seek the Court's approval.
- 3.10 Ultimately the financing condition of the purchase agreement could not be satisfied by the Potential Purchaser, and as of April 26, 2011, the Purchase Agreement has been terminated in accordance with its terms.

Resolution of Issues leading to Suspension of Institutional Sales Process

- 3.11 As noted above, in negotiating the Purchase Agreement, WestLB and the Receiver sought to ensure that in the event that the Potential Transaction could not be completed, the Receiver would be in a position to commence a process for the sale of the Assets, without being faced with the same issues that had caused the Receiver to suspend the Institutional Sales Process. As a result, notwithstanding the termination of the Purchase Agreement, WestLB and the Receiver have obtained certain agreements to resolve the Outstanding Neighbouring Property Issues identified in the Eleventh Report, and which remained unresolved as of the Fifteenth Report.
- 3.12 Among other things, the Receiver has obtained the following:
- a) The Rock and RRDI, by its Receiver, have concluded the Water Supply Agreement for the sharing of the water supply from Lake Rosseau, and it has

been approved by the Court by its April 13 Order. Since Court approval, a new water taking permit has been issued to RRDI by the MOE authorizing the taking of water from Lake Rosseau to supply the Hotel and the golf course;

- b) Wallace Marine has delivered a Confirmation and Estoppel Agreement dated March 18, 2011 to the Receiver. Along with other confirmations, agreements and acknowledgements contained in the Confirmation and Estoppel Agreement, Wallace Marine has acknowledged that to its knowledge, and subject to certain environmental compliance issues (which the Receiver advises have been resolved as noted at paragraph 3.13 below) (a) RRDI has complied with all of its covenants and agreements contained in the STP Lease, (b) there is no default or breach under the STP Lease on the part of RRDI or Wallace Marine; and (c) the STP Lease is in good standing. Wallace Marine has also consented to an assignment of the STP Lease to a purchaser on certain conditions;
- c) The Receiver has negotiated the basic terms of an agreement in respect of the Association. RRDI and certain other members of the Association have mutually undertaken to use reasonable commercial efforts to negotiate and settle binding definitive documentation to reflect an agreement regarding, among other things, the fees to be charged by the Association and the scope of its activities. This agreement would be effective until April 30, 2013. Such undertaking must be assumed by a purchaser;

- d) In addition, in connection with negotiating the Purchase Agreement, agreements have been reached between the Receiver and the Ad Hoc Committee and Independent Directors providing a structure for the resolution of the RPMA Dispute and the dispute identified in the Receiver's Sixteenth Report regarding RRDI's obligations to the Condominium Corporation in respect of condominium fees. This agreement, while negotiated and agreed upon by the parties, has not yet been implemented but is available to any purchaser, at a purchaser's option, although it is not binding on a purchaser that chooses not to consent to its terms.
- 3.13 In addition, the Receiver reported in its earlier reports the issues it had identified with the operation of the sewage treatment plant, and the problems with respect to its compliance with MOE regulations during periods of maximum capacity. The Receiver reported its efforts to deal with these issues in cooperation with the MOE, with the assistance of its environmental consultant, Conestoga-Rovers & Associates. The Receiver has since completed the work required to remediate the sewage treatment plant in accordance with a consent Provincial Officer's Order issued by the MOE, and no further issues are anticipated with the sewage treatment plant.
- 3.14 As a result of the foregoing, the marketing of the Assets in accordance with the Sales Process, as proposed, will not face the same challenges and uncertainties that some prospective purchasers were concerned with in the previously authorized Institutional Sales Process.

4.0 Sales Process Protocol

Current Marketplace

- 4.1 As noted in its Fifteenth Report, the Receiver understands that market conditions for resort properties have improved over the past year since the suspension of the Institutional Sales Process. The Hotel is expected to perform strongly during the upcoming summer season, and it is anticipated that financial results during the summer will show continued improvement over 2010.
- 4.2 The Receiver considers the timing of the proposed Sales Process to be optimum. Based on the timeline proposed by the Receiver, a transition to a new owner is expected to take place near or at the end of the Hotel's busiest season, when it will be least disruptive. Furthermore, the marketing of the Hotel will take place during the busy summer season which will enhance the Receiver's marketing efforts by allowing prospective purchasers to assess the Hotel's operations during their peak performance.

Proposed Sales Process

- 4.3 The Sales Process must proceed on an expeditious basis, as the Receiver has limited (albeit sufficient) remaining Receiver's Borrowings available to continue to fund the administration of the estate.
- 4.4 In order to establish the Sales Process, the Receiver obtained proposals from CBRE and another firm that specializes in the sale of hotels and resort properties. After considering the proposals, and in consultation with WestLB, the Receiver decided

that it should proceed with the retention of CBRE, and therefore, the Receiver has entered into a listing agreement in the form filed with this report as **Confidential Appendix "I"** (the "**Listing Agreement**"), subject to Court approval.

4.5 The following are the key terms of the Listing Agreement:

- a) the term is for a period of 4 months from the date of execution by the parties;
- b) the fee structure consists of (i) a work fee to be reimbursed against any commission fees earned on a successful transaction; and (ii) a percentage commission fee payable upon a successful closing of an en bloc sale transaction. A minimum commission amount has been fixed.

