

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

THE HONOURABLE) WEDNESDAY, THE 8TH DAY
MR. JUSTICE CUMMING) OF JULY, 2009

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



WESTLB AG, TORONTO BRANCH

Applicant

- and -

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

ORDER

THIS MOTION, made by Alvarez & Marsal Canada ULC, in its capacity as Court-appointed receiver and manager pursuant to section 101 of the *Courts of Justice Act* (Ontario) and trustee and receiver and manager under the *Construction Lien Act* (Ontario) (the "CLA"), 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") 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 to undertake a process as described at Section 5 of the Second Report of the Receiver dated July 3, 2009 (the "Second Report") for the marketing and sale of unsold condominium units (the "Units") in the resort hotel condominium known as The Rosseau, a JW Marriott Resort and Spa (the "Hotel") and the development land surrounding the Hotel owned by RRDI together with the residual interest of RRDI in the Hotel and all other property, assets, and undertaking of RRDI (collectively, the "Assets"), consisting of (i) a program for the marketing and selling of individual Units to retail purchasers (the "Retail Sales Program") as described at paragraphs 5.8 to 5.11 of the Second Report, and (ii) a process for the marketing and selling of the Assets on an en bloc basis to institutional and commercial investors (the "Institutional Sales Process") as described at paragraphs 5.4 to 5.7 of the Second Report;
- (c) authorizing the Receiver to retain Baker Real Estate Incorporated ("Baker") as broker to conduct the Retail Sales Program;
- (d) authorizing the Receiver to retain Colliers MaCaulay Nicolls (Ontario) Inc. ("Colliers") as broker to conduct the Institutional Sales Process;
- (e) authorizing the Receiver to enter into an agreement (the "New Marriott Marketing License Agreement") with Marriott Hotels of Canada Ltd. ("Marriott Hotels") and/or its affiliate International Hotel Licensing Company S.a.r.l. ("IHLC"), to provide for the use by the Receiver of the "Marriott Trademarks" of Marriott Hotels and/or IHLC, as they are defined in the Marketing License Agreement between IHLC and RRDI dated June 15, 2004, in consideration for the payment of certain increased introduction fees, on the terms and conditions as provided for at paragraph 8.8 of the Second Report;
- (f) barring any claims against Marriott Hotels, IHLC, and their respective affiliates and officers, directors, employees, representatives and agents, including in their capacity as operator of the Hotel (collectively, "Marriott"), that may be asserted

relating to the use of the Marriott Trademarks by the Receiver or any of its agents in their promotion and marketing of the Units to retail purchasers;

- (g) directing that any Operating Profits, as that term is defined in an Amended and Restated Hotel Management Agreement between Marriott Hotels, RRDI, and The Rosseau Resort Management Services Inc. (“RRMSI”) dated as of October 6, 2006 (the “Hotel Management Agreement”), that may be payable by Marriott Hotels under the Hotel Management Agreement are to be paid to the Receiver to be held pending further order of the Court;
- (h) authorizing and directing McCarthy Tetrault LLP (“McCarthy”) to pay to the Receiver the balance of funds described at paragraph 9.11 of the Second Report (the “Commission Funds”) out of the Closing Costs Holdback as defined at paragraph 9.5 of the Second Report, after retaining the sums of \$538,630.13 and \$3,832.50, the latter representing the amount of the Law Society Levy as defined at paragraph 9.5 of the Second Report; authorizing McCarthy to pay the Law Society Levy to the Law Society of Upper Canada; authorizing McCarthy to pay to itself the sum of \$220,183.13 out of the Closing Costs Holdback upon satisfaction of the conditions recommended by the Receiver at paragraph 9.11 of the Second Report; and authorizing the Receiver to distribute the Commission Funds in accordance with the recommendation of the Receiver as set out in paragraph 9.11 of the Second Report;
- (i) approving the Second Report and the conduct and activities of the Receiver described therein; and
- (j) such further and other relief as counsel may request and this Honourable Court deems just,

was heard this day, at 330 University Avenue, Toronto, Ontario.

