Court File No.	1803 - 09581
Court	Court of Queen's Bench of Alberta
Judicial Centre	Edmonton
Plaintiff	Bank of Montreal
Defendants	Ladacor AMS Ltd., Nomads Pipeline Consulting Ltd., 2367147 Ontario Inc., and Donald Klisowsky
Document	**BRIEF OF THE RESPONDENT AND CROSS-APPLICANT, DONALD KLISOWSKY**
Address for service and contact information of party filing this document	**Anderson James McCall** 300, 444 - 5 Avenue SW Calgary, AB T2P 2T8 **Attention:** Norman D. Anderson Phone: 403.221.8333 Facsimile: 403.221.8339 File No.: 7965

Court when the application is heard as shown below:

Date:	November 26 – 27, 2019
Time:	10:00 a.m.
Where:	Law Courts Building, Edmonton
Before Whom:	The Honourable Justice R. Graesser on the. Commercial List

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I. INTRODUCTION

1. Alvarez & Marsal Canada Inc. LIT ("**A&M**"), in its capacity as Court-appointed receiver and manager (the "**Receiver**") of the assets, undertakings and properties of Ladacor AMS Ltd. ("**Ladacor**"), Nomads Pipeline Consulting Ltd. ("**Nomads**") and 2367147 Ontario Inc. ("**236 Inc.**") applies, among other things, to:

   i. Approve the actions, conduct and activities of the Receiver;

   ii. Approve the Receiver's proposal to assign Ladacor, Nomads and 236 Inc. into bankruptcy as set out in the Fourth Report of the Receiver; and

   iii. Approve the Receiver's proposed allocation of cash held by the Receiver for Ladacor and Nomads, to 236 Inc.

2. The Defendant, Donald Klisowsky ("**Klisowsky**"), opposes parts of the Receiver's application and cross-applies to:

   i. Stay the Receiver from assigning Nomads into bankruptcy, as the just debts of Nomads can be resolved, and claims maintained, at a far lower cost than that of a bankruptcy; and

   ii. Direct that the Receiver revise or re-allocate the assets and liabilities of Ladacor and Nomads as set out herein, as the Receiver has failed to deal with the property of Nomads in a commercially reasonable manner.

II. ISSUES

A. Issues surrounding Liberty Mutual's Indemnity Agreement and Performance Bond

B. Identification and Allocation of Unsecured Debt between Ladacor and Nomads

C. Identification and Allocation of Auction Proceeds between Ladacor and Nomads

D. Identification of Employees of Nomads and any claims (including WEPA)

E. Alberta Treasury Board & Finance Claim against Nomads

F. Issues regarding proposed subrogation from Nomads and Ladacor to 236 Inc.

G. Other issues concerning the conduct of the Receiver

III. THE POSITION OF KLISOWSKY

3. Klisowsky submits that:

   i. The Receiver has mischaracterized the assets and liabilities of Ladacor, Nomads, and 236 Inc. A correct allocation of the assets and liabilities, as set out herein, supports the conclusion that all just debts of Nomads can be resolved, and claims maintained, at a far lower cost than that of a bankruptcy; and

   ii. The Receiver is not dealing with the property of Nomad's in a commercially reasonable manner and has failed to duly and properly discharge its duties, responsibilities, and obligations as Receiver.

IV. EVIDENCE

4. The following evidence has been filed and is relevant to the issues:

   i. Affidavit of Donald Klisowsky sworn 7 September 2019;
   ii. Supplemental Affidavit of Donald Klisowsky, sworn 11 September 2019;
   iii. Affidavit of Larry Slywka, sworn 13 October 2019;
   iv. Second Supplemental Affidavit of Donald Klisowsky, sworn 15 October 2019;
   v. Affidavit of Bonnie Erin Richard, sworn 24 October 2019;
   vi. Affidavit of Jack Steenhof, sworn October 25, 2019;
   vii. Transcripts of the cross-examination of Donald Klisowsky, held October 23, 2019;
   viii. Transcripts of the cross-examination of Larry Slywka, held October 23, 2019;
   ix. Transcripts of the cross-examination of Bonnie Erin Richard, held November 4, 2019; and
   x. Transcripts of the cross-examination of Jack Steenhof, held November , 2019.

