ONTARIO

SUPERIOR COURT OF JUSTICE
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Date: September 1, 2009

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From: Anna Fuksa, assistant to the Honourable Madam Justice Pepall

Total No. of Pages: 20 (including cover)

Message:

Re: WESTLB AG, TORONTO BRANCH v. THE ROSSEAU RESORT DEVELOPMENTS INC.
Court File No.: CV-09-8201-00CL

Attached please find Endorsement dated September 1, 2009.

COURT FILE NO.: CV-09-8201-00CL
DATE: 2009-09-01

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: WestLB AG, Toronto Branch v. The Rosseau Resort Developments Inc.

BEFORE: Pepall, J.

COUNSEL: J. Carhart and A. Sambasivan as Representative Counsel for Unit Owners and Other Unit Purchasers
R. Shayne Kukulowicz and J. Dietrich for the Receiver of RRDI
P. Huff for WestLB AG
G. Moffat for Marriott Hotels of Canada, Ltd.
D.G. Cohen for Fortress Credit Corp.
D. Byers and M. Konyukhova for Rosseau Resort Management Services Inc.

Endorsement

Relief Requested

[1] The Receiver of Rosseau Resort Developments Inc. ("RRDI") and Representative Counsel for unit owners and unit purchasers whose transactions have not yet closed request the appointment of a receiver of all right, title and interest of Rosseau Resort Management Services Inc. (RRMSI) in various agreements relating to the property known as the Rosseau Resort and seek approval of the sixth report of the Receiver. RRMSI moves to amend paragraph 6 of my order of August 18, 2009. No one supports RRMSI's motion and all those appearing support the motion of the Receiver and Representative Counsel.[1]

[1] Any relief granted is without prejudice to the rights and obligations of 18 unit purchasers whose transactions have not closed and who wish to get out of their agreements.

Backround Facts

[2] Rosseau Resort Development Inc. (RRDI) is the registered owner of property on Lake Rosseau in Muskoka. When it was ordered into receivership on May 22, 2009, RRDI had been developing and constructing a first class hotel and condominium complex (the "Hotel"), the construction of which was incomplete. RRDI's property consists of about 40 acres plus the land on which the Hotel is situate. At the time of the receivership, 72 of a total of 221 units had been sold and closed, 65 had been sold but the sale transactions had not closed, and 84 remained to be sold. The terms of the agreements of purchase and sale required that the units be included in a rental pool and then be made available for rent by guests of the Hotel. The court appointed receivership was initiated by the first secured creditor, WestLB AG ("WestLB"). The construction of the Hotel has now been substantially completed.

[3] To understand the nature of the motions before me, one must examine various inter-related agreements.

[4] Firstly, there is a hotel management agreement ("HMA") that governs the management and operations of the Hotel. It is between the operator of the Hotel, Marriot Hotels of Canada, Ltd., RRDI and RRMSI. The receivership of RRDI is an event of default under the HMA that permits Marriott Hotels to terminate the HMA.

[5] RRMSI is a shell corporation. RRMSI is related to and owned by the same shareholder group as RRDI. Mr. Ken Fowler holds the principal equity interest in both RRDI and RRMSI. RRMSI assigned to WestLB all its right, title and benefit in the HMA, including all monies or other benefits which may be claimed under it and the right to surrender, cancel or terminate the HMA.

[6] Amongst other things, the HMA provides that:

- It is for a term of 25 years renewable for 4 successive periods of 10 years.

- RRDI and RRMSI are collectively defined as the "Owner". The obligations of RRDI and RRMSI under the HMA are joint and several. The rights of either RRDI or RRMSI as Owner may be exercised by either RRDI or RRMSI and any act or failure to act by either of them is treated as an act or failure to act by each of them.