ON READING the Second Report, the Supplementary Report to the Second Report of the Receiver (the “Supplementary Report”), the Affidavit of Ken Fowler sworn July 7, 2009, and on hearing the submissions of independent counsel for the Receiver, counsel for WestLB AG, Toronto Branch, and the Receiver, counsel for Fortress Credit Corp., counsel for RRDI, RRMSI

and Ken Fowler Enterprises Limited and counsel for Marriott, no one appearing for any other person on the service list:

Service

1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof.

Sales and Marketing Process

2. THIS COURT ORDERS that the Receiver be and is hereby authorized to undertake a process for the marketing and sale of the Assets of RREDI as described at Section 5 of the Second Report, consisting of (a) the Retail Sales Program, and (b) the Institutional Sales Process.

3. THIS COURT ORDERS that the Receiver be and is hereby authorized to retain Baker as broker to conduct the Retail Sales Program substantially on the terms and conditions as set out in the form of Exclusive Listing Agreement attached as Confidential Appendix "B" to the Supplementary Report (the "Exclusive Listing Agreement"). The execution by the Receiver of the Exclusive Listing Agreement in substantially the form attached as Confidential Appendix "B" is hereby authorized and approved

4. THIS COURT ORDERS that the Receiver be and is hereby authorized to retain Colliers as broker to conduct the Institutional Sales Process substantially on the terms and conditions as set out in the form of Exclusive Authority to Sell agreement attached as Confidential Appendix "A" to the Supplementary Report (the "Exclusive Authority to Sell"). The execution by the Receiver of the Exclusive Authority to Sell in substantially the form attached as Confidential Appendix "A" is hereby authorized and approved

New Marriott Marketing License Agreement

5. THIS COURT ORDERS that the Receiver be and is hereby authorized to enter into and execute the New Marriott Marketing License Agreement on the terms and conditions as provided for at paragraph 8.8 of the Second Report, together with such further terms and conditions as the parties may agree to in order carry into effect the New Marriott Marketing License Agreement.

6. THIS COURT ORDERS that Marriott shall not have nor incur any liability or obligation in connection with, arising from or in any way incidental to the use by the Receiver (which term shall hereafter include any of the Receiver's employees, agents or authorized representatives, including any brokers retained by the Receiver to market and sell the Units) of the Marriott Trademarks. Without limiting the foregoing, Marriott shall not incur any liability to any Person (as defined in the Marketing Licence Agreement) including, without limitation, any legal or beneficial owner, whether one or more Persons, of any of the Units or any contract purchaser of a Unit, arising from or in any way incidental to:

- (a) the marketing and sale of the Units by the Receiver, including pursuant to the Retail Sales Program approved pursuant to this Order;
- (b) any advertisements or offers by the Receiver to sell any of the Units;
- (c) any brochures, printed or electronic media or any other marketing materials distributed or made available by the Receiver as part of the Retail Sales Program which contain or provide a link to any of the Marriott Trademarks or contain a link to the Hotel or to Marriott;
- (d) any oral statements or representations made by the Receiver regarding the Marriott Trademarks, the Hotel, the Units, or Marriott (including, without limitation, any services to be provided by Marriott to the Hotel or the Units) as part of the Retail Sales Program;
- (e) the disclosure of any and all information presented by the Receiver arising from, incidental to, or in connection with the Retail Sales Program;
- (f) any and all offers to purchase a Unit received by the Receiver;
- (g) any Agreement of Purchase and Sale entered into by the Receiver in respect of the sale of any Unit;
- (h) any loss or damage to any Person or to property which was allegedly caused by the action or inaction of the Receiver in connection with the Retail Sales Program;
- (i) any failure on the Receiver's part to comply with any provision of the New Marriott Marketing Licence Agreement or any other agreement entered into by the Receiver in connection with the Retail Sales Program; and
- (j) any contractual or other claim by any Person relating to the Receiver's activities with respect to the Hotel or any part thereof.

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal with respect to any of the matters referenced in the immediately preceding paragraph

shall be commenced or continued against Marriott except with the written consent of such party or with leave of this Court.

