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| COURT FILE NUMBER | 2201 - 01016 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE OF | CALGARY |
| APPLICANT | ROBUS SERVICES LLC |
| RESPONDENT | ROBUS RESOURCES INC. |
| DOCUMENT | **BENCH BRIEF OF THE APPLICANT ENERPLUS CORPORATION (for the Application to be heard by The Honourable Assistant Chief Justice K.G. Nielsen at 3:00 p.m. on Wednesday, December 14, 2022)** |
| CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT: | **BENNETT JONES LLP**<br>Barristers and Solicitors<br>4500, 855 – 2nd Street S.W.<br>Calgary, Alberta T2P 4K7<br><br>Attention: Chris Simard / Chelsea Tolppanen<br>Telephone No.: 403-298-4485/3083<br>Fax No.: 403-265-7219<br>Client File No.: 68320.6 |

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## I. INTRODUCTION

1. Enerplus Corporation (the "**Applicant**" or "**Enerplus**") has filed an application returnable at 3:00 p.m. on Wednesday, December 14, 2022, for an Order:

(a) ordering and declaring that:

(i) Alvarez & Marsal Canada Inc., in its capacity as Receiver (the "**Receiver**") of Robus Resources Inc. ("**Robus**") is obligated to pay to Enerplus all the amounts owing to Enerplus (collectively, the "**Post-Filing Costs**") with respect to all goods and services provided by Enerplus under the November 17, 2017 Joint Operating Agreement (the "**Operating Agreement**") attached as Exhibit "1" to the Affidavit of Derek Lynn sworn on December 7, 2022 (the "**Lynn Affidavit**") from and after the date of the Receivership Order (the "**Receivership Order**") granted herein on April 12, 2022 (the "**Filing Date**");

(ii) the Post-Filing Costs are post-filing obligations of the Receiver, that must be paid in full before the repayment of any creditors of Robus or any creditors of the Receiver (including, without limitation, the repayment of any amounts secured by the Receiver's Borrowings Charge (as defined in the Receivership Order), and whether such repayments are by way of cash, credit bid, or some other form of consideration);

(iii) the Receiver's obligation to pay the Post-Filing Costs to Enerplus are secured by and shall have the benefit of the Receiver's Charge (as defined in the Receivership Order), and the Receiver's Charge is hereby increased by the amount of the Post-Filing Costs outstanding, from time to time;

(iv) [**OR, IN THE ALTERNATIVE TO PARAGRAPH (iii)**] Enerplus is hereby granted a constructive trust as against the Property (as defined in the Receivership Order), in the amount of the Post-Filing Costs outstanding, from time to time; and

(v) all of the Receiver's audit rights with respect to the Post-Filing Costs, as provided for in the Operating Agreement and at law, are expressly preserved.

2. The Receiver, through its words and actions, has elected to adopt and affirm the Operating Agreement, and has received the benefit of Enerplus's performance of its obligations under the Operating Agreement since the Filing Date. As a result, the Post-Filing Costs are current post-filing obligations of the Receiver, which must be paid before any creditors of Robus can be repaid.

3. If Enerplus ceased providing goods and services under the Operating Agreement, the Receiver's ability to maximize the value of Robus's assets for the benefit of Robus's creditors would be severely impacted. Enerplus is a critical vendor.

## II. FACTS

4. In 2016, 2017 and 2019, Enerplus and Robus entered into a series of agreements and amendments, pursuant to which:

(a) Enerplus sold a 99% beneficial working interest to Robus in approximately 140 oil and gas wells, along with certain associated facilities and pipelines (collectively, the "**Joarcam Assets**");

(b) Enerplus retained a 1% beneficial working interest in the Joarcam Assets;

(c) Enerplus remained as the registered legal owner of the Joarcam Assets;

(d) Enerplus remained as the licensee of the Joarcam Assets, for purposes of the regulation of the Joarcam Assets by the Alberta Energy Regulator ("**AER**"); and

(e) Enerplus was appointed as the operator (the "**Operator**") of the Joarcam Assets, pursuant to the Operating Agreement.[1]

[1] Lynn Affidavit, para. 3

5. Since its appointment as operator under the Operating Agreement, Enerplus has operated the Joarcam Assets for the joint account of Robus and Enerplus.[2]

6. After the Filing Date, the Receiver could have elected to terminate the Operating Agreement. The Receiver never did that. On the contrary, the Receiver has "stepped into the shoes" of Robus under the Operating Agreement, and has done the following things *vis-à-vis* the Operating Agreement after the Filing Date:

(a) used Robus's EnerLink account to receive the JIBs issued after the Filing Date and, in EnerLink, disputed charges in some of the JIBs, but accepted most of the JIBs without any dispute;[3]

(b) continued to accept the goods and services provided by Enerplus as Operator under the Operating Agreement;[4]

(c) stipulated to Enerplus the manner in which the Receiver wished Enerplus to carry on accounting for transactions under the Operating Agreement, and how to pay the Receiver any net amounts owed to the Receiver under the Operating Agreement;[5]

(d) consulted with Enerplus on the details of an operation that had to be conducted by Enerplus as Operator under the Operating Agreement with respect to a pipeline leak on one of the Joarcam Assets, and directed the manner in which it wished Enerplus to conduct the operation;[6]

(e) specifically requested Enerplus to carry out certain workover operations on a number of wells comprising the Joarcam Assets, and paid Robus's share of the costs of those operations, pursuant to authorities for expenditure issued by Enerplus under the Operating Agreement;[7]

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[2] Lynn Affidavit, para. 3(e)
[3] Lynn Affidavit, para. 8(a)
[4] Lynn Affidavit, para. 8(b)
[5] Lynn Affidavit, paras. 10 - 11, Exhibit "2"
[6] Lynn Affidavit, paras. 12 - 13, Exhibit "3"
[7] Lynn Affidavit, paras. 18 - 21, Exhibits "7" and "8"

(f) permitted Enerplus to exercise its rights of set-off under the Operating Agreement, by netting the monthly revenue amounts owed to the Receiver as against the costs owed by the Receiver, after the Filing Date;[8]

(g) paid some (but not all) of the charges in the JIBs issued by Enerplus under the Operating Agreement after the Filing Date.[9]

## III. ISSUES

7. The only issue for determination by this Honourable Court is whether the Receiver is obligated to pay the Post-Filing Costs.

## IV. LAW AND ARGUMENT

### A. A Receiver's Election with Respect to Executory Contracts

8. When a receiver is appointed, it has an election to make with respect to every executory contract to which the debtor company is party: it can elect to either disclaim the contract; or elect to adopt the contract.[10] The Receivership Order expressly authorized the Receiver to make this election with respect to the Operating Agreement, and all other "contracts of [Robus]."[11]

9. A receiver can make its election to adopt an executory contract through words, or by conduct. A receiver can be deemed to have elected to adopt a contract, by doing nothing,[12] or even in the absence of having positively disclaimed the contract.[13]

10. The types of conduct by receivers that courts have found would constitute the adoption of executory contracts, even in the absence of a positive express election to do so, include:

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[8] Lynn Affidavit, para. 22

[9] Lynn Affidavit, paras. 21 - 22

[10] Frank Bennett, *Bennett on Receiverships*, 4th ed (Toronto: Thomson Reuters, 2021) ("**Bennett**") at 557 **[Tab 1]**

[11] Receivership Order, para. 3(c)

[12] Bennett at 557 **[Tab 1]**

[13] *North Bend Ventures Ltd v Timberland Helicopters Inc*, 2010 BCSC 1907 ("*North Bend*") at para. 23 **[Tab 2]**; *General Motors Corporation v Peco, Inc,* [2006] OJ No 636, 19 CBR (5th) 224 ("*General Motors*") at paras. 14 – 16 **[Tab 3]**

(a) being aware of ongoing work being done by the counterparty under the executory contract, and not dissuading the counterparty from doing such work;[14]

(b) receiving goods and services under the executory contract and not electing to terminate it within a reasonable time;[15]

(c) continuing to possess lands subject to a lease entered into by the debtor;[16] and

(d) making payments to the counterparty that were due under the executory contract.[17]

11. In this case, the Receiver has clearly affirmed the Operating Agreement through its conduct. Not only did the Receiver elect not to terminate the Operating Agreement, and allow Enerplus to continue supplying goods and services thereunder, it has gone much further: it has taken many positive steps to partly perform Robus's obligations under the Operating Agreement, and to exercise Robus's rights under the Operating Agreement.[18]

**B. A Receiver's Liability to Pay for Post-Filing Goods and Services**

12. When a receiver is appointed, it is not personally liable under executory contracts to which the debtor is a party. However, that changes if the receiver elects to adopt an executory contract, by words or deeds. When it so elects, the receiver becomes personally liable to perform the debtor's obligations under the contract.[19]

13. This result is fair and equitable. Pursuant to the Receivership Order, Enerplus was obligated after the Filing Date to continue providing all goods and services under the Receivership Order, on the express condition that Robus, through the Receiver, continued to pay "the usual prices or charges for all such goods or services received after the date of [the Receivership Order]."[20] Because Enerplus remained obligated after the Receiver's appointment to provide all

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[14] *General Motors* at paras. 14 – 16 **[Tab 3]**
[15] *Re Pope & Talbot*, 2009 BCSC 17 at para. 22 **[Tab 4]**
[16] *North Bend* at para. 23 **[Tab 2]**
[17] *North Bend* at para. 23 **[Tab 2]**
[18] As detailed in paragraph 6 above.
[19] Bennett at 558 **[Tab 1]**; *Bayhold Financial Corp v Clarkson Co*, [1991] NSJ No 488, 86 DLR (4th) 127 at page 18 **[Tab 5]**
[20] Receivership Order, para. 12.

goods and services under the Operating Agreement, it was incumbent on the Receiver, if it wished to terminate, to make that election within a reasonable time.[21] Because it did not do so, it must pay the Post-Filing Costs, for all post-filing goods and services provided by Enerplus.

14. The Receiver's obligation to pay the Post-Filing Costs is entitled to priority, through one of two means:

(a) pursuant to paragraph 18 of the Receivership Order, the Receiver's fees and disbursements are secured by the super-priority Receiver's Charge on the property of Robus. Because the Receiver has a personal obligation to pay the Post-Filing Costs, the Post-Filing Costs are "disbursements" of the Receiver. This Honourable Court could expressly declare that the Post-Filing Costs shall benefit from the Receiver's Charge; or

(b) as recognized by the Ontario Superior Court of Justice, a counterparty's entitlement to be paid for post-filing goods and services provided under an executory contract can be protected by the declaration of a constructive trust over Robus's property for the benefit of the counterparty. The requirements for unjust enrichment and a constructive trust are all present here: there has been an enrichment of the estate by Enerplus's provision of goods and services; there has been a corresponding deprivation of Enerplus because it has not been paid; and there is no juristic reason for the Receiver not to pay Enerplus.[22]

[21] *Re Pope & Talbot* at para. 22 **[Tab 4]**
[22] *General Motors* at paras. 17 – 31 **[Tab 3]**

## V. RELIEF SOUGHT

15. It is respectfully submitted that the Order be granted in the form proposed by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 7th day of December, 2022.

**BENNETT JONES LLP**

Per: _____

Chris Simard / Chelsea Tolppanen

Estimated Time for Argument: 20 minutes

## VI. TABLE OF AUTHORITIES

**TAB**

1. Bennett, Frank, *Bennett on Receiverships*, 4th ed (Toronto: Thomson Reuters, 2021)
2. *North Bend Ventures Ltd v Timberland Helicopters Inc*, 2010 BCSC 1907
3. *General Motors Corporation v Peco, Inc*, [2006] OJ No 636, 19 CBR (5th) 224
4. *Re Pope & Talbot Ltd*, 2009 BCSC 17
5. *Bayhold Financial Corp v Clarkson Co*, [1991] NSJ No 488, 86 DLR (4th) 127

# TAB 1

effectively becomes the landlord in its own name for the purposes of any eviction, distress, or action for arrears. Accordingly, the mortgagee or receiver may also distrain for arrears in its own name.[137]

Similarly, where after taking possession and control of the lease portfolio, the mortgagee or receiver leases premises and the tenant subsequently defaults, the mortgagee or receiver can for all intents and purposes be considered the landlord. Thus, as where the tenant attorns or if mortgagee or receiver enters new leases with tenants, the mortgagee or receiver effectively becomes a landlord so as to invoke the remedies afforded to a landlord at common law or pursuant to the *Commercial Tenancies*.[138]

If the tenant refuses to attorn, the situation is different. For the mortgagee in possession or the privately appointed receiver, the receiver must proceed to collect arrears of rent and current rent in the name of the mortgagor as the mortgagor still has legal title. Legal proceedings, including distress rights, therefore must be commenced in the debtor's name against the defaulting tenant. By contrast, a court-appointed receiver is normally given the authority in the order to cause the tenants to attorn. If the court-appointed receiver does not have authority to commence legal proceedings or the authority to distrain, the receiver requires leave of the court to pursue delinquent tenants in its own name or in the name of the debtor.[139]

*(iv) Renewal of Lease and New Leases*

Unlike foreclosure under a mortgage, a receiver, whether privately or court-appointed, may, if the power is expressly afforded, renew leases and enter into new leases in the debtor's name. Although the mortgagee or receiver should avoid lengthy terms extending beyond the maturity date, if any, of the security instrument, it should, where possible, seek to renew or let on a basis consistent with that of the previous term of lease. New leases and renewals of longer terms may impair the sale of the property in situations where a prospective purchaser wishes occupation, as well as impair and prejudice the debtor's right to redeem. However, apartment and shopping complexes by their very nature differ in such a way that continuation of tenancy agreements is mandatory even where the term of the lease extends beyond the expiry of the redemption period.

In the absence of a general power to let and renew leases, the court-appointed receiver should obtain leave of the court if the proposed lease or renewal lease is for a period of time extending beyond the redemption period, if any, or is for a period of time that may be considered excessive given the circumstances of the debtor's business. On the other hand, the privately

D.L.R. (3d) 190n (Ont. C.A.); *White et al. v. Nelles* (1885), 11 S.C.R. 587, 1885 CarswellOnt 13 (S.C.C.).

137 *McGuin v. Fretts* (1887), 13 O.R. 699 (Ont. C.A.).