- The Owner is obliged to require that all unit owners execute a rental pool management agreement ("RPMA") as a condition of purchase. RRMSI is described in the HMA as the rental pool manager. Under the HMA, RRMSI as the rental pool manager delegated all of its obligations under the RPMAs to Marriott Hotels except the obligation to provide periodic financial statements to unit owners and to make distributions to them. As a result of this delegation, Marriott Hotels is in essence responsible for the rentals and employs all staff necessary for the management and operation of the Hotel.

- The operation of the Hotel is placed under the exclusive supervision and control of Marriott Hotels. Marriott Hotels undertakes responsibility for all aspects of the Hotel operations, from employing staff, to booking the facilities, to marketing and promotion. It is not required to fund expenses of the Hotel and is not obliged to incur any liability or obligation. It collects all revenue of the Hotel and is responsible for applying and distributing it in accordance with the HMA. If it does incur any liability or obligation, it may deduct this amount from future distributions to the Owner.

- Generally speaking, Marriott Hotels may deduct its Hotel and management expenses from gross revenues. The remaining operating profit, if any, may be distributed to the Owner but the HMA does not specify which one. Marriott Hotels may treat either RRDI or RRMSI as the Owner under the HMA.

- To the extent that expenses exceed gross revenue, there is an operating loss. The Owner must fund operating losses within 30 days of request by Marriott Hotels. In addition, the Owner must provide Marriott Hotels with sufficient working capital to carry on Hotel operations if gross revenues are insufficient to do so. According to the Receiver's second report dated July 3, 2009, operating losses had been consecutively incurred at the Hotel since it opened in December, 2008 and, while the Hotel was forecast to generate modest operating profits from July to September, 2009, the operating profits will be insufficient to offset the actual and forecasted operating losses for the pre July, 2009 and post September, 2009 periods respectively. In April, WestLB funded the sum of $1.9 million to RRDI to reimburse Marriott Hotels and in June, the Receiver funded an additional sum of $550,000.

[7] The second relevant agreement to consider is the RPMA. It is between the unit owners or purchasers whose agreements of purchase and sale have not yet closed and RRMSI. It governs the lease and occupation of the units. As mentioned, the units must be included in the rental pool and all unit owners must enter into a RPMA. Unit owners are prohibited from leasing or permitting occupation of their units except as permitted by the RPMAs. In the RPMAs, RRMSI is appointed as the exclusive rental pool manager.

[8] In the disclosure documents provided to each potential unit purchaser, RRMSI was described as a single purpose newly incorporated entity that had no assets and that had no prior history of managing rentals or rental pools. The documents stated that its ability to fulfill its obligations to fund the ongoing operations of the rental pool may depend on its ability to arrange other sources of funding. Prior to the receivership, RRMSI had no employees of its own and all of the functions of RRMSI under the agreements were performed by employees of RRDI.

[9] The disclosure documents state that RRDI arranged for RRMSI to act as the exclusive rental pool manager. There is no written agreement between the two

companies. Mr. Fowler states that RRMSI was appointed as the exclusive rental pool manager by verbal agreement with RRDI. The disclosure documents describe RRMSI as the initial rental pool manager. This seems to contemplate that another entity could be a successor rental pool manager. Mr. Fowler states further that there was also a verbal agreement between RRDI and RRMSI that RRDI would fund all amounts required to be funded by the HMA. This is not reflected in the disclosure documentation. Mr. Fowler states that this is because the verbal agreement it had with RRDI related to RRDI's obligations to Marriott Hotels and was not material to the obligations as between RRMSI and the unit owners. The verbal agreement is not referenced in the HMA.

[10] In spite of the fact that, according to Mr. Fowler, RRMSI had no obligations to Marriott Hotels because they had been assumed by RRDI, in January, 2009, RRMSI delivered to Marriott Hotels funds in the amount of $435,000 on account of operating losses. Mr. Fowler states that this payment was made by way of an inter-company transfer between RRMSI and RRDI. There was another inter-company transfer from RRMSI to RRDI in the amount of $54,000. Mr. Fowler states that this transfer was to have been made to Red Leaves Development Inc., a company related to RRDI and RRMSI.

