

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

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, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

**MOTION RECORD
(Returnable August 17, 2009)**

Date: August 12, 2009

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

WESTLB AG, TORONTO BRANCH

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Respondent

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TAB NO.

1. Notice of Motion, returnable August 17, 2009

TAB 1

**ONTARIO
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**NOTICE OF MOTION
(Returnable August 17, 2009)**

Alvarez & Marsal Canada ULC ("A&M"), in its capacity as Court-appointed receiver and manager pursuant to section 101 of the *Courts of Justice Act* (Ontario) (the "CJA") and trustee and receiver and manager under the *Construction Lien Act* (Ontario), and McIntosh & Morawetz Inc., in its capacity as interim receiver pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* (jointly and collectively, the "Receiver"), of the undertaking, property and assets of The Rosseau Resort Developments Inc. ("RRDI"), will make a motion to a Judge of the Commercial List at 10:00 a.m. on Monday, the 17th day of August, 2009, or as soon after that time as the Motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR AN ORDER:

- (a) abridging the time for service of the Notice of Motion and the Motion Record herein and dispensing with further service thereof;
- (b) authorizing the Receiver, on behalf of RRDI, to repudiate the Amended and Restated Hotel Management Agreement between RRDI, The Rosseau Resort Management Services Inc. ("RRMSI") and Marriott Hotels of Canada Ltd. ("Marriott") dated October 6, 2006 (the "Current Hotel Management Agreement"), relating to the operation of the 221 unit condominium hotel located on property on Lake Rosseau, Muskoka, Ontario (the "Hotel"), such repudiation to be effective at 11:59 p.m. on Friday, September 18, 2009, to correspond with a 30 day notice of termination to be delivered by Marriott to RRDI and RRMSI pursuant to the Current Hotel Management Agreement (the "Effective Date");
- (c) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into a new form of Hotel Management Agreement (the "New Hotel Management Agreement") with Marriott on the principal terms and conditions of the Current Hotel Management Agreement, and a side letter to the New Hotel Management Agreement (the "Side Letter") in a form to be filed with the Court prior to the hearing of this Motion, to be effective on the Effective Date. The principal terms of the New Hotel Management Agreement and Side Letter are as set out in a summary of terms (the "Summary of Terms") attached in redacted form as an Appendix to the Fourth Report of the Receiver dated August 12, 2009 (the "Fourth Report"), and in a non-redacted form as a Confidential Appendix to the Fourth Report. The completion of a New Hotel Management Agreement and Side Letter is subject to definitive documentation based on the Summary of Terms in a form acceptable to A&M;

- (d) authorizing the Receiver, on behalf of RRDI, to repudiate effective as of the Effective Date an International Services Agreement between RRDI, RRMSI and International Hotel Licensing Company S.a.r.l, an affiliate of Marriott ("IHLC") dated October 6, 2006, a Royalty and Licensing Agreement between RRDI, RRMSI and IHLC dated October 6, 2006, and any other current agreements with Marriott or its affiliates (the "Other Current Marriott Agreements") that the Receiver deems necessary, and to enter into new such agreements as between RRDI and Marriott on such terms as the Receiver may agree and as are consistent with the terms of the New Hotel Management Agreement (the "Other New Marriott Agreements", together with the "New Hotel Management Agreement", the "New Marriott Agreements"), all as of the Effective Date;
- (e) authorizing the Receiver on behalf of RRDI, to repudiate any and all agreements, verbal or otherwise, between RRDI and RRMSI whereby RRDI arranged to delegate the appointment of rental pool manager ("Rental Pool Manager") to RRMSI in respect of the rental pool in which all current owners (the "Unit Owners") of condominium units at the Hotel ("Units") are required to participate;
- (f) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into new forms of Rental Pool Management Agreements (the "New Rental Pool Management Agreements") with Unit Owners, existing purchasers of Units who have not yet closed outstanding agreements of purchase and sale with RRDI ("Existing Unit Purchasers"), and new purchasers of Units ("New Unit Purchasers"), substantially in the form set out in the draft New Rental Pool Management Agreement attached to the Fourth Report as an Appendix, effective on the Effective Date;
- (g) authorizing A&M, solely in its capacity as receiver and manager pursuant to the CJA, on behalf of RRDI, to enter into settlement agreements with Unit Owners and Existing Unit Purchasers substantially on the terms as set out in the forms of Unit Owner Settlement Agreement (the "Unit Owner Settlement Agreement") and

Unit Purchaser Settlement Agreement (the "Unit Purchaser Settlement Agreement") attached as Appendices to the Fourth Report;