138 R.S.O. 1990, c. L.7. See *Jamort Invts. Ltd. v. Fitzgerald*, [1968] 1 O.R. 541, 1968 CarswellOnt 703 (Ont. Master).

139 *Stuart v. Grough* (1887), 14 O.R. 255 (Ont. Ch.).



appointed receiver takes the risk that the new lease or renewal lease is commercially reasonable. However, if there is legislation permitting the receiver to apply to the court for directions as to the terms of the proposed lease or renewal lease, the receiver should proceed on that basis where such terms may materially prejudice the debtor's right to redeem.

## 5. CONTRACTS

### (a) Existing Contracts with the Debtor

At the commencement of any receivership, the receiver reviews the terms of any on-going or executory contracts at the time of the appointment or on the making of the initial order with a view to determining whether the receiver should adopt or repudiate them. The receiver must decide whether to adopt or repudiate executory contracts entered into by the debtor prior to the receivership.[140] If the receiver elects to continue the contract, the receiver will be subject to the terms of the contract. If the receiver does nothing, it is possible that the receiver may be found to have adopted the contract. The receiver has a reasonable time period to decide.[141] It is of importance that the receiver review the nature of the contract carefully to determine whether it is in the best interests of the creditors to adopt the contract or to repudiate it. Depending upon the nature of the contract, the receiver may be able to vary it to the benefit of the creditors and debtor.

If the *Bankruptcy and Insolvency Act* applies to the receivership, subsection 14.06(1.2) provides that a trustee, including a receiver, is not personally liable for claims arising prior to the appointment of the receiver.[142] If the receiver completes the contract, the receiver may be conferring a preference on a creditor who would otherwise be unsecured. In cases where the contract is almost complete, such as in the case where the debtor had sold goods but had not delivered them, the court examines the terms of the contract, the intention of the parties, and the debtor's conduct. If the debtor intended that title to the goods pass to the purchaser and that the debtor separated the goods from its other inventory, the court will enforce the contract in favour of the purchaser[143] or in the case of real property where equitable title has passed,

140 *Galanda Properties Inc. v. Tiercon Industries Inc. (Receiver of)* (2007), 38 C.B.R. (5th) 142 (Ont. S.C.J. [Commercial List]); *Spyglass Resources Corp. v. Bonavista Energy Corporation*, 2017 ABQB 504, 51 C.B.R. (6th) 54 (Alta. Q.B.) at para. 67.

141 *North Bend Ventures Ltd. v. Timberland Helicopters Inc.*, 2010 BCSC 1907 (B.C. S.C.).

142 Subsection 14.06(1.1) makes reference to a trustee and includes an interim receiver and a receiver within the meaning of subsection 243(2) of the Act.

143 *NEC Corporation v. Steintron International Electronics Ltd.* (1985), 59 C.B.R (N.S.) 91, 1985 CarswellBC 496, [1985] B.C.J. No. 611 (B.C. S.C.) distinguished in *Toronto Dominion Bank v. 101142701 Saskatchewan Ltd.*, 2014 SKQB 125, 12 C.B.R. (6th) 195 (Sask. Q.B.) where the claimant failed to prove that the debtor kept his wine purchases separate and apart from the other inventory such that they were co-mingled.

direct the receiver to perform the contract.[144] However, if a creditor has a claim for commission on the sale of the debtor's assets prior to the receivership, the court will not honour the claim if the listing agreement expired and the receiver does not renew it.[145]

If the creditor has a contract with the debtor prior to the receivership, and if the receiver does not affirm the contract, the court will not force the receiver to pay a commission to the creditor where the creditor completes the contract following receivership.[146] Similarly, the court will not permit the payment of a fee to a consultant who marketed and arranged the sale of certain assets of the debtor prior to the appointment of the receiver even though the court subsequently approved the sale, and despite the fact that the receiver would have had to market and incur costs as did the debtor.[147]

### *(i) Repudiate Contract*

As stated above, in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership unless the receiver continues to perform them.[148] However, that does not mean the receiver can arbitrarily repudiate or break a contract. The receiver must exercise proper discretion in repudiating a contract since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached its standard of care by dissipating one of the debtor's assets. If the receiver

144 *Freevale Ltd. v. Metrostore (Holdings) Ltd.*, [1984] 1 Ch. 199, [1984] 2 W.L.R. 496, [1984] 1 All E.R. 495 (Eng. Ch. Div.).

See also *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.* (2001), 25 C.B.R. (4th) 198, 2001 CarswellOnt 1567, [2001] O.J. No. 1727 (Ont. S.C.J. [Commercial List]) where the court ordered a trustee in bankruptcy to complete an agreement of purchase and sale even though there was no benefit to the estate.

145 *Howlett v. 512046 B.C. Ltd.* (2000), 17 C.B.R. (4th) 224, 2000 BCSC 871, 2000 CarswellBC 1130 (B.C. S.C. [In Chambers]).

146 *Avison Young Real Estate Alberta Inc. v. Bosa Properties (Eau Claire) Inc.*, 2015 ABQB 208, 24 C.B.R. (6th) 143 (Alta. Q.B.).

147 *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296, 2007 CarswellOnt 5799 (Ont. S.C.J.). However, if the receiver adopts the contract, it may be possible for the creditor to argue the principles of *quantum meruit* and unjust enrichment.

148 *Re Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 86 D.L.R. (4th) 127, 10 C.B.R. (3d) 159 (N.S. C.A.), dismissing an appeal from (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (N.S. T.D.); *Re Pope & Talbot Ltd.* (2008), 46 C.B.R. (5th) 34, 2008 BCSC 1000, 2008 CarswellBC 1726 (B.C. S.C. [In Chambers]); *2155489 Ontario Inc. v. SMK Speedy International Inc.*, 2009 CarswellOnt 668 (Ont. S.C.J. [Commercial List]).

Referred to in *Alberta Health Services v. Networc Health Inc.* (2010), 28 Alta. L.R. (5th) 118, [2010] 11 W.W.R. 730, 2010 ABQB 373 (Alta. Q.B.) where on the basis of strong public policy issues, the court dismissed an application by the landlord to lift the stay of proceedings and to compel the court-appointed receiver to accept or disclaim a lease.

Referred to in *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 970, 60 C.B.R. (6th) 267 (B.C. S.C.), affirmed 2018 BCCA 283, 61 C.B.R. (6th) 196 (B.C. C.A.) where the court dismissed the creditor's application to stay the receiver's completion of the debtor's contract.



operates the business, the receiver has a duty to preserve the goodwill and the assets of the business. Consequently, the receiver should not disregard executory contracts where they are beneficial to the stakeholders. In fact, the receiver should take into account the equitable considerations of all stakeholders in deciding whether to terminate the contract.[149] Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court where the receiver does not have the power to do so under the initial order.[150] In exercising the discretion, the court must assess the equitable interests and equities of the parties.[151] If the court grants the repudiation, the debtor remains liable for any damages as a result of the breach.[152]

149 *Re 144 Park Ltd.*, 2015 ONSC 6735 (Ont. S.C.J. [Commercial List]) at para. 20, additional reasons as to costs, 2015 ONSC 6864 and 2015 ONSC 7985 (Ont. S.C.J. [Commercial List]) where after weighing the equitable considerations, the court dismissed the receiver's request to terminate purchase agreements; *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) at para. 31 where the receiver was successful in obtaining an order terminating certain purchase agreements.

See also *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013, 80 C.B.R. (6th) 118 (B.C. S.C.) at paras. 58-63 where despite the equities, the court approved the receiver's termination of the pre-sale purchaser's contracts.

See also *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.* (2020), 82 C.B.R. (6th) 289, 2020 ONSC 5071 (Ont. S.C.J.), affirmed 2021 ONCA 58, 2021 CarswellOnt 868 (Ont. C.A.) where the court was satisfied that the receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders in disclaiming the agreement of purchase and sale.

150 *Bank of Montreal v. Probe Exploration Inc.* (2000), 33 C.B.R. (4th) 173, 2000 CarswellAlta 1659, [2000] A.J. No. 1752 (Alta. Q.B.), appeal dismissed (2000), 33 C.B.R. (4th) 182, 2000 CarswellAlta 1621, [2000] A.J. No. 1751 (Alta. C.A.) where the court refused to allow the receiver to terminate a contract essentially on the basis that the receiver is bound to act in an equitable manner, must be fair and equitable to all, and must not prefer one creditor over another.

See also *Jung v. Talon International*, 2019 ONCA 644, 72 C.B.R. (6th) 1 (Ont. C.A.), affirming 2018 ONSC 4245, 64 C.B.R. (6th) 301 (Ont. S.C.J.), leave to appeal refused *Talon International Inc. v. Henry Jung, et al.*, 2020 CarswellOnt 4887 (S.C.C.). In this case, the receiver sold a hotel residential complex the effect of which terminated agreements of purchase and sale requiring that purchasers' deposits be returned.

See also *Petrowest Corporation. v. Peace River Hydro Partners*, 2019 BCSC 2221, 74 C.B.R. (6th) 53 (B.C. S.C.), affirmed 2020 BCCA 339 (B.C. C.A.) where the court concluded that the receiver was a party to arbitration agreements between the debtor and third parties and therefore not bound by those agreements.

151 *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2004 BCSC 1818, 19 C.B.R. (5th) 45 (B.C. S.C.) at para. 22, affirmed 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.); followed in *Bank of Montreal v. Smith*, 2021 SKQB 47, 2021 CarswellSask 124 (Sask. Q.B.) where on the facts, the property interest had not passed to the purchaser, that the bank as secured party had priority and that the purchaser was not a *bona fide* purchaser for value.

152 Cited in *Bank of Montreal v. Scaffold Connection Corp.* (2002), 36 C.B.R. (4th) 13, 2002 ABQB 706, 2002 CarswellAlta 932 (Alta. Q.B.) and in *New Skeena Products Inc. v. Kitwanga Lumber Co.* (2005), 39 B.C.L.R. (4th) 327, 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267 (B.C. C.A.), affirming (2004), 19 C.B.R. (5th) 45, 2004 BCSC 1818, 2004 CarswellBC 3540 (B.C. S.C.) where the court concluded that the receiver had the power in the initial order to apply for a vesting order to convey assets free and clear of security including executory contracts. The court went on to discuss and conclude that trustees in bankruptcy have a common law right to disclaim contracts.

See also *Re Pope & Talbot Ltd.* (2009), 50 C.B.R. (5th) 99, 2009 BCSC 17, 2009 CarswellBC 88 (B.C. S.C.).

See also *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 86 B.C.L.R. (4th) 114, 44 C.B.R. (5th) 171, 2008 BCSC 897 at para. 58, 72 R.P.R. (4th) 68 (B.C. S.C.) where the court reviews the case law on the right of the receiver to terminate existing contracts and summarizes the effects; namely, (a) the receiver is not bound by existing contracts entered into before the receivership unless it decides to be bound by them; (b) the receiver should seek leave of the court before disclaiming contracts; (c) the debtor remains liable for any damages if the receiver disclaims the contracts; (d) the receiver owes a duty of care to preserve the goodwill to the debtor, not to the creditors; (e) the receiver can disclaim the contract with a third party even if the third party has an equitable interest; and (f) if the receiver decides to perform the contract entered into by the debtor before the receivership, then the receiver is liable for the performance. Referred to in *2155489 Ontario Inc. v. SMK Speedy International Inc.* (2009), 2009 CarswellOnt 668 (Ont. S.C.J. [Commercial List]).

See also *Royal Bank of Canada v. Penex Metropolis Ltd.* (2009), 2009 CarswellOnt 5202 (Ont. S.C.J.), where the court granted the receiver power to disclaim contracts in the initial order. In this case, the court re-iterated that as long as the receiver's decision to terminate a contract is commercially reasonable or "within the broad bounds of reasonableness", the court will not interfere. Referred to in *Romspen Investment Corp. v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426, 45 C.B.R. (6th) 309 (Ont. S.C.J.) at para. 31 where the court stated that the central question "to disclaim a contract was whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract."

See also *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) at paras. 27 and 32 where the court concluded that it had to consider the "equities" in favour of the purchasers in deciding whether to terminate pre-receivership contracts.

See also *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, 59 C.B.R. (6th) 304 (B.C. S.C.), where the court thoroughly reviews the value of disclaiming contracts entered into before the receivership; appeal as of right in *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 188, 61 C.B.R. (6th) 221 (B.C. C.A.), affirmed *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251, 62 C.B.R. (6th) 180 (B.C. C.A.); for related proceedings to place 0981478 B.C. Ltd. into bankruptcy, see *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 1409, 63 C.B.R. (6th) 86 (B.C. S.C.). Considered in *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.* (2020), 82 C.B.R. (6th) 289, 2020 ONSC 5071 (Ont. S.C.J.), appeal from 2020 ONSC 5071 dismissed 2020 ONCA 817, 85 C.B.R. (6th) 1, additional reasons as to costs 2021 ONCA 58, where the receiver disclaimed an agreement of purchase as the purchaser loaned money to the seller to complete the condominium unit against which there was an existing mortgage.

See also *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013, 80 C.B.R. (6th) 118 (B.C. S.C.) at paras. 58-63 where despite the equities, the court approved the receiver's termination of the pre-sale purchaser's contracts.

See also *Re 144 Park Ltd.*, 2015 ONSC 6735, 32 C.B.R. (6th) 113 (Ont. S.C.J. [Commercial List]), additional reasons 2015 ONSC 6864, 32 C.B.R. (6th) 125 (Ont. S.C.J. [Commercial List]);

*Re SHS Services Management Inc./Gestion Des Services SHS Inc.*, 2015 ONSC 2798, 32 C.B.R. (6th) 273 (Ont. S.C.J. [Commercial List]) where the receiver by its conduct terminated licence agreements;

*Jung v. Talon International*, 2018 ONSC 4245, 64 C.B.R. (6th) 301 (Ont. S.C.J.), affirmed 2019 ONCA 644, 72 C.B.R. (6th) 1 (Ont. C.A.), leave to appeal refused *Talon International Inc. v. Henry Jung, et al.*, 2020 CarswellOnt 4887, 2020 CanLII 26456 (S.C.C.).

*Bank of Montreal v. Smith*, 2021 SKQB 47, 2021 CarswellSask 124 (Sask. Q.B.) at paras. 31 and 32.