[11] The rental pool manager's ability to pay revenue to unit owners arises from the payment of operating profit by Marriott Hotels of which there has been none. According to the Receiver, the distribution of operating profit does not match the expectation of distributable profit to unit owners under the RMPAs. The Court has ordered that any payments under the HMA be paid to the Receiver but to date there have been none given the lack of any operating profit. According to the Receiver, under the existing structure, the calculation of amounts owing to unit owners under the RPMAs could result in there being amounts owing to unit owners even when the Hotel incurs an operating loss.

[12] Amongst other things, the RPMAs provide for the following:

- The term is 25 years renewable for 4 successive periods of 10 years.

- It addresses periods of personal use by the unit owner and availability of the unit for rent to the public.

- RRMSI is to provide cleaning, rental and management services to the units. These responsibilities have been delegated to Marriott Hotels.

- If in a fiscal year, certain costs exceed the gross rental pool revenue, the rental pool manager guarantees to pay the deficiency to unit owners. This is regardless of whether any operating profits are payable to the Owner by Marriott Hotels under the HMA. The Receiver is of the view that RRMSI does not have the resources to meet this obligation.

- Marriott Hotels is granted the right to enforce all rights and privileges of the rental pool manager against the unit owners.

- The rental pool manager may terminate its appointment on 180 days notice. The unit owner may terminate if, amongst other things, the rental pool manager fails to observe any material covenant that materially adversely affects the owner and the default continues for 45 days following written notice and if more than ¾ of the owners approve the termination provided that the rental pool manager will be given not less than 120 days prior written notice of the termination. Disputes are to be settled by arbitration although both the unit owner and RRMSI may commence legal proceedings for mandatory, declaratory or injunctive relief as may be necessary to define or protect the rights and enforce the obligations contained in the RPMA pending the settlement of the dispute.

- The rental pool manager is entitled to a management fee.

- The rental pool manager is to deposit all gross rental pool revenue into an operating account. This revenue is defined as all amounts collected by the

rental pool manager as charges for the rental of all of the units. The gross rental pool revenue is adjusted as a result of various deductions such as marketing and royalty fees. An owner is entitled to net rental revenue that reflects a calculation based on factors including the adjusted gross revenue and the days the subject unit was in the rental pool. The obligations imposed by the RPMA are conditional upon sufficient funds being available in that account from the gross rental pool revenue or from the owner's resources. Owner refers to the unit owner, not RRMSI.

[13] There are also other agreements executed with Marriott Hotels and/or its affiliates. These consist of a License Royalty Agreement, an International Services Agreement, a Technical Services Agreement and a Marketing License Agreement. RRDI is a party to all of these agreements and RRMSI is a party to the first two of these agreements. Marriott Hotels is entitled to certain fees under these agreements.

[14] In its second report, which was approved by Cumming J., the Receiver reported that in light of the assignment of the HMA to WestLB and the delegation of RRMSI's responsibilities to Marriott Hotels, it appeared that RRMSI had no practical ability to perform any services as rental pool manager under the RPMAs and that the Receiver understood that RRMSI had no ability to fund any distributions to unit owners under the RPMAs in respect of the calculation of net rental revenue. At least since the beginning of June, 2009, efforts have been made to address these and other problems with Mr. Fowler on behalf of his various companies without success. On July 8, 2009, Cumming J. authorized the Receiver to undertake a sales and marketing process which included the sale and marketing of the 84 unsold condominium units and the residual interest of RRDI in the Hotel and other assets. On July 24, 2009, the price list proposed by the Receiver for a "One-Day Only Sale" on August 22, 2009 was approved by Campbell J. He stated that it was opposed by RRDI and in his endorsement, he noted that given the nature of the resort and its location, time was of the essence. He fixed costs in the amount of $2000 to reflect the failed opposition but stated that the amount would be payable at the discretion

of any judge dealing with the matter if so minded and who concluded on a further attendance that there was no foundation to the opposition.

