

COURT FILE NO.: CV-09-8201-OOCL**DATE:** 2009/06/03**SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)****RE:** WESTLB AG, TORONTO BRANCH v. THE ROSSEAU RESORT
DEVELOPMENTS INC.**BEFORE:** PEPALL, J.**COUNSEL:** Katherine McEachern and Michael McGraw for WestLB AG, Toronto BranchShayne Kukulowicz for Alvarez & Marsal Canada ULC and McIntosh &
Morawetz Inc., Interim Receiver and Trustee

Peter Howard for The Rosseau Resort Developments Inc. ("RRDI")

Fred Myers for Fortress Credit Corp.

Sam Rappos for Traveler's Guarantee Company of Canada

HEARD AT TORONTO: June 2, 2009**ENDORSEMENT**

[1] On May 22, 2009, I appointed an Interim Receiver pursuant to s. 47 (1) of the BIA and a Trustee pursuant to s. 68 (1) and 2 (b)(c)(d) of the CLA. I granted an Interim Receiver's borrowing charge of \$15,000,000 but limited the amounts that could be borrowed under the term sheet to \$1,500,000 up to June 1, 2009. I adjourned the s. 101 CJA and s. 68 (2)(a) CLA relief requested by WestLB to June 1, 2009 in light of the provisions of s. 244 of the BIA.

[2] The Interim Receiver and Trustee has brought a motion requesting an order authorizing the completion of certain sale transactions and ancillary relief; directing and authorizing payment of completion bonuses up to a maximum amount of \$75,000; and approving its First

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Report and conduct described therein. (Acceptance of the A&M Reports was also requested but this issue was already addressed in my reasons of May 22, 2009).

[3] On June 1, 2009, counsel for RREDI requested an additional one or two day adjournment to address a resolution with WestLB and Fortress. I granted an adjournment for one day.

[4] The materials before me consist of those originally filed for the hearing May 20 and 21, the First Report and Supplementary Report of the Interim Receiver and Trustee, and affidavits of Peter Fowler sworn June 1 and 2, 2009.

[5] The First Report addressed numerous issues including a summary of the Interim Receiver's activities to date. The Interim Receiver has met with numerous stakeholders and others including on site employees, representatives of Marriott Hotel, employees of the hotel, construction trades, representatives of the largest construction subcontractors, and representatives of Ken Fowler Enterprises Limited. It also had discussions with several hotel unit purchasers and sent notices to all of them. It had discussions with mortgagees of non - RREDI Red Leaves entities and discussed sales and marketing with Sotheby's.

[6] The Interim Receiver reported that Marriott Hotels had indicated that it was supportive of the receivership proceedings and that it intended to continue to operate the hotel in the normal course of business. Since May 22, 2009, there have been no interruptions to the operations of the hotel and no deterioration in service levels or other "customer experience" factors. Marriott noted certain construction deficiencies that required rectification.

[7] Following its various meetings and discussions, the Interim Receiver was of the view that the majority of constituencies were supportive of the process. The Interim Receiver noted that with the summer season quickly approaching, all parties are desirous that completion of outstanding construction of the hotel be done as soon as possible and that a formal unit sales and marketing program be commenced in earnest. Subject to further order of this Court, it is the intention of the Interim Receiver to enter into contracts with contractors so that construction may be completed. Completion is essential to protecting hotel revenues and advancing the sale and marketing programme to sell the unsold hotel units.

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[8] The Interim Receiver seeks authorization to complete sales of the condominium units and recommends a limited incentive programme with respect to 9 RRCI subcontract employees who are critical to the completion of the construction in that they provide site supervisory and skilled labour services to RRDI on behalf of RRCI. These employees are currently owed arrears of approximately \$75,000. Given the critical nature of the services they provide, the Interim Receiver requests authorization to enter into agreements with them that include a stay bonus not to exceed \$75,000.

[9] In addition, 64 units subject to agreements of purchase and sale have not yet closed. The requested approval and vesting order would permit titles to the units to be vested in the purchasers free and clear of encumbrances in accordance with the applicable agreements of purchase and sale. Information regarding individuals who have purchased hotel units and pricing information have been filed in a confidential appendix. I am ordering that it remain sealed and not form part of the permanent court file pending the closing of the transactions identified.

[10] In the supplementary report dated May 29, the Interim Receiver reported on its meetings of May 26 and 27 with substantial construction sub-contractors and legal counsel. Information requests were made and the Interim Receiver worked diligently on these requests. With the assistance of counsel for lien holders and the Interim Receiver, on June 1, 2009, those parties were able to reach a satisfactory agreement with respect to the information requested.