*(ii) Adopt Contract*

On the other hand, if the receiver chooses to adopt or perform such contracts or allows key employees to continue with the contracts, the receiver can be considered to have adopted the contracts with the result that the receiver will become liable for their performance.[153] In some instances, the receiver may sell the balance of the contract to a purchaser as in the case of the balance of an unexpired lease where the debtor was tenant. If the counter party objects, the receiver may proceed to the court for an order granting it permission to assign the contract. There is no jurisdiction under the *Bankruptcy and Insolvency Act* for a receiver to do so. However, as in the case of a trustee in bankruptcy or a debtor operating under the *Companies Creditors Arrangement Act*, the receiver by analogy can adopt the test in assigning the contract, namely

(a) whether the third party purchaser would be able to perform the obligations; and
(b) whether it would be appropriate to assign the rights and obligations to that person.[154]

If the receiver does nothing, that is, neither affirms nor disclaims a contract or does not continue to order goods or request services under an existing contract, the receiver is not liable for payments. In order to fix a receiver with the liability, the receiver must expressly or by implication on the facts affirm the contract.[155]

If the receiver does nothing, it is possible for third parties to seek leave and bring an action for specific performance of the contract against the receiver where the contract is substantially completed. However, the court will not grant such an order if the receiver has to supply further work or service on the contract.[156] The extent of such further work or service remains to be debated as

[153] *General Motors Corp. v. Peco Inc.* (2006), 19 C.B.R. (5th) 224, 15 B.L.R. (4th) 282, 2006 CarswellOnt 987 (Ont. S.C.J.).

[154] Section 84.1 of the *BIA* and section 11.3 of the *CCAA*. See *Re Urbancorp Cumberland 1 GP Inc.* (2020), 86 C.B.R. (6th) 125, 2020 ONSC 7920 (Ont. S.C.J. [Commercial List]) where the court also took into consideration the amount of the purchase price. The court made reference that its jurisdiction under subsection 243(1)(c) of the *BIA* [the court may take any other action that the court considers advisable] and section 100 of the *Courts of Justice Act* [power to grant a vesting order] were broad enough to give the court jurisdiction to make such an order.

[155] *Re Pope & Talbot Ltd.* (2009), 50 C.B.R. (5th) 99, 2009 BCSC 17, 2009 CarswellBC 88 (B.C. S.C.). Distinguished in *Bank of Montreal v. Grafikom Ltd. Partnership* (2009), 59 C.B.R. (5th) 90, 2009 CarswellOnt 6162 (Ont. S.C.J.) where a former employee authorized a payroll company to issue cheques to employees without the receiver's knowledge, direction, or authority on the day the receiver was appointed. In this case, the court concluded that the receiver was not liable for the payments.

See also *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.) at para. 33 where the court held that it would not order specific performance of a contract where to do so would be akin to a mandatory order requiring the receiver to borrow money.

[156] *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 (B.C. S.C. [In Chambers]). Followed in *bcIMC Construction Fund Corp. v. Chandler Homer Street*

# TAB 2

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***North Bend Ventures Ltd. v. Timberland Helicopters Inc.***, 2010 BCSC 1907

Date: 20101215
Docket: H101529
Registry: Vancouver

Between:

**North Bend Ventures Ltd.**

Petitioner

And

**Timberland Helicopters Inc.**

Respondent

- and -

Docket: S092753
Registry: Vancouver

Between:

**Forest & Marine Financial Limited Partnership**

Plaintiff

And

**Timberland Helicopters Inc., H.D. Heliservices Ltd., St. Lima Holdings Ltd., Longridge Pine & Timber Co. Ltd., Brian Dunn**

Defendants

Before: The Honourable Madam Justice Fenlon

## Oral Reasons for Judgment

Counsel for the Petitioner/Plaintiff: A. Brown

Counsel for the Respondent/Defendants: S.R. Ross

Place and Date of Hearing: Vancouver, B.C. December 6 and 10, 2010

Place and Date of Judgment: Vancouver, B.C. December 15, 2010

[1] **THE COURT**: This case involves a dispute between a receiver and a creditor over whether a mortgage of lease granted by the debtor continues to be valid.

**Background**

[2] North Bend Ventures Ltd. obtained a mortgage of lease from Timberland Helicopters Inc., a company that carried on business near Courtenay hiring out a helicopter for use in logging and fighting forest fires. Timberland leased land from the City of Courtenay, and constructed a hangar on it to house its helicopter.

[3] The lease was for a term of five years commencing January 1, 2005 and expiring December 31, 2009, with three additional terms of five years each. Timberland was to exercise the renewal option by giving written notice to the landlord six months prior to the expiry of the term.

[4] Timberland ran into financial difficulties, and fell into arrears on the North Bend mortgage. North Bend commenced foreclosure proceedings, and registered a Certificate of Pending Litigation against the leased lands.

[5] At the same time, another creditor, Forest & Marine Financial Limited Partnership, obtained a court order in April 2009, appointing Abakhan & Associates Inc. as receiver of Timberland, with power to manage, operate, and maintain control of Timberland's assets and business.

[6] The six-month redemption period in North Bend's foreclosure action expired on June 15, 2009. The receiver asked North Bend to delay taking an order absolute, because the receiver needed the hangar until the helicopter, Timberland's main asset, was sold. The receiver was hoping to obtain new financing for the company, and to sell the helicopter and hangar in an orderly way to the benefit of all creditors.

[7] The receiver was not paying close attention to the details of the mortgage or the lease, and did not exercise the option to renew the lease before the June 30 deadline. The receiver now says that in any event it would not have done so.

[8] On December 7, 2009, North Bend served a notice of motion on the receiver, advising that North Bend was again seeking an order absolute of foreclosure. The receiver convinced North Bend to adjourn their application until March 31, 2010, in exchange for the receiver paying North Bend $10,000. The receiver continued in possession of the leased land after December 31, and continues to occupy the lands to this day.

[9] In about April 2010, the receiver took the position that North Bend's mortgage security had come to an end on December 31, when the lease expired. I note parenthetically that North Bend raised concerns about the receiver's conduct in encouraging North Bend to defer foreclosing on the mortgage of lease until after the term of the lease expired on December 31, thereby putting North Bend in the position of having to argue about whether the mortgage interest continued. For its part, the receiver says it was up to North Bend's lawyer to be aware of the renewal date in the lease, and to take steps to preserve North Bend's security. Although those issues were addressed to some extent by the parties in the hearing before me, they are not issues that I need to decide today.

## Issue

[10] As I noted at the outset, the main issue in this application is whether the mortgage of lease is a valid, subsisting and enforceable charge against the hangar lands.

## Analysis

[11] I begin by considering the nature of a mortgage of lease, which is a relatively rare form of security. The underlying leasehold estate is finite. It will generally end at the expiration of the term of the lease, and is liable to being terminated prior to that date. If the lease terminates and ceases to exist, the mortgagee's interest is terminated, and also ceases to exist. Upon termination of the lease, the leasehold mortgagee is left with no interest in the lands, and accordingly no security for the

debt owed to it, since if the lease is terminated there is nothing to foreclose, and nothing to redeem: *Falconbridge on Mortgages,* 5th ed., paras. 6:60 and 6:70.

[12] On the facts of this case, has the Timberland lease been terminated? The receiver says it has been terminated, for two main reasons: First, because the term of the lease expired on December 31, 2009 and was not renewed. And second, because the receiver entered into a new lease with the City, which replaced and necessarily terminated the previous lease between Timberland and the City. I will address each of these arguments in turn.

### 1. Did the lease terminate on December 31 because it was not renewed?

[13] A lease does not cease to exist when its term expires if the tenant continues in possession with the consent of the landlord.

[14] In *Guardian Reality Co. of Canada v. John Stark & Co.* (1922), 64 S.C.R. 207 the landlord sought to have the tenant expelled from the premises it occupied under a five-year term lease. The lease contained an option to renew for an additional five-year term. The tenant failed to renew, but continued in occupancy with the consent of the lessor for a period of time. The tenant purported to renew the lease for another five years.

[15] Mr. Justice Duff rejected the landlord's argument that the tenant did not have a right to exercise the option to renew once the lease had expired. While this decision has more to do with whether the lessee is able to exercise a right to renew after the expiry of the original term, it is clear from the reasoning that, where the lessee continues in occupancy with the consent of the lessor, the lease does not terminate, since it would not be possible to rely on the renewal terms of the lease if it had ceased to exist when the original term ended.

[16] In similar vein is *0723922 B.C. Ltd. v. Karma Management Systems Ltd. (c.o.b. Madame Cleo's)*, 2008 BCSC 492. In that case, the landlord brought a petition for a writ of possession of the commercial premises leased by the tenant.

The original term was for five years. The tenant entered into a renewal agreement following that, but the agreement was found to be invalid.

[17] Madam Justice Ross, in light of the invalid extension agreement, found that the tenant continued to occupy the premises on a month-to-month basis, and that the landlord could terminate the lease by giving notice. These decisions confirm that a lease does not terminate on expiry without something more when the tenant remains in possession. That something will generally be either a call on the tenant by the landlord to renew, or notice by the landlord that the lease is going to be terminated.

[18] The City, in the case before me, did not at any point terminate the lease or demand vacant possession of the leased lands. To the contrary, the City permitted the receiver to continue in possession after December 31. This is consistent with the receiver overholding under the lease. If this is the case, the lease continued in existence as did the mortgage of lease. But the receiver says that was not the case. The receiver relies on its second argument that the lease terminated because the receiver entered into a new lease with the City, which necessarily replaced and put an end to the previous lease with Timberland.

### 2. Did the lease terminate because the receiver entered into a new lease?

[19] Determining whether the receiver was overholding or had entered into a new lease with the City requires a careful review of the facts and circumstances.

[20] I begin by noting that a court-appointed receiver must elect whether to adopt or disclaim executory contracts entered into by the debtor company. The receiver was appointed on April 14, 2009. In May, the City asked the receiver about rectification of the breaches of the Timberland lease. The receiver wrote back confirming that it was responsible “for all payments since April 14, 2009, pertaining to ongoing operations.” The receiver asked the City to provide it with all appropriate billings.

[21] On December 16, Joy Chan, the property manager for the City who was responsible for the Timberland lease, wrote to the receiver asking about payment of property tax arrears and legal fees due under the lease. She stated:

> The lease expires as of December 31, 2009. Will these amounts be settled by the end of the year? Otherwise, the City will have no interest in renewing the lease.

[22] In response, the receiver agreed to pay the property tax arrears and legal fees. The receiver also agreed to prepay the next year's rent. The receiver says that these payments did not amount to an affirmation of the Timberland lease. He says the arrears were paid up only to induce the City to continue negotiating a new lease between the receiver and the City.

[23] However, in light of the receiver's continued possession of the leased lands and use of the hangar from May 2009 to date, and the absence of any evidence of disclaimer, I find that the receiver affirmed the lease, and paid the sums due to the City in accordance with the contractual obligations of Timberland under that lease. It follows that the receiver had not entered into a new lease before December 31, 2009. It remains only to decide whether the receiver entered into a new lease on a month-to-month basis after that date, or continued to overhold under the original Timberland lease.

[24] The property manager for the City informed both counsel for the receiver and for North Bend, in a conversation that took place about one week prior to the hearing of this application, that she understood that the City had agreed to the receiver overholding under the Timberland lease, and a new lease with the receiver was never entered into.

[25] Somewhat to the contrary is the evidence of the solicitor for the City, Charles Allen, who provided a draft letter to both counsel summarizing his understanding of the transaction between the receiver and the City. In that letter, he said:

> I can state with perfect certainty that the City of Courtenay never considered the possibility that the receiver's continued occupancy of the property could

> be legally considered an overholding, under the Timberland lease. I can also state with perfect certainty that this issue was not considered, because it simply did not matter to the City of Courtenay's interests. Nor is the City of Courtenay concerned about the resolution of the issues between the receiver and North Bend, other than a resolution be achieved.

[26] Mr. Allen’s view is only somewhat contrary to Ms. Chan's because the thrust of Mr. Allen's statement is really that in his view the City was not turning its mind to the issue at all. This evidence is not particularly helpful, and I place little weight on what Ms. Chan and Mr. Allen thought was happening at the time. Neither the project manager's nor the lawyer's view of the legal arrangements between the receiver and the City is determinative. I must consider the evidence and decide that issue based on the evidence as a whole.

[27] I return then to a review of the evidence. As I have noted, on December 16, Ms. Chan advised the receiver that the lease was expiring at the end of December. She told the receiver that the City would have no interest in renewing the Timberland lease unless the property tax arrears and legal fees were paid.

[28] On December 18, Ms. Chan sent the receiver a copy of the lease with Timberland and told the receiver that the City planned to enforce Article 9 of the lease, after December 31. That section requires the tenant to remove its hangar from the land.

[29] On December 24, the receiver wrote to "get a handle on the figures" owed. He set out the outstanding arrears of taxes and legal fees under the original term of the lease, and then referred to both a first-year lease payment, and first-year property taxes and utilities, giving a total of $31,078.03 as the sum to cover all of these categories. He asked Ms. Chan to confirm if those numbers were correct.

[30] Within the hour, Ms. Chan replied that the figures were correct. The effect of her communication is that the lease would be renewed if three preconditions were met: First, the arrears under the original term were paid by December 30, 2009; second, all monies due under the first year of the lease were paid in advance of the lease being executed; and third, City Council approved the market rate, and the

lease itself. (The third precondition reflects the obligation of the City under Section 26 of the Community Charter.)

[31] Seven minutes later, still on December 24, the receiver wrote back to Ms. Chan asking "to confirm that payment of the indicated $31,078.03 by December 30, 2009 will ensure renewal of the lease".

[32] I conclude from this exchange that the parties were, at least as of December 24, contemplating a renewal of the original lease, despite the fact that the receiver had not given notice of intention to renew by June 30. Ms. Chan used language of renewal when she initiated the negotiation on December 16. The receiver also referred to a renewal of the lease in its communication to the City on December 24. The receiver asserts that the parties could not have been discussing a renewal of the lease on December 24, because Ms. Chan described the arrangement as a five-year lease with an additional five-year option to renew. The receiver says this is inconsistent with the original lease, which provided for a five-year term with two more five-year options to renew after the first renewal.

[33] However, there were many aspects of the proposed renewal that were consistent with the lease, including rental rate, property taxes and utilities, and payment in advance. It is open to a tenant and landlord, on renewal of a lease, to negotiate changes to its terms if they so wish.

[34] In any event, the Christmas break then ensued. On December 29, in response to the receiver's December 24 request for confirmation that payment of the $31,000 by December 30 would ensure renewal of the lease, Ms. Chan wrote that the lease would have to be approved by council, as this is a municipal bylaw. She advised that she could provide a letter of intent, but said the letter would state that the lease is subject to counsel approval.