4.6 The Receiver has reviewed the terms of the Listing Agreement with WestLB, as the stakeholder with the primary economic interest in the transaction, and WestLB has advised the Receiver that it is satisfied with the retainer of CBRE and the terms of the Listing Agreement, and supports the proposed Sales Process.

4.7 The Listing Agreement filed as Confidential Appendix "I" contains sensitive financial and competitive information which, if disclosed publicly, could prejudice the position of the Receiver and/or CBRE. Accordingly, the Receiver respectfully requests that the Appendix, which is filed separately in a sealed envelope, remains sealed and only opened and reviewed by the Judge presiding over this motion, and be returned to the envelope and sealed after the hearing of this motion and not form part of the permanent court file.

- 4.8 The Receiver has developed with CBRE a Sales Process Protocol in the form attached to this report as **Appendix “B”**, pursuant to which the Receiver and CBRE will solicit potential interested parties through CBRE’s network and database of contacts, and those parties that had expressed an interest in the previous Institutional Sales Process.
- 4.9 The Receiver has worked with CBRE to develop and prepare all relevant sales materials including a brief investment overview letter (the **“Investment Overview”**) attached to this report as **Appendix “C”**. The Investment Overview describes the acquisition opportunity and sets out key aspects of the Sales Process Protocol. CBRE has also worked with the Receiver to establish an electronic data room for due diligence by prospective purchasers. The Receiver has also, with the assistance of its legal counsel, prepared the forms of relevant documents for use in the Sales Process including a form of confidentiality agreement (the **“Confidentiality Agreement”**), attached to this report as **Appendix “D”**, and a template form of Agreement of Purchase and Sale (the **“Template APA”**), to be provided to all potential purchasers.
- 4.10 In order to be qualified by the Receiver as a bidder (a **“Qualified Bidder”**) and to obtain access to the electronic data room, potential bidders will be required to execute the Confidentiality Agreement and submit a completed letter of introduction (the **“Introduction Letter”**) to the Receiver that describes: (a) the potential bidder and its business and industry experience; (b) the potential bidder’s financial wherewithal or ability to obtain financing in order to complete the transaction being contemplated; and (c) whether the potential bidder contemplates any third party equity participation or any form of joint acquisition, and if so, to provide a description of such third party.

The information contained in the Introduction Letter must be acceptable to the Receiver, acting in its sole discretion, prior to a potential purchaser being qualified by the Receiver as a Qualified Bidder.

- 4.11 The Sales Process Protocol contemplates a timeline that will (a) require binding offers to be received on or before June 21, 2011 in the form of the Template APA, together with a deposit in the amount of 10% of the purchase price; (b) the identification by June 24, 2011 of a shortlist of Qualified Bidders with whom the Receiver will negotiate in order to identify a purchaser; (c) confirmation of a purchaser on or about June 30, 2011; and (d) Court approval of a transaction on or about July 14, 2011, all in consultation with WestLB.
- 4.12 The Receiver reserves the right to extend, abridge or suspend the timelines set out in the Sales Process Protocol should it be determined necessary and appropriate to do so by the Receiver, acting in its sole discretion. The Receiver shall not be required to accept the highest and/or best offer, or any offer in respect of the Assets, and shall be entitled to recommend to the Court a transaction that the Receiver believes is appropriate in the circumstances and minimizes closing risk.
- 4.13 The Receiver has consulted with CBRE regarding the timelines and steps proposed under the Sales Process Protocol, and CBRE considers these to be appropriate for the nature of the Assets to be sold.
- 4.14 The Receiver believes that the Sales Process Protocol is reasonable and consistent with other sales processes previously approved by this Court. It is substantially similar to the Institutional Sales Process that was terminated by the March 9 Order.

WestLB has advised the Receiver that it is agreeable to the Sales Process Protocol. The Receiver therefore recommends and seeks approval by this Honourable Court of the Sales Process Protocol.

5.0 Recommendations

5.1 Based on the foregoing, the Receiver seeks an order:

- a) authorizing the Receiver to commence the Sales Process in accordance with the Sales Process Protocol filed herewith;
- b) approving the retention by the Receiver of CBRE as broker to assist the Receiver with the conduct of the Sales Process in accordance with the Listing Agreement;
- c) sealing Confidential Appendix "1" to this Report until further order of this Court; and
- d) approving this Eighteenth Report, and the conduct and activities of the Receiver as described herein.

* * *

All of which is respectfully submitted, this 2nd day of May, 2011.

**ALVAREZ & MARSAL CANADA ULC &
ALVAREZ & MARSAL CANADA INC. IN THEIR CAPACITIES AS
CONSTRUCTION LIEN ACT TRUSTEE AND RECEIVER AND MANAGER,
AND INTERIM RECEIVER, RESPECTIVELY, OF THE ASSETS OF
THE ROSSEAU RESORT DEVELOPMENTS INC.**

Per:



Richard A. Morawetz