V. FACTS AND ARGUMENT

A. Issues surrounding Liberty Mutual's Indemnity Agreement and Performance Bond

5. Klisowsky admits to having agreed to indemnify Liberty Mutual in his personal capacity, as well as on behalf of Nomads and 236 Inc. with respect to the performance bond (the "**Indemnity Agreement**").

6. The timing of relevant events in relation to the Indemnity Agreement are as follows:

a. January 2, 2018 - Indemnity Agreement executed;

b. April 5, 2018 - Labour and materials bond and a performance bond agreement executed with Liberty Mutual;

c. May 18, 2018 – Receivership;

d. Early June 2018 - Receiver cancels any contract or pending contract with Kor-Alta;

e. June 5, 2018 - Liberty Mutual registers its interest against Debtors at PPR;

f. May- June, 2018 - MPE (Engineering Consultant for Kor Alta Project) makes claim to Liberty Mutual. MPE was not listed in the accounts payable of any of the Debtors at the time of the receivership on May 18, 2018;

g. June 21, 2018 – Liberty Mutual's counsel gives notice to Debtors and to Receiver of MPE claim of $66,480.75 under labour and materials bond and Kor-Alta's claim of an unknown amount under Liberty Mutual's performance bond;

h. September 9, 2019 – Liberty Mutual gives notice to Debtors and Receiver of sum of Kor-Alta's claim under performance bond of $1,038,062.86.

Supplemental Affidavit of Don Klisowsky sworn 11 September 2019, at para 8 (the "**Klisowsky 1st Supp Affidavit**")

7. The significance of the above timeline is that it demonstrates the Receiver failed to consider or account for the estimated $1.1 million liability (the "**Performance Bond**") that was triggered as a result of the Receiver cancelling the contract with Kor-Alta and did not take any steps to cancel the Performance Bond with Liberty Mutual.

8. In the Supplement to the Receiver's Fourth Report, while the Receiver claims (at para 34) that it gave notice of the cancellation of the project related to the Performance Bond in its First Report, it was not until the Receiver's Fourth Report that it gave notice of the claim under the Performance Bond for $1.1 million by Liberty Mutual.

9. The Receiver takes the position that it was commercially reasonable to cancel the contract associated with the Performance Bond, yet it is clear the Receiver did not even recognize the existence of the Performance Bond until September 2019 in its Fourth Report. A liability of this size would surely merit mention, but the Fourth Report marks the first time this liability is referred to by the Receiver.

10. The Indemnity Agreement contained a 30-day clause (Clause 45) that would allow for the Performance Bond to have been cancelled.

Klisowsky 1st Supp Affidavit at para 4 and Exhibit B

11. Alternatively, if the Performance Bond was not capable of being cancelled, the Receiver failed to exercise due diligence in cancelling the underlying contract associated with the bond. Considering the serious consequences and significant financial implications of the Performance Bond for several parties, it was not commercially reasonable to cancel the underlying project, or alternatively, it was unreasonable to cancel the project without seeking the input from the guarantors under the Performance Bond.

12. The Receiver did not disclose the existence and quantum of the Performance Bond until September 2019, accordingly it is clear that no consideration was given by the Receiver to the triggering of the Performance Bond at the time of cancelling the underlying contract. The Receiver's only mention of the underlying project was in the Receiver's First Report in three short paragraphs where the Receiver advised of communications it made that the Receiver could not carry on the existing contract or enter into a new contract to start the work, due to "project metrics, timing and overall circumstances." Of note is that the anticipated project completion date was mid-2019.

13. In the further alternative, if the Liberty Mutual debt is a valid claim, the funds held/to be obtained by the Receiver should be used to pay towards Liberty Mutual's claim.