[35] On December 30, 2009, the receiver advised that he would "run this by the financiers this morning" and get back to her. Less than an hour later, the receiver

asked Ms. Chan to provide the letter of intent she had described, so that he could get the financing approval "and we can hopefully resolve this today".

[36] The latter reference is presumably explained by the City's earlier advice that it would not have an interest in renewing the lease unless the payments were received by year-end.

[37] On January 13, 2010, the receiver paid North Bend $10,000 to adjourn its foreclosure application to March 31, 2010. This is evidence that the receiver believed that North Bend's security was still extant, and that the lease had not been terminated. The receiver now says that it should not have paid that money at all -- he did not realize until February that the mortgage of lease had actually come to an end along with the Timberland lease on December 31. In my view, however, the receiver's conduct at the time is a more reliable measure of what was going on with the lease, than is a retrospective analysis.

[38] There is no doubt that the receiver was trying to conclude a long-term lease with the City (although it is not clear whether that lease was to be a new lease or a renewal under the Timberland lease). It is also common ground that this did not occur, because the receiver could not meet the City's preconditions to such a lease: City Council approval and removal of North Bend's C.P.L.

[39] In early 2010, the City's lawyers sent three letters to the receiver, reminding him of these conditions, and the fact that the lease could not go to City Council for approval until the C.P.L. and judgment had been removed from title. As I have noted, the receiver takes the position that, in the gap between December 31 (the expiry of the original term of the lease) and the expected formalization of the new lease with the City once the preconditions had been met, he had entered into a new agreement with the City to lease the lands on a month-to-month basis. The receiver says that must be so, because a court-appointed receiver contracts as a principal, rather than as an agent for the debtor. It follows, says the receiver that the arrangement it entered into with the City after December 31 is between different parties, so it cannot be part of the original lease. In my view, the receiver's personal

liability under new contracts it enters into or under old ones it confirms is not persuasive either way. It is a neutral factor.

[40] I have already found that the receiver confirmed the original lease. As with any executory contract which is not personal in nature, the fact that the entity who is to fulfill the contractual obligation has changed does not bring an end to the contract. It would have been open to the receiver to give notice to renew under the lease, prior to June 30. It was also open to the receiver to overhold under the lease, beyond December 31.

[41] The receiver next says it cannot be overholding under the lease, because its arrangement with the City is inconsistent with the overholding provisions at Article 34 of the lease. That article specifics that an overholding “shall, in the absence of a written agreement to the contrary, be from year to year, and subject to all the terms and conditions of the lease.”

[42] The receiver acknowledges that the agreement with the City was unwritten, and that the rent was prepaid for a year in accordance with Article 34 of the lease. But it says the tenancy was not year to year, but rather month to month.

[43] The tenancy was month-to-month, says the receiver, because, despite agreeing to pay the sums due one year in advance, the receiver obtained from the City the concession that, if the receiver sold the helicopter and no longer required the hangar, the City would return the lease payment on a prorated basis. The receiver says this is equivalent to a month-to-month lease and inconsistent with a one-year lease under the overholding provision.

[44] I have concluded that this arrangement is not inconsistent with overholding under the lease. It is open to a tenant and landlord to amend the terms of the lease they have entered into. The receiver complied with the overholding provision initially by paying one year in advance. It was within the City's purview to relax that requirement and grant a concession to the tenant if it wished.

[45] I return then to the question: was the receiver overholding under the Timberland lease, or had it entered into a new lease as of January 2010? I summarize some of the key facts:

1. The City had expressed an intention to terminate the Timberland lease and demand vacant possession but did not do so, because the receiver confirmed the lease and met the obligations of Timberland under that lease.

2. The City and the receiver, in December 2009, were discussing the terms of a renewal.

3. The City did not take any steps to terminate the lease when the term expired.

4. The receiver continued in possession with the consent of the landlord after the term of the lease expired.

5. The City and the receiver were negotiating a long-term lease, but had not yet put anything in writing.

6. In accordance with the overholding provision in the lease, the City paid in advance a full year's rent, taxes and utilities at the rates contained in the lease.

7. The parties continued in the first part of 2010 to contemplate a written lease agreement, once the C.P.L. and another judgment charge were removed from title, and City Council approval was obtained.

8. The negotiations became bogged down because the receiver could not get the financing it expected to pay out North Bend and remove the C.P.L.

[46] Considering these facts and all of the evidence before me, I conclude that it is more probable than not that the receiver continued in possession of the leased land on an overholding basis, pending conclusion of a formal lease with the City.

[47] As I have noted, there is some ambiguity on the evidence as to whether, as of April 2010, the City and the receiver intended to enter into an entirely new lease or were still negotiating a renewal, but either way, the new arrangement was never concluded, and the object of those negotiations does not affect the overholding that began in January 2010, and which continues to this day. It follows that the Timberland lease has not been terminated, and that the mortgage of lease continues to be valid.

[48] In conclusion, I make the following orders:

1. In response to the receiver's application for directions in the Forest & Marine action, S092753, I declare that the mortgage of lease is valid.

2. North Bend's application to lift the stay of proceedings and the receivership order filed on December 22, 2009 is granted.

3. North Bend may proceed with its application for an order absolute of foreclosure in action number H101529.

4. North Bend's application to cross-examine George Abakhan on his affidavit number one, dated July 7, 2010 was not pursued, and is dismissed.

North Bend would, in the usual course, be entitled to its costs at Scale B, but I will hear any submissions from the parties that they wish to make.

[SUBMISSIONS RE: COSTS]

[49] **THE COURT**: I am going to order that North Bend is entitled to its costs of this application at Scale B. There is no suggestion that the receiver has not been acting in a proper manner, but the fact is that North Bend has had to incur additional

expense in coming to court. Given the outcome, it does seem appropriate to award North Bend its costs, at Scale B, both for the application before me, and the application before Master Tokarek on November 19, 2010. I make that order.

[50] I will add that the order for costs is made against the receiver in its capacity as receiver, and not personally.

The Honourable Madam Justice L.A. Fenlon

# TAB 3

**COURT FILE NO.: 05-CL-5957**
**DATE:** 20060217

**SUPERIOR COURT OF JUSTICE - ONTARIO**



**RE:** General Motors Corporation (Applicant) and Peco, Inc. (Respondent)

**BEFORE:** Justice Cumming

**COUNSEL:** ***Craig Hill***, for Mantum Corporation

***Rachelle Moncur***, for the Receiver Respondent

**DATE HEARD:** February 16, 2006

**E N D O R S E M E N T**

## The Motion

[1] The moving party, Mantum Corporation ("Mantum"), seeks an order that Zeifman &Partners Inc., the Receiver and Manager of PECO, Inc. (the "Receiver"), pay to Mantum 35% of a refund of $234,577.77 (the " Refund") recovered from the Worker's Safety and Insurance Board ("WSIB"), held by the Receiver

## The Evidence

[2] There is common ground the Refund resulted solely as the result of the extensive work performed by Mantum over several years. Mantum has a contract with PECO dated March 23, 2000, whereby Mantum would determine whether PECO was entitled to Workers' Compensation refunds due to overpayments. The contract provided:

> …Mantum will be paid a fee of 35% of amounts recovered and/or savings obtained for all previous years….
> Fees become payable at the time refunds/savings are realized by way of cheque, credit or reduction in accrued amounts payable.

[3] This work culminated in a successful appeal conducted by Mantum on behalf of PECO before the Workplace Safety and Insurance Appeals Tribunal November 30, 2004 with the 10 page decision dated March 30, 2005 allowing PECO's appeal. There remained the precise quantification of the Refund, to be determined by the WSIB after a typical audit by WSIB conducted after any decision affecting classification.

[4] PECO did not have all the requisite historical records. Mantum was successful by June 15, 2005 in convincing WSIB to process PECO's adjustments determining the Refund without requiring the usual source documents. Mantum continued in discussions with the WSIB, eventually resulting in a determination about August 22, 2005 that the Refund was quantified at $234, 577.77, after a re-calculated reduction of some $150,000.00 by the WSIB from the calculation of $404,798.34 the WSIB had initially made July 15, 2005.

[5] Of this amount of $234,577.77, Mantum would be entitled to its fee of 35% thereof. Mantum picked up the cheque for $234, 577.77 on September 1, 2005 with the authority of PECO.

[6] Mantum presented an invoice September 2, 2005 but was told by the Receiver September 7, 2005 that Mantum was simply an unsecured creditor of PECO.

[7] There is common ground that any unsecured creditors of PECO would have no recovery in any bankruptcy proceeding, PECO being insolvent albeit not in formal bankruptcy.

[8] On the initiative of General Motors Corporation ("GMC") as a secured creditor, the Receiver had been appointed by Court Order June 24, 2005 pursuant to s. 101 of the *Courts of Justice Act*, the Receivership Order having the terms of a standard, normative order.

[9] The powers pursuant to the Receivership Order included the power to "manage, operate and carry on the business of the Debtor…."

[10] The Receiver reportedly learned of the possibility of a refund in early July, 2005 but did not know of Mantum's role until August 11, 2005.

[11] Mr. Terrence J. Ryan, the principal of Mantum, had learned August 4, 2005 from Mr. Glen Retty, the Controller of PECO, that PECO was in receivership but was told that Mantum would be paid in full for his services. Mr. Retty had the authority from the Receiver to make such a commitment to Mantum although the Receiver did not know the commitment was made, nor as stated above, know of Mantum's involvement in the refund process until August 11, 2005.

[12] The Receiver, aware in early July that there was the possibility of a refund, had the opportunity from that point onwards to determine the precise status and arrangements in respect of the refund process.

**The Law**

**Paragraph 11 of the Receivership Order**

[13] In my view, in operating PECO, the Receiver's surrogates, being Mr. Retty and Mr. Glen Rogers, both key employees of PECO, had the authority to and did bind the Receiver, after the creation of the Receivership, to Mantum's continued role in providing services in pursuing a refund.

[14] Moreover, the Receiver did not at any point after learning of Mantum August 11, 2005 and within a few days thereafter receiving from Mantum a copy of its contract with PECO, dissuade Mantum from continuing its efforts by indicating that Mantum's continued involvement was no longer wanted and its payment for services was at risk.

[15] Paragraph 11 of the Receivership Order, effectuating the continuation of services to PECO, provides for full payment by the Receiver for the supply of services after the date of the Order, June 24, 2005.

[16] Although the bulk of Mantum's work was before June 24, 2005, there was significant work done right into late August. Moreover, Mantum's fee accrued only at the point of actual recovery of the Refund, being September 1, 2005. Mantum was entitled to the fee only at the point of recovery and simply for achieving that recovery. It did not matter how much time or effort was expended or for how long. Accordingly, in my view, given the nature of the contract and the evidentiary record, the Receiver adopted the contract between PECO and Mantum by the actions and conduct of its authorized surrogates. I find that paragraph 11 of the Receivership Order applies.

**Unjust Enrichment**

[17] In my view, and I so find, Mantum is also entitled to recovery on a basis of unjust enrichment.

[18] There is an *enrichment*, in that the Receiver has in hand 100% of the Refund rather than 65%, being all to which PECO was entitled. There is a corresponding *deprivation* inasmuch as Mantum is short the 35% of the Refund to which it is entitled.

[19] It is agreed the only possible issue in respect of a sustainable claim for unjust enrichment is whether there is the absence of a *juristic reason* for the enrichment.

[20] An obligation which leads to the enrichment – whether the obligation arises from a debtor-creditor relationship or other contractual context, or whether it arises by way of the principles of common law or of equity or by way of statute- may constitute a juristic reason. *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O. R. (3d) 717(Ont. Gen. Div.) at 769.

[21] Turning to the situation at hand, given its terms, the contract between Mantum and PECO does read literally as though the obligation of PECO is to pay Mantum upon Mantum providing the service of obtaining the Refund to the credit of PECO. No part, ie. 35%, of the Refund is paid by the WSIB directly to Mantum. By the contractual terms, the Refund in its entirety is paid to or

credited to the account of PECO. Thereupon, Mantum is entitled to receive a fee of 35% of the amount of the recovered Refund from PECO.

[22] However, the literal contractual arrangements must be considered within the context of the overall circumstances.

[23] Mantum and PECO had agreed to a contractual arrangement which in substance was a contingency agreement whereby there was to be a sharing on a fixed formula of whatever quantum resulted from the successful venture.

[24] Contracts ultimately are bundles of reciprocal reasonable expectations, created by the exchange of promises. Such reasonable expectations are determined on an objective test. Turning to the instant situation, on an objective test the reasonable expectations of the parties were that if Mantum was successful there would be a sharing of the Refund. The parties had as reasonable expectations that PECO had a 65% interest in the Refund fund and Mantum had a 35% interest in that fund. Indeed, as seen from the evidentiary record, on a subjective test these were the reasonable expectations held by both Mantum and PECO, with each party knowing full well the reasonable expectation of the other.

[25] PECO clearly did not have any expectation of retaining the 35% interest of Mantum in the Refund. GMC and the Receiver, standing in PECO's shoes, can have no such expectation.

[26] Second, the entire Refund is identifiable as a discrete fund, received from the WSIB via Mantum and held to date by the Receiver. That is, the monies have never become part of the general funds or assets of PECO.

[27] Third, in reality, the contest for the 35% is between Mantum and only a single creditor of PECO, being GMC as a secured creditor. This is not a situation seen in an insolvency whereby the monies in dispute would be shared amongst creditors of a bankrupt if the moving party, Mantum, was unsuccessful.

[28] If Mantum is not entitled to its claimed 35%, then the secured creditor receives the enrichment of that amount, ie. the secured creditor through the Receiver receives 100% of the Refund. No creditor of PECO, other than GMC, is disadvantaged by Mantum receiving the 35% of the Refund in dispute. To not give Mantum the 35%would result in a windfall to GMC.

[29] Fourth, as stated above, the Receiver through its surrogates in operating the business authorized Mantum to continue in its efforts after the creation of the Receivership and assured Mantum it would receive its 35% if it were successful.

[30] Considering all of these factors, in my view, and I so find, there is no juristic reason for the Receiver to retain the 35% of the Refund in dispute. Mantum is entitled to its claimed 35% of the Refund plus any interest earned thereon in the interval from its receipt to payment pursuant to the Order implementing this decision. This result is consistent with principles of equity and is the only result possible that is equitable and fair to all parties.

**Disposition**

[31] For the reasons given, the motion is allowed. I impose a constructive trust upon the Refund in respect of Mantum's interest therein and entitlement thereto. I order the Receiver to pay Mantum forthwith its entitlement in the Refund that is subject to the constructive trust.