Operating Profits

8. THIS COURT ORDERS that any amounts that may be payable by Marriott Hotels under the Hotel Management Agreement to RRDI or RRMSI (the "Distributions"), if paid by Marriott Hotels, are to be paid to the Receiver to be held in its trust account pending further order of the Court, subject to and without prejudice to the reservation of rights of all interested parties. Without limiting the foregoing, Distributions received by the Receiver shall be subject to all rights, claims, priorities and entitlements as may exist in respect of such Distributions, including any trust claims and trust obligations that may be asserted in respect thereof by RRMSI, condominium owners or any other party, and for the purposes of determining any such claims, the Distributions shall be considered as held in a separate trust account of the Receiver. Any Distributions are subject to and without prejudice to Marriott Hotels' rights under the Hotel Management Agreement to apply such Distributions, whether against Operating Losses (as defined in the Hotel Management Agreement) or otherwise. The Receiver has not and nothing in this Order shall deem the Receiver to have adopted the Hotel Management Agreement or any agreements as between RRDI and RRMSI, and the rights of the Receiver to repudiate such contracts or agreements as permitted by the Amended and Restated Appointment Order dated June 2, 2009 are expressly reserved. Furthermore, the rights of Marriott Hotels to terminate any agreement to which it is a party in accordance with the terms thereof and, in respect of RRDI, subject to relief from the stay of proceedings, are hereby expressly reserved.

Closing Costs Holdback

9. THIS COURT ORDERS that McCarthys shall pay to the Receiver the Commission Funds out of the Closing Costs Holdback.

10. THIS COURT ORDERS that the Receiver be and is hereby authorized to pay to real estate agents the commissions owed to them from the Commission Funds, on receipt of proof satisfactory to the Receiver of their claim to the payment of commission (the "Proven Real Estate Agent Claims"), provided that the Receiver shall not make any such payments until (A) all of the Proven Real Estate Agent Claims have been ascertained, and (B) the Receiver is satisfied

that the amount of Commission Funds is sufficient to satisfy each Proven Real Estate Agent Claim

11. THIS COURT ORDERS that upon the Receiver becoming satisfied that the amount of Commission Funds is sufficient to satisfy each Proven Real Estate Agent Claim, upon notice provided by the Receiver to McCarthys, McCarthys be and is hereby authorized to pay itself the sum of \$220,183.13 from the balance of the Closing Costs Holdback retained by them after payment of the Commission Funds to the Receiver.

12. THIS COURT ORDERS that McCarthys is authorized to pay the Law Society Levy to the Law Society of Upper Canada.

13. THIS COURT ORDERS that McCarthys shall make no further distributions from the Closing Costs Holdback without approval of the Court.

14. THIS COURT ORDERS that in the event that the Receiver is not satisfied that the amount of Commission Funds is sufficient to satisfy each Proven Real Estate Agent Claim, the Receiver will seek further advice and direction from the Court.

Second Report

15. THIS COURT ORDERS that the Second Report, the Supplementary Report, and the activities and conduct of the Receiver described therein, be and are hereby approved.

Sealing Order

16. THIS COURT ORDERS that Confidential Appendix "A" and Confidential Appendix "B" attached to the Supplementary Report be and are hereby sealed and shall remain sealed until further Order of this Court.

PIPEDA

17. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act* ("PIPEDA"), the Receiver is authorized and permitted to disclose to any potential purchaser of the Assets pursuant to the Institutional Sales Process human resources and payroll information in RRDI's records pertaining to RRDI's

past and current employees, and records and information regarding the Hotel and the Units that may contain personal information as defined by the PIPEDA, provided that the potential purchaser shall maintain and protect the privacy of such information and return all such information to the Receiver or destroy it in the event that no transaction is completed with that potential purchaser.

Aid and Recognition

18. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

July 8, 2009 Peter A. Cumming J.

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ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 06 2009

PER / PAR:

[Signature]

V.

WESTLB AG, TORONTO BRANCH

Applicant

Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Lawyers for WestLB, AG, Toronto Branch
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& Marsal ULC Canada, in their respective
capacities as Court-appointed interim
receiver, trustee, receiver and manager