B. Identification and Allocation of Unsecured Debt between Ladacor and Nomads

14. Since being appointed, the Receiver has referred to Ladacor and Nomads interchangeably, which has caused some confusion and led to the Receiver incorrectly classifying the assets and liabilities of Ladacor and Nomads. As a result of this

mischaracterization, some of the recommendations made by the Receiver are not supported by the facts.

15. In the Receiver's Fourth Report (para 8), it incorrectly states that Ladacor and Nomads did not separate their assets and liabilities. Prior to the receivership, as of late 2017 or early 2018 all the assets and liabilities of Nomads' modular systems business were effectively transferred to Ladacor and all related business activity was conducted and paid for by Ladacor. Nomads ceased operating as an operational business, reverting to a passive holding company in or around the end of 2017, with Ladacor taking over as the sole operating entity.

Affidavit of Donald Klisowsky sworn 7 September 2019 at paras 3-5 ("**Klisowsky Affidavit**") and Klisowsky Transcript at 43:6-43:18

16. To operate the modular construction business, the bank account used by Ladacor was a Bank of Montreal Account (the "**BMO Account**") established in September 2017. By mid-January 2018 the BMO Account was the only account being used to conduct any business, with all payables and receivables flowing through it.

Klisowsky Affidavit at paras 4-5

17. The Fourth Report of the Receiver contains a listing of unsecured creditors for Ladacor, Nomads and 236 Inc., at Appendix "A", "B" and "C", respectively. The Receiver has determined the total unsecured debt of each to be:

a) Ladacor: $3,536,050.08
b) Nomads: $4,732,768.43
c) 236 Inc.: $1,798,935.78

18. Most of the unsecured creditors that are listed as Nomads unsecured creditors, are actually Ladacor creditors. The unsecured debt of 236 Inc. is addressed later in this Brief.

19. Previous reports of the Receiver included only preliminary/incomplete listings of creditors, therefore no issues were raised by Klisowsky following those Reports.

20. The Receiver prepared the list of unsecured creditors for Ladacor and Nomads with the assistance of the former controller of Ladacor, Bonnie Erin Richard ("**Richard**"), who had only worked for Ladacor for approximately 6.5 months prior to the receivership.

21. Paragraphs 19 and 20 of the Receiver's Supplement to the Fourth Report identifies the procedure it used, based on the advice of Richard, for determining whether a debt was assigned to Nomads or Ladacor. That procedure assigned invoices based on:

    a) Which project the invoice was related to; and
    b) In the event the invoice was not for a specific project, which entity it was addressed to.

22. The above procedure of assigning creditors is inconsistent with how the business operated prior to the receivership and is not commercially reasonable, as it failed to recognize the structural shifts completed in the Fall of 2017 and the fact that Ladacor, not Nomads, has paid such accounts, following that change.

23. Richard was directly involved in the preparation of the financial reporting that was required to BMO from Ladacor. Richard admitted that the way in which the inventory, assets and receivables were allocated between the two companies by the Receiver (on her recommendation), was not consistent with the how things were reported to BMO.

    Transcript of the Questioning of Erin Richard, on 4 November 2019 (the "**Richard Transcript**") at 65:3-65:21

24. Prior to the receivership, Ladacor was the company for which all business activity was flowing through. All inventory, accounts payable, accounts receivable, and wages were that of Ladacor, which is exactly what Ladacor (via Richard) was reporting to BMO. This arrangement is also consistent with what was reflected in the accounting system of Ladacor just prior to the receivership, which listed nearly all of the unsecured creditors under Ladacor.

    Klisowsky Affidavit at para 17 and Exhibit D

25. It is not commercially reasonable for the Receiver to assign or delegate liabilities to Nomads or Ladacor after the fact, in such a way that is entirely inconsistent with the state

of affairs that existed within the companies prior to the receivership. The recommendations made by Richard are not consistent with her own financial reporting to BMO.