[32] I may be spoken to as to costs.

_____

CUMMING J.

**DATE:** February 17, 2006

# TAB 4

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Pope & Talbot Ltd. (Re), 2009 BCSC 17**

Date: 20090122
Docket: S077839
Registry: Vancouver



**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended**

**AND**

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"**

**AND**

**AN APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended**

Before: The Honourable Chief Justice Brenner

## Reasons for Judgment

| | |
|---|---|
| Counsel for Pope & Talbot: | K. Jackson |
| Counsel for PriceWaterhouseCoopers | V. Tickle |
| Counsel for Westcoast Energy Inc.: | F. Dearlove |
| Counsel for Ableco: | P. Rubin |
| Date and Place of Trial/Hearing: | November 19, 2008<br>Vancouver, B.C. |

[1] The issue on this application is whether PricewaterhouseCoopers (“PWC”), the court-appointed receiver of Pope & Talbot Ltd (“P & T”) is required to pay contractual standby charges to Westcoast Energy Inc. (“Westcoast”) in respect of natural gas supply that continued to be available at two of the P & T mills from the date the receiver took possession until the mills were sold to third party purchasers.

[2] P & T used the firm transportation services of Westcoast under the Firm Service Agreement (“FSA”) to supply natural gas to its mills at Mackenzie and Fort St. James. Firm transportation service entitled P & T to a specified maximum daily capacity in the relevant zone of Westcoast’s pipeline system. A fixed monthly charge known as the “Demand Toll” was payable in respect of this available capacity and a variable charge (the “Commodity Toll”) calculated on the basis of gas actually delivered was also payable.

[3] On May 10, 2008 the Receiver was appointed by the court as receiver of the assets and undertakings of P & T, but by the terms of the order was prohibited from taking possession of the two mills and from operating the business formerly carried on by P & T at the mills. On June 16, 2008 the court expanded the receivership to include the mills, but the receiver continued to be barred from operating the mills.

[4] The Fort St. James mill sale completed August 22, 2008; the Mackenzie mill sale closed September 22, 2008. At no time from May 10 to September 22, 2008 did the receiver ever operate either mill.

[5] Under the terms of the receivership order all suppliers including Westcoast were obliged to continue their contractual obligations to supply goods and/or

services to Pope & Talbot as “may be required by the receiver”. However since it never operated either mill, PWC never used natural gas from Westcoast.

[6] On June 23, 2008 Westcoast’s counsel wrote to the receiver. After noting the provision of the receivership order requiring Westcoast to continue providing the “firm service”, its counsel asked for confirmation that the receiver would honour Westcoast’s invoices. PWC never replied; periodic billings from Westcoast were never paid.

[7] The amount outstanding from May 10 to September 30 is $147,190.01.

[8] On June 30, 2008 as part of P & T’s post filing creditors claim process, Westcoast filed a proof of claim seeking $44,855.78 for services for the month of April and May 1 to 9, 2008 in respect of unpaid firm service charges for the pre-receivership ***CCAA*** period. It also filed a contingent claim for $548,249.75 for the period May 10, 2008 to October 31, 2009 (the end of the term of the FSA) in the event the receiver sought to terminate the FSA.

[9] On July 24, 2008 the receiver issued a notice of disallowance in respect of the contingent claim; it allowed the pre-receivership claim.

[10] On August 18, 2008 the receiver advised Westcoast of the status of its efforts to sell both mills. It raised the possibility that if sold, the purchasers might want to take an assignment of the supply contracts with Westcoast. Sales of both have now closed; neither purchaser has requested an assignment.

[11] The receiver denies liability to pay on the basis that no natural gas was ever supplied during the billing period and that it never affirmed the contract. It contends that since no natural gas was being supplied, it was not obliged to make an election to affirm or disclaim the contract until called upon to do so by Westcoast. No such demand was ever made.

[12] Westcoast's response is that it was entitled to treat the contract as on foot until such time as the receiver made an election. Since the receiver never disclaimed the contract Westcoast says it was entitled to treat the contract as in good standing and that it is entitled to be paid the firm service charges. Westcoast billed periodically under the terms of the contract, but its accounts were never paid by the receiver.

[13] The issue is this: on these facts, which party had a positive duty to act? Did the receiver have the obligation to assess this contract and make a decision whether to affirm or disclaim and notify Westcoast, or did Westcoast have a duty to call on the receiver to make the election and, in the absence of a response, apply to the court to force the receiver to make an election? Here neither party took such a step during the billing period. The question is: which party should bear the loss for its failure to act?

[14] It is well settled law that, in the absence of an affirmation, a court appointed receiver is not bound by existing contracts made by the debtor. See ***New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.,*** 2005 BCCA 154, 251 D.L.R. (4$^{TH}$) 328.

[15] In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication. Here there was clearly no express affirmation.

[16] The question is whether, on the particular facts of this case, the receiver's silence or its August 18 letter constituted an implied affirmation.

[17] Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

[18] In this case, no goods were actually being supplied. While the contract did require the payment of a standby charge known as the Demand Toll, the mills were never operated and hence no natural gas ever flowed. By sending its invoices and the June 23 letter, Westcoast gave clear notice to the receiver that it expected to be paid for its standby charges. But it received no response to its letter and no payment of its invoices.

[19] In the August 18 letter, PWC did not agree to pay the Demand Tolls. What it did was to advise Westcoast that sales for the two mills were pending. PWC raised

the possibility that the outstanding amounts might be paid, in whole or part, by such purchasers.

[20] In these circumstances can it be said that the receiver's conduct constituted affirmation of the contract?

[21] In my view, on the rather unusual facts of this case where no actual goods or services were being supplied, the receiver did not come under an obligation to affirm or disclaim the contract until required to do so. In a receivership of this nature a receiver is in the position of having to assess many contracts and to decide whether to continue or terminate them.

[22] If goods or services are being supplied, the receiver will be forced to complete this assessment and make its decisions within a reasonable time. But where no actual services or goods are being supplied, it is my view that the onus of taking a step rests with the other contracting party. It would have been a simple procedure for Westcoast to apply to the court for an order requiring the receiver to make its election. Other parties in this case did just that.

[23] Here the receiver never gave any indication of ever wanting supply from Westcoast. It never made any payments nor indicated any intention of doing so. At best it raised the possibility that either or both of the mill purchasers might make the payment indicated to Westcoast. It was open to Westcoast to cease providing the firm transportation services under the FSA and to terminate the contract (or if in doubt to seek an order from the court permitting it to do so). It never did this and accordingly its application will be dismissed.

[24] It is also clear that the receiver never had any intention of affirming this contract. That being the case it is apparent that this contract came to an end at a date prior to the date of this application. I will invite submissions from the parties as to when that effective date should be declared by this court.

"D. Brenner, CJSC"

The Honourable Chief Justice Brenner

**SCHEDULE "A"**

Pope & Talbot, Inc.

MacKenzie Pulp Land Ltd.

P&T Funding Ltd.

Penn Timber, Inc.

Pope & Talbot Lumber Sales, Inc.

Pope & Talbot Pulp Sales U.S., Inc.

Pope & Talbot Relocation Services, Inc.

P&T Power Company

P&T Finance Three LLC

# TAB 5

S.C.A. No. 02376

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

**Jones, Hallett and Matthews, JJ.A.**

**BETWEEN:**

BAYHOLD FINANCIAL CORP. LIMITED
Appellant

- and -

THE CLARKSON COMPANY LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.
Respondents

Douglas Caldwell, Q.C. and Joel E. Fichaud for the Appellant

Harry E. Wrathall, Q.C. and Stephen Kingston for the Respondents

Appeal Heard: September 18, 1991

Judgment Delivered: December 2, 1991

**THE COURT:** Appeal dismissed with costs to the respondents to be taxed, per reasons for judgment of Hallett, J.A.; Jones and Matthews, JJ.A. concurring.

**HALLETT, J.A.:**

This is an appeal from a decision of Kelly J. dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited (Community) which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver/manager to take possession of the assets of Community; that is the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver/manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist

season and thus obtain a good price for the hotel as a going concern. The hoped for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981 at $623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for $200,000.00. The sum of $157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of $42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at $109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of $63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

Following the purchase of the hotel by Bayhold at the sheriff's sale, it went into possession and in late 1982 allowed Mr. Rahey (with the approval of Clarkson) to operate the hotel. In the spring of 1983 Bayhold entered into an agreement with Equitas Investment Corp. (Equitas) to sell the hotel for the sum of $1,000,000.00 ($50,000.00 down and the balance secured by two mortgages back to Bayhold).

The agreement of purchase and sale provided for the transfer of the real property free from encumbrances but insofar as the chattels were concerned, Bayhold agreed only to transfer its interest. The agreement provided that Bayhold did not warrant the condition or even the existence of the chattels although there was a list of chattels initialled by the parties. The chattels were, of course, located in the hotel and included all the furnishings.

The agreement of sale was to close on May 2, 1983. Bayhold was aware that under the Burchell order, Clarkson had a prior charge against the chattels for $63,117.50. Despite repeated requests by Clarkson to Bayhold to purchase the chattels, Bayhold did not respond. Clarkson threatened to remove the chattels. On April 29, 1983, Clarkson engaged a private security firm and the chattels were removed from the hotel. On May 2, 1983, Equitas offered to buy the chattels from Clarkson for about $30,000.00. The respondent, Mr. Scouler, the chartered accountant with Clarkson who was Clarkson's directing mind in this receivership, refused the offer. He felt the chattels were worth about $150,000.00. He advised Equitas it would have to purchase the chattels at auction. On May 2, 1983, Equitas advised Bayhold it would not complete the purchase. Bayhold did not re-open the hotel and on November 29, 1983, sold it for $450,000.00 to a Sydney businessman.

Bayhold commenced action against Scouler, Clarkson and its successor firm, the respondent Ernst and Young Inc., claiming damages for breach of duties as receiver/manager up to a maximum amount of $808,339.21 plus prejudgment interest from November 29, 1983 (the date Bayhold sold the hotel) to April 3, 1990 of $519,425.47. The learned trial judge dismissed all the claims, essentially finding that Clarkson was not negligent in the performance of its duties. The appellant Bayhold identified six issues on the appeal; I will deal with each in the order raised by the appellant.

**Issue 1**

The appellant asserts that the respondents Clarkson, Scouler and Ernst Young are liable for damages to Bayhold for breach of fiduciary duty for failing to apply to the court in April 1981 after Clarkson as receiver/manager had borrowed in excess of $50,000.00. The appellant asserts that Clarkson was limited, pursuant to the terms of the receivership order, to borrow an amount not exceeding $50,000.00.

It is therefore relevant to look at the terms of the receivership order. It provided for a broad power of management as contained in Clause 3 of the order wherein it is stated:

> "3. THAT The Clarkson Company Limited, be and it is hereby appointed Receiver and Manager of the undertaking; property and assets of each of the Respondents, with authority to manage the business and undertaking of each of the Respondents, and to act at once and until further order of this Court."

Community was one of the respondents named in the receivership order.

Specific powers granted the receiver are set forth in Clause 6 of the order:

> "6. THAT the said Receiver and Manager be and it is hereby empowered from time to time to do all or any of the following acts and things until further order of this Court or a judge thereof:
>
> (a) To carry on and manage the businesses of all of the Respondents, in all phases whatsoever;
>
> (b) To enter into negotiations for the sale, conveyance, transfer, assignment, mortgaging or other disposition of the real property and/or shares of the Respondent Companies, owned, legally or beneficially, by any of the Respondents, in such manner and at such price as the Receiver and Manager, in its discretion, may determine,

provided that the Receiver and Manager may not enter into any agreement or commitment to sell, convey, transfer, assign, mortgage or otherwise dispose of the real property and/or shares of the Respondent Companies, without prior approval of the Court;

(c) To pay such debts of the Respondents, as the Receiver and Manager deems necessary or advisable to properly operate and manage the businesses of the Respondents and all such payments shall be allowed the Receiver and Manager in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents in priority to any other person, company, or corporation, secured or unsecured;

(d) For the purpose of carrying out the powers and duties hereunder, to employ, retain, or dismiss such agents, assistants, employees, solicitors and auditors as the Receiver and Manager may consider necessary or desirable for the purpose of preserving and realizing on the said property and assets of the Respondents, and carrying on the businesses and undertakings of the Respondents, and to enter into agreements with any person or corporation respecting the said businesses or properties and that any expenditure which shall be properly made or incurred by the said Receiver and Manager in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents, in priority to any other person, company, or corporation, secured or unsecured;

(e) To receive and collect all monies now or hereafter owing to the Respondents;

(f) To take such other steps as the Receiver and Manager deems necessary or desirable to preserve and protect the real and personal property of the Respondents, in its custody."

The court, pursuant to Clause 7 of the receivership order, authorized the borrowing of up to $50,000.00 which would be secured against the property and assets of all the respondents, which of course included Community. That clause of the order provided as follows:

"7. THAT for the purpose of exercising the powers and performing the duties hereunder, the said Receiver and Manager be and it is

> hereby empowered from time to time to borrow monies not exceeding $50,000.00 by way of revolving credit which may be borrowed and re-borrowed provided that the said limit is not exceeded at any time and that as security therefor the whole of the said properties and assets of the Respondents, together with all other assets and properties which may hereafter be in the custody or control of the said Receiver and Manager, do stand charged with the payment of the sum or sums so borrowed as aforesaid together with interest thereon in priority to all claims of the Applicant or any other person, secured or unsecured, by which the assets and properties of the Respondents may be encumbered."

The receivership was funded by Revenue Canada which advanced funds to Clarkson or reimbursed Clarkson for monies Clarkson borrowed from the Toronto Dominion Bank during the period Community was in receivership. By April 1981, Clarkson had borrowed in excess of $50,000.00. The appellant argues this was a breach of the terms of the order and therefore a breach of fiduciary duty that Clarkson, as receiver/manager, owed not only to the court but to all the creditors and the debtors. The appellant argues that Clarkson was required by law to go back to the court to obtain increased borrowing authority and that Clarkson's failure to do so deprived Bayhold of an opportunity to make representations to the court that there were other options the receiver/manager could pursue rather than continue with its strategy to keep the hotel open so as to take advantage of the hoped for increase in occupancy in the tourist season.