[15] On August 17, 2009, the Receiver brought a motion requesting a variety of relief including: an order authorizing the Receiver to repudiate the HMA and to enter a new HMA on behalf of RRDI with Marriott Hotels; authorizing the Receiver to repudiate the arrangements between RRDI and RRMSI whereby RRMSI was appointed rental pool manager; and approving the Receiver's fourth report.

[16] In its fourth report, the Receiver expressed its conclusion that the financial and legal structure underlying the Hotel's rental pool and the form of RPMAs entered into between RRMSI and the unit owners were not viable in their current form, that the HMA could not be assumed nor adopted by the Receiver on behalf of RRDI, and that it had to implement a restructuring of the various agreements and arrangements to which RRDI was a party. The Receiver outlined the steps it proposed to take including entering into new RPMAs with unit owners, purchasers of units whose agreements of purchase and sale had not yet closed, and new unit purchasers including those buying at the "one day only" sale so as to restructure the rental pool and enable it to be financially viable. The Receiver could then sell the unsold units to purchasers and sell the residual interest of RRDI in the Hotel. The Receiver was of the view that the steps outlined were necessary to preserve the value of the assets, maintain the operations of the Hotel and successfully carry out the sales and marketing process. Absent same, the Receiver stated that the operations of the Hotel would be jeopardized. The Receiver stated that in order to undertake sales of units to prospective new unit purchasers, the Receiver had to have in place for the one day sale the necessary arrangements with Marriott Hotels, an appropriate and workable RPMA, and the requisite disclosure documentation to facilitate sales pursuant to the retail sales programme.

[17] The Receiver noted that the RMPAs require the payment of revenue by the rental pool manager to the unit owners but the rental pool manager's ability to do this arises

from the payment of operating profit by Marriott Hotels under the HMA. RRMSI does not have an ownership interest in the Hotel or an exclusive right to receive distributions from Marriott Hotels. The Receiver stated that it cannot continue the structure of the RPMAs. The calculation of amounts owing to the unit owners could result in there being an amount owing to the unit owners even when the operations of the Hotel incur an operating loss. The structure appears to have been developed on the premise that RRDI would have the financial resources to backstop the obligations of RRMSI to unit owners and the Receiver was of the view that it was inappropriate to continue in this manner with new unit purchasers. I agree. The Receiver also determined that it was desirable to continue with Marriott Hotels as the Hotel operator. It negotiated a new HMA in which RRDI's obligations would be secured by a court ordered charge in the amount of $5 million subordinate only to the Receiver's charge and borrowing charge and priority construction lien claimants and it also negotiated a charge in favour of unit owners in the amount of $5.3 million.

[18] Following extensive negotiations with stakeholders, the Receiver was successful in reaching a resolution of outstanding issues relating to the August 17, 2009 motion with all but RRMSI. The secured creditors, WestLB and Fortress Credit Corp., represented unit owners, purchasers with agreements of purchase and sale that had not yet closed, lien claimants and Marriott Hotels all consented or were unopposed to the Receiver's proposals. The Receiver had negotiated terms of settlement with a committee of unit owners, a key element of which was a new RPMA to be entered into with RRDI as the rental pool manager.

[19] On August 13, 2009, Mr. Fowler on behalf of RRMSI wrote to the Receiver and its counsel. He stated amongst other things, that having reviewed the proposed new RPMAs, he considered the financial terms to be reasonable but felt they were prejudicial to RRMSI and without legal authority. He stated that the purpose of the letter was to register RRMSI's objection to the order sought and that RRMSI did not consent to the order. He requested that the Receiver provide a copy of its letter to the Court and said

that RRMSI did not intend to file additional material or to instruct counsel to attend at Court. The Receiver confirmed that it would file the letter in Court which it did.