- (h) approving the form of release (the "Release") to be executed by Unit Owners and Existing Unit Purchasers in connection Unit Owner Settlement Agreements and Unit Purchaser Settlement Agreements in the form attached as an Appendix to the Fourth Report, provided that the form of the Release shall not include RRMSI, Ken Fowler Enterprises Ltd., Red Leaves Partnership, Kenneth A. Fowler, and Peter Fowler (the "RRMSI Parties"), as requested by RRMSI, in the event that the relief requested at paragraph (i) below is opposed by RRMSI;
- (i) declaring that upon the termination of the Current Hotel Management Agreement by Marriott and upon the repudiation of any and all agreements, verbal or otherwise, between RRDI and RRMSI delegating the appointment of Rental Pool Manager to RRMSI, the existing Rental Pool Management Agreements (the "Existing Rental Pool Management Agreements") between RRMSI and Unit Owners and Existing Unit Purchasers are frustrated and cannot be performed by RRMSI; that Unit Owners and Existing Unit Purchasers are entitled to terminate their Existing Rental Pool Management Agreements; and that the execution by Unit Owners and Existing Unit Purchasers of the New Rental Pool Management Agreements shall be deemed to be notice of the termination by the Unit Owners and Existing Unit Purchasers of their Existing Rental Pool Management Agreements;
- (j) declaring that in the event the relief sought at paragraph (i) above is opposed by RRMSI, any action against a Unit Owner or Existing Unit Purchaser by RRMSI
- (k) 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;

- (l) approving the form of disclosure statement and related documentation (“Disclosure Documentation”) to be distributed to potential New Unit Purchasers in respect of the Retail Sales Program approved and authorized by Order of this Court dated July 8, 2009, substantially in the form to be filed with the Court, subject to such clarifying amendments that the Receiver may make in the process of finalizing the Disclosure Documentation, and any amendments that may need to be made in connection with the outcome of this Motion;
- (m) authorizing the Receiver to execute the certificate required on the Disclosure Documentation, following the necessary amendments as described in paragraph (k) above, in lieu of, and on behalf of the chief executive officer and chief financial officer of RRDI, regardless of whether such officers are currently appointed for RRDI, without any personal liability on their part or on the part of the Receiver or its directors or officers;
- (n) in connection with the Unit Owners Settlement Agreements, granting charges on the Assets of RRDI in favour of the Unit Owners, as follows (the “Unit Owners’ Charges”):
 - (i) in an amount sufficient to secure the total aggregate obligation of RRDI to pay rent under New Leases (as they are defined in the Settlement Agreements) entered into with all Unit Owners pursuant Unit Owner Settlement Agreements, not to exceed \$1.6 million; and
 - (ii) in an amount sufficient to secure the total aggregate obligation of RRDI to honour the Indulgence Cards and Other Incentives in respect of all Unit Owner Settlement Agreements, not to exceed \$3.7 million;

such Charges to rank *pari passu* with each other and subordinate only to the Receiver’s Charge and the Receiver’s Borrowings Charge each as provided for in the Amended and Restated Appointment Order dated June 2, 2009 (the “Appointment Order”), and that portion of the construction trade lien claims

which are determined to have priority over all mortgages registered on title to the real property of RRDI;

- (o) granting charges on the Assets of RRDI in order to secure the obligations of RRDI to Marriott Hotels under the New Hotel Management Agreement and Other New Marriott Agreements, as follows:

- (i) a charge in the maximum amount of \$5 million to be secured by RRDI's right, title and interest in and to the real and personal property comprising the Hotel (the "Primary Marriott Charge"); and
 - (ii) a charge in the maximum amount of \$2 million secured by RRDI's right, title and interest in and to its real property other than the Hotel (the "Secondary Marriott Charge").

such charges to rank subordinate only to the Receiver's Charge and the Receiver's Borrowings Charge each as provided for in the Appointment Order, that portion of the construction trade lien claims which are determined to have priority over all mortgages registered on title to the real property of RRDI, and the Unit Owners' Charge, provided that the total amount secured by the Primary Marriott Charge and the Secondary Marriott Charge shall not exceed \$5 million, with access to the Secondary Marriott Charge only if there are not sufficient Assets available for distribution under the Primary Marriott Charge;

- (p) approving and authorizing the Receiver to pay the reasonable legal fees and disbursements, inclusive of GST, of the Ad Hoc Committee of Unit-Owners represented by Miller Thomson LLP:

- (i) in an amount to a maximum of \$75,000 in respect the matters relating to the Unit Owner Settlement Agreements and the Unit Purchaser Settlement Agreements and the other matters raised herein; and

- (ii) in an amount to a maximum of \$25,000 in respect of a trust claim that may be raised by Unit Owners relating to funds held by McCarthy Tetrault LLP, in the event that the issue of entitlement to such funds is brought forward to the Court for determination;
- (q) approving the Fourth Report and the conduct and activities of the Receiver described therein;
- (r) sealing the Confidential Appendices to the Fourth Report pending further Order of this Court; and
- (s) such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- (a) the matters as set out in the Second Report and the Fourth Report; and
- (b) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The pleadings and proceedings herein;
- (b) The Second Report;
- (c) The Fourth Report; and
- (d) such further and other material as counsel may advise and this Honourable Court permit.

Date: August 12, 2009

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Proceeding commenced at Toronto

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