The premise for this argument is that a receiver/manager must obtain approval of the court before it exceeds the borrowing authorized by the court pursuant to a clause such as Clause 7 of the receiving order and that the failure to do so is a breach of a fiduciary duty that gives rise to the liability of a receiver/manager for unpaid amounts due to creditors of the debtor. In my opinion, that proposition is not valid. The purpose of Clause 7 of the receiving order and like clauses which are common in such orders was to authorize the receiver/manager to borrow up to $50,000.00 and with respect to such borrowings the receiver/manager would have a charge against the undertaking property and assets of the debtor in priority to other creditors. The only result of a failure to get approval for further borrowings would be that the receiver/manager would have no assurance that the court would retroactively grant the receiver/manager a prior charge against the assets for such excess borrowings. The failure to obtain court approval does not automatically result in the receiver/manager becoming personally liable for the existing contractual obligations of the debtor. In this case, Clarkson was being indemnified by Revenue Canada for funds borrowed to operate and manage the hotel business. The receiving order, read as a whole, shows that there was no prohibition against borrowing in excess of $50,000.00. The receiver/manager was given broad management powers and could borrow up to $50,000.00 and have a charge against the assets for such an amount. If the receiver/manager chose to borrow more without obtaining court approval, the only repercussion would be that

Clarkson would not have the comfort of a charge against the assets of the hotel for such excess borrowing.

Support for this conclusion is the following statement from **Receiverships** by Frank Bennett (the Carswell Company Limited, Toronto, Canada, 1985) where the author states at p. 128:

> " The receiver has no authority to borrow more money than has been authorized, including any overdraft position. If the receiver does not obtain a further order for borrowings, he may be prevented from being indemnified out of the assets for expenses incurred unless he can show that such expenses were proper and beneficial to the estate. If the receiver borrows in good faith but for an improper purpose, he will be denied indemnity.
>
> However, the receiver may bring a motion after the event for an order **nunc pro tunc**, but on such motion, the receiver must demonstrate that the borrowings were properly incurred and that he was justified in the circumstances in exceeding his borrowing limits. It will not be enough to show that the additional expenses were made in good faith and in the ordinary course of business.
>
> If there is no provision in the order authorizing the receiver to borrow moneys, the court may infer such power from the other provisions in the order, particularly the power to carry on the business."

Further at p. 216, the author states:

> “In the event that the receiver exceeds his borrowing power, or borrows without power to do so, he may be deprived of his right of indemnification out of the assets in receivership to the extent of such amount in excess of his authority. Irrespective of whether the receivership is private or court-appointed such borrowings may be unsecured or at best rank subsequently to any prior security unless they can be justified as necessary for the preservation of the property. While each case must be reviewed on an individual basis, it is not enough to show that the further liabilities had been incurred **bona fides** and in the ordinary course of business. Furthermore, if the debt is incurred on a speculative basis, the receiver will be denied his indemnity."

The decision of the Manitoba Court of Appeal in **Rothburg v. Federal Business Development Bank** (1979), 28 C.B.R. annotated 73, is illustrative that the courts regularly consider whether a receiver should be retroactively indemnified for exceeding the borrowing limits under clauses similar to Clause 7 of the receiving

order granted in the case we have under consideration. There are no cases cited by the appellant to support its position that the failure to return to court to have the court authorize borrowing in excess of $50,000.00 could result in the receiver/manager becoming personally liable for obligations under contracts including the liabilities accruing under mortgages that existed prior to the receiver/manager being appointed.

Insofar as the appellant's arguments focus on breaches of perceived duties of receiver/managers, it is important to consider what are the duties of a receiver/manager. The essential duty of a receiver/manager as an officer of the court is to discharge those duties prescribed by the order appointing the receiver/manager. (See **Parsons v. Sovereign Bank of Canada** (1913), A.C. 160). Bennett at p. 118 explains the extent of a receiver/manager's duties as follows:

> " Notwithstanding that the receiver and manager is an officer of the court, his fiduciary duty to all extends to a standard of care in the running of the business comparable to the 'reasonable care, supervision and control as an ordinary man would give to the business were it his own'. Where he fails to provide such a standard of care, he may be liable for his negligence."

That is the standard a receiver/manager's performance must measure up to before liability is imposed. The trial judge found that Clarkson was not negligent in the conduct of the receivership. There was ample evidence before the trial judge to support such a finding.

In summary, the receiving order gave the receiver/manager broad power of management. Read in the context of the receiving order and the law, Clause 7 did not prohibit Clarkson from borrowing in excess of $50,000.00 while operating the hotel. Therefore, there was no breach of duty giving rise to the liability that the appellant seeks to impose. Accordingly there is, in my opinion, no merit to the first issue raised by the appellant.

**Issue 2**

"Are the respondents liable to Bayhold for damages for breach of fiduciary duty for closure of the hotel on November 3, 1981?"

The clauses in the receivership order relevant to this issue are Clauses 3, 6(a), (b), and (f), which have previously been set out. In short, Clause 3 appointed Clarkson receiver and manager of the undertaking property and assets of Community with authority to manage the business until further order of the court. Under Clauses 6(a) and (b) there were broad and specific powers of management and under 6(f) Clarkson could take such steps as it deemed necessary or desirable to preserve and protect the real and personal property of Community. Clause 9 might also be of some relevance in that it provided that the receiver and manager

could apply to court from time to time for direction and guidance in the discharge of its duties.

It is clear from the order and not uncommon that the receiver/manager could not dispose of major assets without court approval. In this case, the receivership order provided that the receiver/manager could not dispose of the real property or the shares of Community without prior approval of the court. The question raised by the appellant is whether or not the receiver/manager could close the hotel without court approval where it was operating at a loss. The appellant asserts in paragraph 110 of the factum that the receivership order, paragraph 6(a), provided that Clarkson should:

> "...'until further order of this court . . . carry on and manage the business of all the Respondents, in all phases whatsoever'."

Counsel for the appellant argues from this provision that the closure without court approval offended the receivership order and constituted a breach of the receiver/ manager's fiduciary duties to Bayhold. Accordingly he asserts that the respondents are liable to Bayhold for the full amount that was owing on its mortgage as of the date of the foreclosure sale, plus prejudgment interest from that date, for a total claim in excess of 1.3 million dollars.

The receivership order does not state what the appellant asserts. Clause 3 provides for Clarkson's appointment as receiver/manager of the undertaking, property and assets of each of the respondents with authority to manage the business and undertaking of each of the respondents and to act at once and until further order of this court. Clarkson was empowered under Clause 6(a) until further order of the court to carry on and manage the business in all phases. The appellant's argument is that unless a further order of the court was obtained the receiver/manager had an obligation to continue to operate the hotel. The words of Clause 6 granted Clarkson the power to carry on the business. The clause did not oblige Clarkson to do so until further order of the court. There is a major distinction between a power and an obligation; this is the flaw in the appellant's argument. Furthermore, the receiver's general power of management seems to me to entail full scope of management responsibilities including, as provided for in paragraph 6(f), the right of the receiver/manager to take such steps as it deems necessary or desirable to preserve and protect the real and personal property of Community. The only power given to the receiver/manager in the order that could not be exercised without court approval would be the sale or mortgaging of the real property or shares of the respondent companies, including Community. When the receivership order is read as a whole, there is no limitation placed on the scope of the receiver's powers of management other than if he chooses to sell or mortgage the real property or the shares of the respondent companies. The order does not expressly require that he keep the hotel open or obtain court approval before closing. Does the law impose such a duty on a receiver/manager?

The appellant submits that if Clarkson had applied to the court in October or November of 1981 for approval of its intention to close the hotel, the court would have terminated the receivership for the hotel and returned the hotel to Community. He asserts that this would have permitted Community to operate the hotel until the most propitious moment for a sale and that in all likelihood an offer in the range of $1,000,000.00, as eventually was offered by Equitas in April 1983, could have been obtained and Bayhold's mortgage would have been paid out. It should be noted that by the fall of 1981, prior to the closure of the hotel, Bayhold had already commenced foreclosure proceedings. With respect to the arguments advanced by the appellant, it is a matter of speculation as to what would have happened had Clarkson applied to the court for approval to close the hotel. It is quite clear the operation of the hotel was incurring very substantial deficits. It is more likely that the court would have approved of the closing of the hotel rather than return it to Community which had no apparent ability to finance the continued operation of the hotel.

The appellant relies on certain statements from Bennett on **Receiverships** that Clarkson could not have closed the hotel without court approval. At p. 118 Bennett states:

> "As a fiduciary to all, the court-appointed receiver must manage and operate the debtor's business as though it were his own. He cannot therefore, without court approval, close the business down or repudiate executory contracts."

Bennett does not cite any authority for the statement that the receiver/manager cannot close the business without court approval.

At p. 119 of text, Bennett states:

> " As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business."

Does this statement lead to the conclusion that Clarkson should have applied to the court before closing the hotel? Is the statement supported by the authorities? Bennett appears to cite as authority for this proposition the case of **Re: Newdigate Colliery Ltd.; Newdegate v. The Company,** [1912] 1 Ch. 468 (C.A.). However a review of that case does not support such a broad statement. The **Newdigate** case is authority for the following valid proposition (p. 468):

> " It is the duty of the receiver and manager of the property and

> undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment."

In that case, the receiver/manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver/manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver/manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims.

Again it is important to remind oneself that the duty owed by a receiver/manager is to exercise reasonable care in the management and operation. of the business. The trial judge found Clarkson was not negligent in deciding to close the hotel. There was no duty specifically imposed on Clarkson pursuant to the receivership order to keep the hotel open until such time as it obtained approval of the court to close it. While it may have been prudent to obtain such approval in view of the statements in Bennett, there was no obligation under the receivership order to do so. There is no case law in support of the statement made in Bennett that a receiver/manager cannot close a business without approval of the court.

What Bennett was probably referring to is the recognized duty of the receiver/manager, not only to preserve the property of the debtor, but also the goodwill of the debtor's business if there is any. Certainly if a business is operating at a profit or there is goodwill it would be a breach of the receiver/manager's duty, to the debtor at least, to close the business. The receiver/manager under such circumstances would require court approval before doing so as on its face it would appear that the receiver/manager would be in breach of the duty to preserve the goodwill. It would be for the receiver/manager to satisfy the court that under all the circumstances a liquidation of the business was reasonable. Whether that duty extends to the creditors I have some doubt. However, the receiver/manager does have a duty to creditors to operate the receivership with reasonable care so as not to unfairly affect the interest of all the persons affected by the receivership; that is, debtor and creditors, and has a duty to the court to act in accordance with the terms of the order and the law.

In dealing with the appellant's argument on this issue, it may be useful to consider the nature and purpose of a receiver/manager's appointment. The remarks of Cozens-Hardy M.R. at p. 472 of the **Newdigate** case are relevant; he stated:

> " The jurisdiction of the Court to appoint receivers is extremely old,

> but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency."

The point being that while a receiver/manager is empowered to carry on the debtor's business, it is contemplated that eventually there will likely be a liquidation notwithstanding that the receiver/manager has a duty to preserve the property and the goodwill of the business. The trial judge found in this case there was no goodwill at the time when Clarkson made its decision to close the hotel. The evidence could lead to no other conclusion. In my opinion, the failure to apply to the court for approval to close the hotel on the facts of this case did not breach any duty Clarkson owed to Bayhold. Furthermore, the law is clear that if a debtor or creditor feels adversely affected by any action of a receiver/manager the person may apply to the court to protest the action and the complainant must prove the receiver is in breach of his duties. Bayhold made no such application but continued with its foreclosure action. I reject the argument by the appellants that this proceeding is Bayhold's complaint. The time to apply would have been in November 1981, not years later when this action was commenced.

The position of Bayhold on the first two grounds of appeal is interesting. On the one hand, Bayhold asserts that Clarkson should have applied to the court in April 1981 to approve an increase in its borrowing and at that time Bayhold argues if such an application had been made it could have made submissions to the court that the hotel should have been sold as early as April 1981 as it was losing money and there was no need to wait for the summer season to show that it could not be viable. Yet despite its argument that the hotel should have been sold in April 1981, it objects to Clarkson having closed the hotel in November of 1981, arguing that the hotel should have been kept open to facilitate a sale as an ongoing concern. It is difficult to reconcile these positions except to say that one argument is needed to support the first ground of appeal and the latter argument the second.

In summary, the essence of a receiver's powers is to liquidate the assets. On the other hand, a receiver/manager is vested with the additional power to manage the business, but this does not derogate from his power to realize on the assets. His management duty, if I can call it that, is to act with the care an owner would exercise in the running of his own business subject of course to the terms of the court order appointing him receiver/manager. In this receivership, as in most, the powers to manage are broad. There is nothing in the order that required the receiver/manager to obtain court approval before closing the hotel. Justice Kelly found this was a valid business judgment considering all the circumstances and I agree. The receiver/manager had the power pursuant to Clause 6(f) of the order to preserve the assets; the hotel was losing money, the receivership had turned out to be a financial disaster and closing it to await the foreclosure sale was a reasonable

judgment to preserve the property. The receiver/ manager did owe a duty to act reasonably in the conduct of the hotel business so as to preserve the goodwill and the property of Community in the interests of not only Community but all the creditors, including the appellant. The fact that Clarkson did not apply for court approval of the closure is not a breach of his duty to preserve the goodwill of Community in view of the finding of the trial judge that there was no goodwill, a fact which the receiver was well aware of at the time of the closure. Furthermore, even if Clarkson had breached its duties, the learned trial judge found as a fact that the closure did not cause any loss to Bayhold. There was evidence to support this conclusion. There is no need to go into detail with respect to this finding, as I have disposed of Issue 2 on the ground there was no breach of any duty owed by Clarkson to Bayhold. Therefore I reject the appellant's argument that on this ground the respondents are liable to Bayhold for $808,339.21 plus pre-judgment interest.



**Issue 3**

"Are the respondents liable to Bayhold for damages resulting from the trespass on April 29, 1983, causing loss of the Equitas sale of $1,000,000.00?"

This issue is framed by the appellant in such a way that it assumes the trepass and the removal of the chattels caused the loss of the Equitas sale. The only impropriety which surrounded the chattels removal was Clarkson's failure to obtain a recovery order from the court. The hotel had been purchased by Bayhold at the sheriff's sale on January 13, 1982, and Clarkson had agreed to leave the chattels in place rather than remove them for storage. The sale of the realty by the foreclosure order did not include a sale of the chattels. The chattels were still owned by Community and were subject to a first charge in favour of Clarkson for the balance of the preservation expenses and were subject to a second specific charge and a floating charge in favour of Bayhold under the terms of its security document.