[11] The lien holders who attended in Court are unopposed to all of the relief requested. Indeed, no one opposed the s. 101 CJA and s. 68 CLA relief except RRDI. In his affidavit sworn June 1, 2009, the President of Three Oak Holdings Limited (a partner of the partnership that owns the shares of RRDI), Peter Fowler expressed concern about the progress and performance of the Interim Receiver since its appointment on May 22, 2009. In support, he attached a letter sent by KFE to WestLB asking it to support an alternative process. The letter was not addressed to the Interim Receiver. No other evidence was filed that lent support to the critical comments contained in the letter nor did any other stakeholder attend at Court to voice such concerns. Indeed, no submission was made by counsel for RRDI in support of such criticism. On June 1, 2009, KFE sent a joint offer from it and RRDI to WestLB and Fortress.

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It was not accepted by WestLB. Fortress did not respond. A reading of the letter makes it clear that any resolution was dependant on numerous contingencies including the consents of WestLB and of Fortress, the use of reasonable best efforts to obtain consents of Meridien and TD to grant a silent charge to Fortress in the amount of \$10 million plus interest, and the use of reasonable best efforts to cause one or more partners or their shareholders to provide a guarantee of \$3 million.

[12] I do not propose to repeat the facts set out in my reasons of May 22, 2009 but construction must be completed, closing of the existing agreements of purchase and sale should proceed, the project must be marketed and units sold, and a claims process established to administer the lien claims. The fact remains that there is urgency and stability must be brought to this project. The employees and the trades must have confidence that they will be paid for the work they do. There is no other viable alternative and no other available financing.

[13] The Court's appointed officer has already been successful in securing support for the proposed course of action. Notably, the lien holders did not attend to oppose the relief sought. In my view it is just and convenient that the Interim Receiver also be appointed as a Receiver and Manager pursuant to s. 101 of the *Courts of Justice Act* and pursuant to s. 68 (2) (a) of the *Construction Lien Act*. Those tests are clearly met. In addition, the remaining relief requested by the Interim Receiver and Trustee is merited, is in the best interests of the stakeholders and should be granted. No one took exception to the remaining specific relief requested by the Interim Receiver and Trustee in any event.

[14] Both Fortress and Traveler's Guarantee Co. made additional submissions. Fortress continued to object to the priming of its security. I already addressed that issue and granted the borrowing charge on May 22. I continue to be of the view that it is merited. Fortress' proposal that the Interim Receiver come back repeatedly to Court for requests over and above the \$1.5 million authorized is costly and inefficient. Much of the concern expressed seems to centre on the estimate of professional fees to be incurred. Professional fees subject to the Receiver's charge are subject to review and approval by the Court and other parties, including Fortress, are entitled to take issue with the requests made. In recognition of the expense associated with returning regularly to Court, counsel for Fortress proposed an alternative, namely, that the

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Receiver's reporting authority contained in paragraph 3(q) of the proposed order be mandatory. While my expectation is that the Receiver will provide financial reporting at regular intervals to Fortress, as a Court appointed officer, the Receiver should be left with the discretion to determine what is necessary or desirable. Counsel for the Interim Receiver agreed that the reporting to Fortress would be consistent with that provided to WestLB. The Receiver will also properly exercise its discretion with respect to financial reporting to RRDI. If parties experience any problems in this regard, they may re-attend before me at a 9:30am appointment so that the issue may be addressed expeditiously.

[15] Traveler's Guarantee Company of Canada states that it has an interest in the subject matter of certain deposit trust agreements relating to the administration of new home warranty obligations to purchasers and the guarantee bond. Further work needs to be conducted to investigate this issue. The following wording and terms were agreed to by Traveler's, WestLB and the Receiver: "The amended and restated appointment order and any action taken by the Receiver, including the receipt of advances on account of loans made to the Receiver, are without prejudice to the position of Traveler's that the Receiver's charge and the Receiver's borrowing charge do not apply or should not apply to the subject matter of the deposit trust agreements between RRDI, Traveler's and an escrow agent, or should be subordinated to the interests of Traveler's in the subject matter of those deposit trust agreements." I consider those terms to be acceptable. In addition, the order granted by me is without prejudice to Traveler's to request additional reporting from the Receiver.



Pepall J.

Released: June 3, 2009