[20] Thus, although served, RRMSI opted not to oppose the motion in court on August 17, 2009. Faced with this peculiar position, and the pending one day only court ordered sale of units a few days later, I granted the order requested but somewhat amended on August 18, 2009. Although already provided for in the initial receivership order, I specifically authorized the Receiver to repudiate the HMA and the verbal agreement appointing RRMSI as the rental pool manager and approved a new form of RPMA for execution by new purchasers of units as well as existing unit owners and purchasers. Marriott Hotels had previously expressed its intention to terminate the HMA upon repudiation by the Receiver and the need to negotiate a new HMA.

[21] I also indicated that the relief set forth in paragraph 6 of the order dealing with termination of the RPMAs between RRMSI and unit owners was subject to any motion to vary or amend returnable August 20, 2009. Paragraph 6 stated:

> THIS COURT ORDERS AND DECLARES that as a result of the repudiation by the Receiver and termination by Marriott of the Current Hotel Management Agreement, and the repudiation by the Receiver on behalf of RRDI of any agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the Existing Rental Pool Management Agreements between RRMSI and Unit Owners and Existing Purchasers are not capable of performance and may be terminated by Unit Owners and Existing Unit Purchasers. The execution by a Unit Owner or Existing Unit Purchaser of the New Rental Pool Management Agreement shall be deemed to be notice of the termination by the Unit Owner or Existing Unit Purchaser of their Existing Rental Pool Management Agreement, provided further that any action against a Unit Owner or Existing Unit Purchaser by RRMSI by reason of the execution of a New Rental Pool Management Agreement by a Unit Owner or Existing Unit Purchaser is stayed pending further Order of this Court.

[22] Paragraph 6 provided protection and certainty for the affected unit owners and purchasers. Absent a mechanism to facilitate the unit owners entering into viable rental

pool contracts without the threat of litigation from RRMSI, a gap would be created whereby unit owners and purchasers would continue to be party to their RPMAs while RRMSI was not in a position to perform. The time required to terminate the RPMAs would create an unworkable scenario in which there would be an overlap of two rental pool regimes. 59 unit owners have closed their transactions and paid for their units for an aggregate gross purchase price of approximately $26 million.

[23] I also granted an order appointing Miller Thomson LLP as representative counsel for the unit holders and purchasers whose agreements had not yet closed but all of whom had executed RPMAs with RRMSI ("Representative Counsel") but reserved the right to any such party to opt out of the representation. None has.

[24] RRMSI brought a motion to vary and the Receiver and Representative Counsel brought the within motion returnable August 20, 2009. A timetable that recognized the urgency of the matter was established and I also arranged for a settlement conference on August 26, 2009 before Campbell J.

[25] On August 21, 2009, Marriott Hotels wrote to the Receiver expressing the need for certainty with respect to paragraph 6 of my order and indicating that it is not prepared to remain a party to the HMA with only RRMSI as owner. Marriott requires certainty that the party fulfilling the obligations of the owner under any hotel management agreement has the necessary funds and resources to satisfy the owner's obligations thereunder. It reiterated its intention to terminate the HMA with RRDI and RRMSI.

[26] At the sale on August 22, 2009 which continued into August 23, 2009, agreements of purchase and sale were entered into with respect to 76 of the remaining units available for sale (subject to a 10 day rescission period). These new unit purchasers will be presented with the new RPMAs for execution with RRDI by its Receiver. According to the Receiver, to complete those sales, it is imperative that the RRDI Receiver establish a new HMA and a certain and stable rental pool.