The appellant's argument is that by removing the chattels the receiver/manager committed a trespass and that this trespass was the cause of Equitas refusing to complete the agreement to acquire the hotel from Bayhold for $1,000,000.00.

The trial judge clearly directed himself to the appropriate question when he rhetorically stated at p. 129 of his decision:

> " Although Clarkson's method of seizing the chattels from Bayhold was improper, is Equitas [sic] correct when it alleges that this action caused a loss to Bayhold, in that it resulted in Equitas properly refusing to perform the agreement of purchase and sale?"

After dealing with a number of issues raised by Bayhold on this question, the trial judge decided as follows (p. 132):

" Before Bayhold can succeed in this aspect of the claim, it must satisfy the Court that the negligent or trespass action of Clarkson was the cause of its failure to complete its contract with Equitas, and that it suffered a measurable loss from this failure. On the face of it, Bayhold has not satisfied me that the agreement of purchase and sale incorporated a condition that the hotel be a going concern at the time of the closing, nor have they satisfied me that there was a collateral enforceable agreement to this effect. I therefore cannot conclude that the precipitous and inappropriate seizure action initiated by Mr. Scouler on behalf of Clarkson was the cause of a breach of contract. Bayhold was in a position to provide to Equitas all of the apparent requirements of the written agreement."

The trial judge, in effect, found that the seizure of the chattels by Clarkson was not the cause of Bayhold's losing the sale to Equitas as there was no requirement in the agreement of sale that the chattels be even in existence let alone in the hotel. The learned trial judge found that Bayhold didn't satisfy him that there was a collateral agreement (outside the written agreement between the parties) that the hotel would be a going concern on May 2, 1983, the closing date. The trial judge found that Bayhold could comply with the requirements of the written agreement. The evidence is clear that Bayhold did not sue Equitas on the agreement. The trial judge found that the conduct of both Bayhold and Clarkson with respect to events surrounding the proposed sale to Equitas was somewhat tainted. He stated (pp. 131-132):

" Neither Bayhold nor Clarkson come to court with very clean hands in the matter of Equitas refusing to complete the sale of the hotel. Clarkson took possession of the chattels without proceeding in the appropriate way with a recovery order, and its agent removed furniture in a clumsy way causing some minor damage to the hotel. The agent also removed furniture and fixtures in which Clarkson had no claim. Bayhold was less than candid with Equitas about the nature and extent of the claim of Clarkson to the chattels, and did not give Equitas notice of the clear warning from Carkson that it would take action to remove the furniture if some satisfactory arrangement was not made with respect to its claim. As well, Bayhold did not bargain in good faith regarding the retention of the chattels."

The appellant asserts that the trial judge erred when he seemed to conclude that Bayhold would have had to sue Equitas before coming against Clarkson. This argument is based on the following statement by the trial judge at p. 132:

" Bayhold has not tested the validity of its proposition by a legal action to enforce the agreement or for damages. If Bayhold had

> brought an action to enforce its agreement by way of specific performance, or an action for damages for the breach of the contract, it would have recovered to the same extent that it now seeks to recover from Clarkson. If it had taken this action and failed on the basis that there was a binding term of the contract that the property be a going concern, then an action against Clarkson might be sustainable. However, I am not satisfied that Bayhold would not have succeeded in its action to enforce the contract against Equitas, and I must therefore conclude that Bayhold cannot succeed on this alternative claim."

I tend to agree with Bayhold's assertion that there was no requirement that Bayhold sue Equitas on the agreement before pressing any claim it might have against the receiver/manager for damages arising from the removal of the chattels. However, that does not assist the appellant. The trial judge was not satisfied the removal of the chattels was the cause of Bayhold losing the sale to Equitas. There is evidence to support such a finding as despite the removal of the chattels from the hotel on April 29, 1983, Equitas was prepared to buy the chattels from Clarkson for $30,000.00 on May 2, 1983. Therefore, the removal per se was not the fact which caused Equitas to refuse to complete. It would appear that the reason this sale fell through was that Bayhold did not own the chattels and Equitas was unable to buy the chattels from Clarkson for a price Equitas was prepared to pay. While technically Clarkson had no right to enter the hotel premises in the possession of Bayhold and remove the chattels without a recovery order, Bayhold was well aware that the chattels were owned by Community and aware of Clarkson's prior secured claim to the chattels. In addition, Clarkson had repeatedly requested a decision from Bayhold as to whether it intended to purchase the chattels and, if not, Clarkson would remove them. The trial judge found that Mr. Scouler mistakenly believed the order of Burchell J. dated January 6, 1983, in which the receiver/manager was granted a prior charge against the hotel and the chattels to the extent of the preservation expenses was sufficient authority from the court to seize the chattels on April 29, 1983. I would note that the order provided as follows:

> " AND IT IS FURTHER ORDERED that The Clarkson Company Limited is entitled to the chattels in The Isle Royal Hotel in priority to Bayhold Financial Corporation Limited and Romiss Sales Limited to the extent that the expenses exceed the surplus proceeds of the foreclosure and sale of The Community Hotel Company Limited"

At most, the trespass was technical. Under the circumstances that existed on or about April 29, 1983, it is likely that Clarkson could have obtained from the court a recovery order to remove the chattels from the hotel premises as Bayhold had no legal right to retain them as title to the chattels was still vested in Community and Bayhold knew its interest in the chattels as mortgagee was subject to the prior charge of Clarkson in the amount of $63,117.50. Equitas knew Bayhold was not warranting even the existence of the chattels, so Equitas ought to have

been alert although not fully informed by Bayhold that there was a problem with respect to the transfer of the chattels that were in the hotel. The trial judge's conclusion that the seizure of the chattels was not the cause of Bayhold losing the sale to Equitas was based on the trial judge's view that there was no agreement between Bayhold and Equitas that the sale of the hotel was to be as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of Bayhold under the sale agreement. The terms of the agreement support this conclusion.

When one looks at all the facts surrounding this sale to Equitas, the removal of the chattels was certainly not the real cause of Equitas's failure to complete the agreement to purchase the hotel. Apart from the reason identified by the trial judge, Bayhold cannot be heard to complain too much about this lost sale being caused by Clarkson's removal of the chattels because Bayhold, by purporting to sell the chattels to Equitas pursuant to the terms of the agreement, was holding out to Equitas that it owned the chattels, whereas in fact it did not. The chattels were owned by Community and were subject to a first charge to Clarkson and then a second charge to Bayhold. Bayhold had no right to sell the chattels and can hardly be heard to assert that it lost the sale because Clarkson removed them from the premises. Bayhold really lost the sale because it didn't own the chattels; it didn't have any right to sell them in the first place and Equitas wasn't able to buy them at a price Equitas was prepared to offer to the receiver/manager.

There isn't any need to deal with the issue whether the trial judge was in error when he suggested Bayhold must first sue Equitas for a breach of contract before claiming damages for trespass.

I reject Bayhold's claim for damages which it asserts arises as a result of the trespass on April 29, 1983. The sale to Equitas was not lost because of Clarkson's technical trespass.

**Issue 4**

The appellant sets out this issue as follows:

> "Are the respondents liable to Bayhold for mortgage interest owing to Bayhold during the term of the receivership until Bayhold acquired the hotel at the foreclosure?"

The short answer is "no"; the receiver/manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the **Newdigate** case where Cozens-Hardy, in dealing with contracts which the receiver/manager did not wish to perform and in which he had applied to the court

to be excused from performing, stated at p. 474:

> "I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager."

Buckley L.J. in the same case made it abundantly clear that receiver/managers are not personally bound by existing contracts. He stated at p. 476-477:

> "As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all."

In support of the argument that the receiver/manager is obliged to pay mortgage interest to Bayhold, the appellant relies on certain statements by Bennett, **Receiverships**, and **Kerr on Receivers** (17th) ed., the essence of which are that a receiver/manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver/manager is obliged to preserve (Kerr p. 31, 207, 219-210; **Halsbury's Laws of England** (4th) ed., vol. 39 (Receiverships) at para. 982; Bennett's **Receiverships** (1985), p. 119, 110 and 118).

The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver/manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver/manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the

appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from Kerr at pp. 219-220 with emphasis by the appellant as follows:

> "The receiver and manager is the agent neither of the company nor of the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment. Such contracts, unless they are contracts depending on personal relationship, such as contracts of employment, remain valid and subsisting, notwithstanding the appointment of a receiver and manager. Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. In this respect, a manager differs from a receiver appointed over the assets without any power to carry on the business, who is under no obligation and has no power to carry out these contracts, nor to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts. A manager must not, without leave of the court, disregard the contracts in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages; nor must he pick and choose which contracts he will carry out as being most profitable."

The appellant's factum does not highlight the sentence which states that any breach (of pre-existing contracts) will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business. This statement by Kerr in **Receiverships** is consistent with the views expressed by the justices who rendered opinions in the **Newdigate** case.

The reasons a receiver/manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver/manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver/manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver/manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver/manager only in the general sense that the receiver/manager must honour them to preserve the goodwill of the business. In Bennett on **Receiverships** at p. 223 the author states:

> " At the commencement of any receivership, the receiver reviews the

> terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not he should complete those contracts.
>
> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court." [emphasis added]

The statement which I have underlined in Bennett is a contradiction of the following statement made by Bennett at p. 110 of his book on **Receiverships** and upon which the appellant relies: "The receiver will be bound by the terms of the existing contracts. However, the receiver may move before the court for an order to breach such contracts." Bennett was merely making a general statement; the footnotes refer the reader to his section on contracts which starts at p. 223 where he makes a more specific statement, which I have quoted, and then goes on to discuss the **Newdigate Colliery** case.

That the receiver/manager is not personally liable for breaking pre-existing contracts is clear from the statements of the justices in the **Newdigate Colliery** case. Of course, if the receiver/manager adopts pre-existing contracts he then becomes personally liable for their performance. That is not the situation we have here. With respect to pre-existing contracts, it is the company in receivership that continues to be liable for such contractual commitments if the receiver/manager fails to honour them during the term of the receivership. That is all that the case of **Parsons v. Sovereign Bank of Canada**, [1913] A.C. 160 stands for.

There is no doubt that the law requires a receiver/manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from **Parsons v. Sovereign Bank of Canada** at p. 170-171:

> " The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the

> receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist." [my emphasis]

The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver/manager runs in terminating pre-existing contracts is that to do so could dimish the goodwill and without obtaining approval the debtor might sue the receiver/manager for damages or the court might censure the receiver/manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver/manager if the latter chooses not to honour pre-existing contracts. The preservation of the goodwill of the hotel, if there was any, did not require payment of mortgage interest as the income from the operations was insufficient to do so. In short, the appellant has read into the case law and the statements in the text books a duty on a receiver/manager that he honour contracts and that if he does not he incurs personal liability for the breaches notwithstanding he was not a party to the contracts. The case law does not support such a proposition and, in fact, it supports the contrary (**Newdigate** case). The appellant had a remedy as a secured creditor which it eventually exercised to foreclose the mortgage and have the real property sold by the sheriff pursuant to court order. In conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

**Issue 5**

"Did Bayhold have priority over Clarkson for monies disbursed by Clarkson over $109,608.73?"

The appellant argues that all receipts from the continuation of the hotel business during the receivership including borrowings from the Toronto Dominion Bank plus realizations from the liquidation of the assets ought to have been paid to Bayhold to pay out the mortgages held by Bayhold on Community's property before any receipts were used by Clarkson to pay the expenses of the receivership (except to the extent of $109,608.73 found by Burchell J. to have been expenditures by Clarkson's for preservation of Community assets and therefore having priority over Bayhold). The appellant's argument on this issue rests on the assertion that there was an automatic crystallization of Bayhold's floating charge on Community's assets and undertaking when, on February 1, 1981, Burchell J., upon the application of Revenue Canada as a creditor of Community, appointed Clarkson's receiver/manager. The appellant asserts that the "authorities are overwhelmingly" in support of this argument.

The learned trial judge found that there was no automatic

crystallization and that Bayhold would have to have intervened by appointing its own receiver to have crystallized its floating charge. The appellant asserts that the trial judge considered none of the case law in support of their position that the floating charge had crystallized upon the appointment of Clarkson as receiver/manager. The appellant cites the following cases in support of the argument:

> **Bank of Montreal v. Glendale (Atlantic) Limited** (1977), 20 N.S.R. (2d) 216 (C.A.), at 250-251;
>
> Palmer's **Company Law** (21st Edition) pp. 396-397;
>
> **Irving A. Burton Limited v. Canadian Imperial Bank of Commerce** (1982), 41 C.B.R. (N.S.) 217 (O.C.A.), at 220;
>
> **Kerr on Receivers** (17th Edition), pp. 50-51;
>
> **Evans v. Rival Granite Quarries Limited**, [1910] 2 K.B. 979 (C.A.), at 1000;
>
> **Re Crompton & Co., Limited**, [1914] 1 C.H. 954;
>
> Bennett **Receiverships** (1985), p. 48;
>
> Gough **Company Charges** (1978) pp. 84-86;
>
> Lightman & Moss **The Law of Receivers and Companies** (1986) p. 28.

I have reviewed the authorities cited by appellant's counsel and would note that the statements referred to in the **Glendale** case are quotations from texts simply describing the nature of a floating charge and are not of great assistance in dealing with the issue before us as the statements do not address the issue whether a holder of such a charge must intervene to crystallize the floating charge. However, the statements do set out a point of view on crystallization. The general statement from Palmer's **Company Law** as referred to in the **Glendale** decision at p. 250 reads in part as follows:

> ". . . Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it 'crystallizes', and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallize on the appointment of a receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ..."

In **Burton v. Canadian Imperial Bank of Commerce** the case involved an assignment of book debts. On the facts of that case, anyone would agree that an assignment of book debts made in compliance with the applicable legislation would take priority, with respect to the book debts, over a subsequent assignment in bankruptcy.

With respect to the statement in **Kerr on Receivers** (17th Edition) at pp. 50-51, the author is referring to situations in which a receiver will be appointed and does not address the issue as to when exactly a floating charge crystallizes and what is the effect of the so-called crystallization.

The **Crompton** case doesn't" address the issue raised by the appellant in this case. In **Crompton** the debenture holders applied for and were granted an order appointing a receiver when the company ceased to do business. Here Bayhold never applied for the appointment of a receiver.

With respect to the statement on p. 48 in Bennett, **Receiverships**, the author makes a general statement that "if the business ceases or is disposed of as a business, the floating charge automatically crystallizes since the debtor is no longer in business". No authority is cited by the author for this proposition but it is consistent with the statement from Palmer previously quoted.

In Gough, **Company Charges**, (1978) pp. 84-85, the author states:

> "Since a specific charge over trading assets was considered necessarily to bring about the consequence of paralysis or stoppage of the business, it can be seen that the first moment when it might be envisaged, according to the intention of the parties as expressed in the security contract, that the process of crystallization might come about is when the business of the company for some reason or other ceases to operate on a continuing and going basis; in short, when the business stops. The business might stop by virtue of a decision made by the company management (and therefore ultimately membership), or else by virtue of the decision of any company creditor, including the creditor secured by floating charge, to initiate proceedings towards that end. The company is, respectively, either unwilling or unfree to carry on its ordinary business so that, as far as the company management is concerned, it is unwilling or unable any longer to appropriate its property in the ordinary course of business for purposes other than that of the security. Obviously, in either case it is the intention of the parties under the security contract, with the purpose of the floating charge having been served and the disadvantage of a specific charge over trading assets, viz., to cause a paralysis or stoppage of the business, no longer being relevant, that such circumstances

constitute the natural time for the conversion of charge from being hitherto floating into a specific security."

I agree with the above as a general statement as to the nature, purpose and effect of a floating charge as opposed to a fixed charge.

In Lightman & Moss, **The Law of Receivers and Companies** (1986), p. 28, the general statement dealing with the crystallization is as follows:

" A floating charge will crystallize on the appointment of a receiver (whether by the debenture-holder under the debenture or the court) or on the commencement of winding-up (even if the winding-up is merely for the purposes of reconstruction) or on the cessation of business."

It is to be noted that this statement is made in the context of a chapter entitled "The Basis of Appointment of Receivers"; the statement must be looked at in that light.

The crystallization of a floating charge means that upon the happening of some event or events the charge that had been floating over the assets becomes fixed.

To the extent there are conflicting views as to when a floating charge crystallizes and the effect of the same, I am attracted to the reasoning of Berger J. in **British Columbia v. Consolidated Churchill Copper Corporation Limited et al** (1978), 30 C.B.R. (N.S.) 27 (B.C.S.C., T.D.) that before the floating charge in favour of a mortgage or debenture holder crystallizes, that is becomes fixed on all the assets and undertakings of the debtor, the holder must intervene by going into possession or by bringing an application for the appointment of a receiver.

In that case, Berger J. analyzed the decisions which deal with the subject of automatic crystallization including the decision in **Evans v. Rival Granite Quarries** and concluded that it was only Buckley L.J. in the **Evans** case who took the view, **in obiter**, that a floating charge might crystallize without intervention. Berger J. referred to Gower, **Modern Company Law**, in which the author stated at p. 421:

" Default alone will not suffice to crystallize the charge, the debenture-holders must intervene to determine the licence to the company to deal with the property, normally by appointing a receiver or by applying to the court to do so."

Berger J. went on to state that there has been no judgment rendered in Canada on the issue of automatic crystallization. I agree with the policy enunciated by Berger J. in the following passage from his decision (pp. 41-42):

" But there has been no judgment rendered on the question in Canada. The matter is one of first impression. So policy considerations should be placed on the scales. These considerations weigh heavily against the adoption of the motion of self-generating crystallization. In the case at bar there were numerous acts of default, going back to 1972. Brameda did not, until 14th April 1975, take the position that the floating charge had crystallized. If in truth it had crystallized back in 1972, when Brameda acquired the bank's interest in the debenture, Brameda did not treat the company thereafter as if its licence to carry on business was at an end. Brameda sought to have it both ways: to attain priority over the province's lien without putting Churchill into receivership. This shows the parlous state of affairs which would result if the concept of self-generating crystallization were to be adopted. The requirements for filing by a receiver under the **Companies Act** would be rendered a dead letter. The company would not know where it stood; neither would the company's creditors. How is anyone to know the true state of affairs between the debenture-holder and the company unless there is an unequivocal act of intervention? How can it be said that the default by the company terminated its licence to carry on business when in fact it was allowed by Brameda to carry on business for three years thereafter? If the argument were sound, the debenture-holder would be able to arrange the affairs of the company in such a way as to render it immune from executions. The debenture-holder would have all the advantages of allowing the company to continue in business and all of the advantages of intervening at one and the same time, to the prejudice of all other creditors. This contention was rejected in the **Evans** case: see Vaughan Williams L.J. at pp. 989-90, and Fletcher Moulton L.J. at p. 995.

It is my view that not in the older cases nor in the recent cases nor in the exigencies of policy is there any justification for the adoption of a concept of self-generating crystallization. If there is any practical scope for such a theory it does not extend to a case where the conduct of the debenture-holder is inconsistent with the assertion of any such claim.

This brings me back to the wording of the floating charge in the case at bar. It says that 'such floating charge shall in no way hinder or prevent the company . . . until the security hereby constituted shall have become enforceable from . . . dealing with the subject matter of such floating charge in the ordinary course of its business.' Condition 6 of the debenture says: 'If the security hereby charged.' The point is that default by the company (Brameda) may by

> instrument in writing . . . appoint any person ... to be a receiver ... of the property and assets hereby charged.' The point is that default by the company renders the floating charge enforceable. To that extent, default is a hindrance to the company, i.e., the debenture-holder has the right to intervene when he pleases. But in order to terminate the company's licence to carry on business, the debenture-holder must in fact intervene. This is provided for by the very language of the debenture itself. While the security may become **enforceable** on default, still the debenture-holder must intervene to **enforce** his security before it crystallizes."

In the case we have under consideration, the floating charge in favour of the appellant (the pledge agreement dated July 24, 1974) provides for the standard two-step process for the enforcement of the floating charge. Although the appointment of a receiver gave rise to a default just as did the failure to pay monies due from Community to Bayhold, the terms of the pledge agreement (Clause 6 of the debenture) provided: "At any time after the happening of any event by which the security hereby constituted becomes enforceable, the chargee shall have the following rights and powers". There were then listed a number of powers Bayhold could exercise, including the power to appoint a receiver.

Therefore, although the charges created by the security document became enforceable upon the appointment of Clarkson, Bayhold would have to have taken proceedings under Clause 6 to appoint a receiver or exercise any of the other powers mentioned before the security would be enforced. Bayhold did not exercise its right under the provision of the security document, but allowed the hotel to be operated by Clarkson under the receiving order that had been granted. Bayhold took no formal steps to enforce the floating charge and therefore applying the decision in the **Consolidated Churchill** case, the charge did not crystallize. That means it did not become fixed, therefore Community's assets and revenues were not attached for the benefit of Bayhold other than as an uncrystallized floating charge. Bayhold cannot have it both ways; that is, allow the business to be operated by the receiver/manager without intervening itself and then subsequently take the position its floating charge had crystallized upon the appointment of Clarkson and that it was therefore entitled to all the money that went into the bank account opened by the receiver/manager in connection with its operation of the hotel. That would create an impossible and inequitable situation for all creditors and receivers.

Bayhold, as the first mortgagee on the realty and personalty and holder of the first floating charge on the undertaking, could have applied for the appointment of its own receiver if it wished to enforce its floating charge. It chose not to do so for the obvious reason it did not want to take on the task of providing money to run the hotel in the summer of 1981; a task which was so graciously accepted by the Canadian taxpayers.

In summary, for the policy reasons enunciated by Berger J. coupled

with the fact that the terms of the security document held by the appellant provided separately for, (I) events of default (for example, the appointment of a receiver being in the event of a default), and (ii) enforcement; the appellant, to crystallize its floating charge security, would have had to intervene by application to appoint a receiver of its own or have gone into possession. The appellant did not make any such application to court, nor did it go into possession until after it acquired the hotel at the sheriff's sale. Therefore I reject the appellant's argument that it was entitled to all revenues that came into the hands of Clarkson while operating the hotel.

Bayhold also argues that because it did not get notice of Revenue Canada's application to the court to appoint Clarkson receiver/manager, Bayhold is entitled to all monies received by Clarkson during the receivership. The appellant relies on the case of **Robert F. Kowal Investments Limited et al v. Deeder Electric Limited** (1975), 59 D.L.R. (3d) 492 (Ont. C.A.). The **Kowal** case does not support the appellant's argument. In the **Kowal** case the Ontario Court of Appeal simply said a receiver/manager could not have a charge against the mortgagee's security for the amounts that the receiver/manager had paid to the mortgagee during the period of the receivership as the payments were not made for the preservation of the property and therefore not for the benefit of all the creditors. In the case we have under consideration, Clarkson's expenditures in operating the hotel were for the benefit of all the creditors and Clarkson did not get priority over Bayhold against the hotel assets except to the extent of the preservation expenses in the amount of $109,608.73. Bayhold, by commencing foreclosure proceedings and having the real property sold by the sheriff, realized on its security against the real property. However, the surplus from the sheriff's sale and the realization from the sale of the hotel chattels was insufficient to pay Clarkson's "preservation expenses". Other than with respect to the "preservation expenses", the receiver/manager did not subject Bayhold's security to recover the receiver/manager's expenditures in operating the hotel; these expenses were paid out of the borrowings from the Toronto Dominion Bank and advances from Revenue Canada. In summary, the **Kowal** case does not stand for the proposition that all revenues or realizations on the sale of assets during a receivership must be turned over to a creditor with an uncrystallized floating charge against the assets and undertaking of the company in receivership simply because the holder of the floating charge was not given notice of the application to appoint a receiver/manager.

In summary in Issue 5, Bayhold does not have priority over Clarkson for monies disbursed by Clarkson during the receivership.

**Issue 6**

As framed by the appellant: "Is Clarkson liable to Bayhold for the damage to the building caused by fires and a flood during the receivership?"

During receivership there were two fires which caused damage to the boiler room and the Sadat Room (a conference room). Clarkson received and kept

the fire insurance proceeds of $13,773.07. Clarkson did not repair all the damage to the boiler room because it was not necessary for the operation of the hotel.

With respect to the flood damage, the following facts are relevant. The hotel had been closed on November 3, 1981 and the heat turned down. On January 13, 1982, Bayhold purchased the hotel at the sheriff's sale. Mr. Scouler had undertaken to one of the counsel for Bayhold to keep the hotel premises safe and secure. On January 20, 1982, a Ms. Bagnell, who was employed by Clarkson's at the time, before leaving the hotel during a period of cold weather decided it would be prudent to flush some of the toilets to loosen up any ice clogging the pipes as the heat had been turned back. During the night the pipes froze and there was substantial damage done.

As Bayhold wished to sell the hotel as a going concern, it allowed Mr. Rahey to go into possession and operate the hotel. Mr. Rahey repaired most of the fire and flood damage caused during the receivership. The appellant asserts that Mr. Rahey did so at a cost of $125,000.00 and that Mr. Rahey was setting this off against Community's outstanding mortgage debt to Bayhold. Bayhold claims $125,000.00 from the respondents which it says it owes to Rahey for the work to repair the fire and flood damage. The learned trial judge found that the care of the hotel by Clarkson in this period was adequate under the circumstances and that none of the physical damage was caused by the negligence of Clarkson. The trial judge also concluded that Bayhold had not suffered recoverable damages as a result of the actions even if Clarkson had been negligent.

With respect to the claim of $125,000.00 the respondents make the following points in their factum:

> "Bayhold claims that in 1982-83 Rahey repaired damages sustained by the hotel during the receivership, at a cost of some $125,000.00. Bayhold further claims that Rahey is now 'setting-off' these repairs as against his debt to Bayhold. It seeks damages in the same amount as against Clarkson as a result. Clarkson makes the following points in response:
>
> (a) The learned trial judge found as a matter of fact that Clarkson had maintained adequate precautions and performed adequate remedial measures and was not responsible in negligence for any physical damage to the hotel;
>
> (b) Little or no evidence was provided with respect to repairs performed by Rahey, or the value of any such repairs;
>
> (c) Little or no evidence was provided with respect to any attempt by Mr. Rahey to set-off the amount of any such repairs as against Bayhold. Mr. Rahey had not claimed the cost of

repairs as against Bayhold in the eight years which had elapsed since repairs allegedly took place;

(d) Both Alan Feldman and Gordon MacLean testified that Rahey operated the hotel on the basis that he would contribute necessary repairs, pay mortgage interest, and pay most operating expenses and, in return, be entitled to keep all hotel revenue. By Bayhold's own evidence, accordingly, Rahey has no basis to claim the cost of any repairs as against Bayhold." (emphasis added)

I am satisfied based on the points made by the respondents, as set out above, that the learned trial judge did not commit error when he concluded that Clarkson was not responsible to Bayhold for the $125,000.00. The evidence . does not support a finding for the appellant on this issue. By Bayhold's own evidence the damage was repaired by Rahey pursuant to the agreement they made with him. Based on that agreement alone, Mr. Rahey has no right of recovery against Bayhold for any expenditures made to repair the fire and flood damage while he was operating the hotel. Mr. Rahey has not commenced an action in which he has made such a claim. The evidence supports the trial judge's conclusion that Bayhold did not suffer recoverable damage as a result of the actions of Clarkson.

In summary, I would dismiss the appeal with costs to the respondents to be taxed.

J.A.

Concurred in:

Jones, J.A.
Matthews, J.A.

**1984**

**S.H. 48128**

**1990**

**S.H. 72029**

**IN THE SUPREME COURT OF NOVA SCOTIA**
**TRIAL DIVISION**

**BETWEEN:**

**BAYHOLD FINANCIAL CORP. LIMITED**

**Plaintiff**

**- and -**

**THE CLARKSON COMPANY LIMITED,**
**DANIEL SCOULER and ERNEST & YOUNG INC.**

**Defendants**

**HEARD:** **before the Honourable Mr. Justice F. B. W. Kelly Supreme Court of Nova Scotia, Trial Division, Halifax, Nova Scotia, April 3-5, 9-12, 17, 19, 20, & 23, 1990.**

**DECISION:** **October 2, 1990**

**COUNSEL:** **Harry E. Wrathall, Q.C. and Stephen Kingston for the plaintiff**

**Douglas A. Caldwell, Q.C. and Joel E. Fichaud for the defendants**

S.C.A. No. 02376

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

**BETWEEN**:

BAYHOLD FINANCIAL CORP. LIMITED
Appellant

- and -

THE CLARKSON COMPANY LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.
Respondents

REASONS FOR JUDGMENT BY: HALLETT, J.A.