[27] The Receiver has been advised by some unit owners that they understood they would receive distributions under the RPMA even if there were no funds in the operating account. Indeed, in circumstances where there were no funds paid by Marriott Hotels into the operating account, RRMSI made payments to unit holders. Mr. Fowler states that since the opening of the Hotel in December, 2008, unit owners were delivering funds to RRMSI with respect to the interim occupancy of their units and RRMSI deposited those funds into the operating account. As evidenced by correspondence dated November 5, 2008, sent on letterhead of Red Leaves to Gordon and Judy Jacobs, unit purchasers whose transaction had not yet closed, the Jacobs were to pay interim occupancy fees which were described in the letter as representing a combination of interest on the balance of the purchase price, common expenses and property taxes. The letter stated that "The receipt of rental revenue and use of your suite will unfortunately be withheld if RRMSI is not in receipt of your Interim Occupancy fees on or before December 5, 2008 due date." In his affidavit, Mr. Fowler states that these funds belonged to RRMSI but the moving parties submit that this was not the case given that all of these payments would be for the account of RRDI in that it was the registered owner to whom common element and taxes would be paid and was the one who had entered into the agreements of purchase and sale with the Jacobs and who therefore would be entitled to the interest payment. Mr. Carhart as Representative Counsel submits that this was akin to a Ponzi scheme in that RRMSI was funding payments to the unit purchasers out of money paid by the unit purchasers that should have been paid to satisfy their obligations to RRDI.

[28] The aforementioned 59 unit owners have signed a settlement agreement with the Receiver which calls for the execution of a new RPMA. As stated in the moving parties' factum, "They are the ones most directly put at risk by the allegations of RRMSI that it can still perform the current RPMAs (suggesting a cause of action against them if they execute a new RPMA) and that RRMSI can prevent Marriott Hotels from renting their units to guests of the Hotel (thereby depriving them of revenue from their unit)."

[29] Since the commencement of Hotel operations in December, 2008, Marriott Hotels has made no distributions of operating profit or any other funds to either RRDI or RRMSI as owners under the HMA nor has it paid any distributions to the Receiver.

[30] The settlement conference on August 26, 2009 was unsuccessful and the motions were argued on August 28, 2009.

Positions of Parties

[31] The Receiver and Representative Counsel submit that it is just and convenient for the RRMSI Receiver to be appointed given the intertwined contractual relationships and obligations of RRDI and RRMSI. The moving parties submit that RRDI and RRMSI are inextricably linked and the position of RRMSI creates a deadlock stranding unit owners in RPMAs that RRMSI cannot perform and stalling the ability of the Receiver to regularize the rental pool arrangements, complete a new HMA with Marriott Hotels, and close transactions with existing and new unit purchasers. A receivership addresses this deadlock. There is no real prejudice to RRMSI. It has no ownership interest in the Hotel and has paid no consideration or contribution for the value it now seeks to obtain. Both RRDI and RRMSI are owned primarily by Mr. Fowler. RRMSI is holding the unit holders hostage in circumstances where RRDI was unable to complete construction of the Hotel, unable to fund operating expenses to Marriott Hotels, did not maintain the construction holdbacks required by the *Construction Lien Act*, owes approximately $5 million to its construction trades who built the Hotel, and is unable to meet the payments under incentives it offered to purchasers to induce them to buy units. The requested receivership is just and convenient in these circumstances.

[32] The moving parties also submit that a receiver is merited given RRMSI's suspicious and questionable conduct. Noting the Jacobs' experience, Representative Counsel argues that RRMSI has played fast and loose with the unit purchasers, paying them a rental pool distribution under the RPMA with their own money with a view to inducing the closure of purchase agreements. In addition, RRMSI appropriated funds in

the nature of interest, common expense and property tax payments that belonged to RRDI and is a creditor of RRDI for those amounts.

[33] Furthermore, the RMPAs are so obviously incapable of performance as a result of the repudiations that have been authorized and the termination of the HMA by Marriott Hotels when effective. RRMSI cannot fund payments to unit owners and purchasers and cannot fulfill the operational obligations that were delegated to Marriott Hotels. Furthermore, without the HMA, the RPMAs are orphaned and incapable of performance. RRDI's receivership is an event of default under the HMA and treated as an event of default of RRMSI that entitles Marriott Hotels to terminate. The moving parties submit that the RMPAs have been frustrated and there has been an anticipatory breach in that RRMSI has made it impossible to perform the RMPAs. No damages could be recovered by RRMSI against unit owners for having executed new RPMAs. Paragraph 6 should be sustained as it permits the unit owners to participate in new RMPAs without threat of action by RMSI.

[34] RRMSI states that it is not in default of any obligations and has valuable contractual choses of action. It submits that the structure developed for the project was not unique and reflects the business deal that was negotiated. It is not indebted to RRDI or the Receiver and is not a guarantor of RRDI's debts. It is also not in breach of any obligations under the RMPAs for failure to make payments to the unit owners because the obligation is conditional upon sufficient funds being available in the operating account from the gross rental pool revenue and there are none. The appointment is sought to benefit RRDI and its stakeholders and the Receiver should be disqualified to be the receiver of RRMSI as well as RRDI. WestLB did not obtain an assignment of the contractual choses in action and it, Fortress, Marriott Hotels and the unit owners were aware of RRMSI's status and limited assets prior to entering into their respective agreements with RRDI and RRMSI. The parties should be left to negotiate their differences. Under the RPMAs, the unit owners agreed to resolve disputes by good faith negotiations and arbitration. Under the HMA, all parties are required to cooperate upon

request in good faith to amend the HMA or substitute it provided that the parties' rights and obligations are not materially changed. Furthermore, there could be two rental property managers.

[35] RRMSI submits that none of RRMSI, Marriott Hotels or the unit owners is in receivership and Canadian courts have often expressed unease with unduly interfering with the rights of third parties in an insolvency context. The moving parties are asking the Court to circumvent the termination provisions of the HMA and the RMPAs under the guise of the receivership of RRDI and paragraph 6 of the order should be deleted.

[36] There is no basis for a receiver to be appointed and in any event, the Receiver of RRDI would have a conflict relating to its duties to RRDI and to RRMSI.

Discussion

[37] As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*[2], as a superior court of general jurisdiction, the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over companies in circumstances where they are intricately involved with companies already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Limited and I King West Inc. v. Stinson Hospitality Inc. et al*[3]. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping and Flushing Ltd.*[4].

[38] RRMSI is a shell company. It is owned by the same shareholder group as RRDI. Mr. Fowler holds the principal equity interest of both RRDI and RRMSI. Prior to the

[2] [1972] 2 O.R. 280
[3] (07-CL-6913)
[4] [2003] O.J. No. 3766.

receivership of RRDI, RRMSI had no employees and its functions were performed by employees of RRDI. It has no ownership interest in the Hotel and no exclusive right to receive distributions under the HMA. In any event, RRMSI assigned its rights relating to the HMA to WestLB. As noted in RRMSI's factum, under the HMA, RRMSI delegated to Marriott Hotels most of its obligations under the RPMAs including collection of all hotel rental payments, paying expenses, and accounting functions. The exceptions were the obligation to provide periodic financial statements to unit owners and to make distributions to unit owners. Although the RPMAs seem to render RRMSI liable to unit owners, nothing is payable unless funds are in the operating account.

[39] The obligations and entitlements of the parties to the various agreements are intricately connected, intertwined, and inter-dependent. RRMSI owes obligations to the unit owners that it is unable to perform. Having delegated its responsibilities to others, it is dependent on agreements with RRDI. The RPMAs cannot be performed independently of the HMA. The Receiver recommended and was authorized to repudiate the HMA. Marriott Hotels has expressed its termination intentions with respect to the HMA. Paragraphs 9.01 and 11.30 of the HMA entitle Marriott Hotels to terminate based on the event of default of the receivership of RRDI. An event of default by either of RRDI or RRMSI is treated as an event of default of the other. Section 11.28 of that agreement cannot be read as a bar in these circumstances.

[40] While a party need not be a creditor to seek the appointment of a section 101 receiver, RRDI and RRMSI have joint obligations under the HMA to fund operating losses and working capital deficiencies to Marriott Hotels. Joint and several debtors have a restitutionary right of contribution among themselves: *Chitty on Contracts*[5]. While Mr. Fowler states that RRDI orally agreed to fund all amounts required to be funded by the HMA, no particulars of when that agreement was made were forthcoming and RRMSI did pay $435,000 to Marriott Hotels although Mr. Fowler suggests that the transfer was to

[5] 30th ed. (London: Sweet & Maxwell, 2008) para. 17-027.

have been made to Red Leaves Development Inc. There is also the issue of the other payments and distributions made by RRMSI.

[41] Even if one accepts Mr. Fowler's evidence however, there clearly is a deadlock amongst the various stakeholders. The unit holders are stranded in RPMAs that are incapable of performance. For obvious reasons, the development did not contemplate and should not encompass two property managers and two RPMAs. The $26 million value invested by the unit owners is at risk as is the residual value of the Hotel.

[42] As noted by the moving parties in their factum, even if there is no current default of RRMSI under the RPMAs (which it denies), such a default will arise through the passage of time such as on the repudiation or termination of the HMA. The receivership will permit the implementation of the settlement agreements with unit owners and unit purchasers, a key element of which is their agreement to enter into a new RPMA; the continued operation of the Hotel in an orderly manner; the establishment of a working rental pool and the execution of a sustainable new HMA; and the resolution of the deadlock and wasting of value if the status quo is allowed to continue. Counsel for RRMSI submits that the parties should negotiate these problems but the parties have already engaged in extensive negotiations including a settlement conference with Justice Campbell. They have come to Court seeking a just resolution. I am also not persuaded that the Receiver is obliged to attend at arbitration and am satisfied that it may seek the relief it requests.

[43] In all of the circumstances outlined, it is both just and convenient to appoint a receiver of all right, title and interest of RRMSI in and to the HMA, the RPMAs and the other agreements and arrangements requested by the moving parties. That said, it seems to me just that for the period commencing September 1, 2009 and continuing for 6 months, the receiver be obliged to record all fees, if any, that would have been received by RRMSI as a result of the RPMAs it entered into with unit owners and purchasers. This time period reflects in an approximate way the termination provisions contained in the

RPMAs. In submissions, counsel for the Receiver indicated that it would be possible to track those amounts. Once the RRMSI receiver is appointed, it should be in a position to consider the binding nature of any agreement relating to contribution and indemnity with respect to the HMA and whether amounts are owed by RRMSI to RRDI and were improperly appropriated. The record would also enable the Court to consider whether RRMSI has any real entitlements. In all of these circumstances, paragraph 6 of my order also should be sustained without prejudice to claims that may be made by either the Receiver or RRMSI to the subject matter of the aforementioned record. For greater certainty, this would not detract from the ability of the unit owners and unit purchasers to terminate by entering new RPMAs, my intention being to provide them with full protection and at the same time preserving the possibility of a claim by RRMSI to the fees, if any, reflected in the record.

[44] While this outcome may not be perfect from the viewpoint of all stakeholders, as Farley J. commented in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*[6], the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. Although he was dealing with the broad powers under section 47(2)(c) of the *Bankruptcy and Insolvency Act*, he stated that the Court could enlist the services of an interim receiver to do not only what justice dictates but also what practicality demands. His observations apply equally to this case.

[45] RRMSI also complains that Alvarez & Marsal Canada ULC should not be appointed receiver of RRMSI as its duties will conflict with those relating to RRDI. The appointment of a different receiver would be very costly for a project that already faces serious challenges. In addition, it would be inefficient. Alvarez & Marsal Canada ULC has already indicated its proposed course of action should it be appointed receiver of RRMSI and may attend to seek the Court's approval of its actions. A receiver is a Court appointed officer and acts under the Court's supervision. In my view, it is impractical,

[6] (1994), 114 D.L.R. (4th) 176.

unnecessary and undesirable to appoint a receiver other than Alvarez & Marsal Canada ULC.

[46] In conclusion, the motion of the moving parties is granted and the motion of RRMSI is dismissed subject to the need of Alvarez & Marsal Canada ULC to maintain a record as discussed. It seems to me appropriate that there be no order for costs.

"S.E.Pepall"

Pepall J.

Released: September 1, 2009