26. Richard admits that she had no prior experience in dealing with amalgamations of companies and further had only been employed by Ladacor for ~6 months. It was not commercially reasonable for the Receiver to rely on Richard's arbitrary recommendations. There is no suggestion that the Receiver contacted BMO as Ladacor's senior lender to determine how it addressed the allocation of internal assets and liabilities.

Richard Transcript at 81:8-81:11

27. Richard gave an Undertaking to use reasonable efforts to confirm if when reporting to BMO, all the inventory, accounts receivable, and accounts payable were in fact reported as belonging to Ladacor only, which was confirmed.

Undertakings given by Richard at Questioning, Nos 4 and 6

28. On Nomad's creditor list there is claim made by Darryl Nimchuk for approximately $325,000, which is not valid. Mr. Nimchuk was a senior executive, and his employement was terminated for cause before the receivership due to his incompetence in relation to his management and lack of reporting to BMO. Alternatively, Mr. Nimchuk should be listed as an employee of Ladacor, not Nomads.

Klisowsky Affidavit at para 18

29. On Nomad's creditor list there is a claim made by the CRA for approximately $153,000, which is not a proper debt of Nomads. If there is any amount owing to the CRA, it is a debt of Ladacor.

Klisowsky affidavit at paras 17 and 21

30. Other specific creditor claims attributed to Nomads are addressed elsewhere in this Brief.

31. Due to the mischaracterization of creditors as between Ladacor and Nomads, the financial situation represented by the Receiver for both Ladacor and Nomads is not accurate and will need to be amended by the Receiver.

C. Identification and Allocation of Auction Proceeds between Ladacor and Nomads

32. As per the Receiver's First Report (paragraph 57), the Receiver pooled together Ladacor and Nomads assets to create 'Auction Assets' for the purpose of a sale.

33. The sale proceeds from the Auction Assets was $606,000 (the "**Auction Proceeds**"). In the Fourth Report of the Receiver (see chart at page 20), there is an allocation of the Auction Proceeds as follows:

    a) Nomads: $451,450
    b) Ladacor: $154,407

34. This allocation of the Auction Proceeds is incorrect. The records show all the Auction Proceeds, as all were owned by Ladacor, ought to have been credited to Ladacor. This is in accordance with the accounting procedure manual of Ladacor, which stated that all purchased material was to be coded into inventory and properly classified as inventory of Ladacor.

    Klisowsky Affidavit at paras 7-9 and Exhibit B

35. Richard's evidence is that she worked with the Receiver to determine the allocation of the Auction Proceeds based on the projects for which the materials and equipment were purchased or used for. Richard claims this approach is consistent with the accounting practices of Ladacor and Nomads pre-receivership, except the opposite is true.

    Affidavit of Bonnie Erin Richard, sworn 24 October 2019 at para 20 ("**Richard Affidavit**')

36. Richard's approach is arbitrary and contrary to the express procedures provided for in the accounting procedure manual of Ladacor, as well as to how Ladacor actually operated.

37. Richard's evidence is that while the intention was for Ladacor to purchase all inventory from Nomads, this never occurred. On cross-examination, at first Richard's evidence was that the inventory, assets, and receivables were never transferred from Nomads to Ladacor either, suggesting form over substance considering the way the reporting to BMO was at the time.

Richard Affidavit at para 27 and
Richard Transcript at 33:2 -33:13

38. Later in her cross-examination, Richard acknowledges that while there may not have been a formal documented transfer of inventory to Ladacor, at the time everyone was treating it as though the inventory had transferred, which included characterizing all inventory as being owned by Ladacor in its financial reporting to BMO:

> **Q** I'm going to suggest to you that the company was treating it as though all of the inventory had transferred to Ladacor AMS, which is evidenced by the inventory report that is being sent to BMO each month that you're signing off on which says that Ladacor AMS Ltd. owns all the inventory.
> **A** Yes.

Richard Transcript at 63:13-63:19

39. Richard also confirmed during cross-examination that in the BMO reporting by Ladacor, it was represented to BMO that all inventory was owned by Ladacor.

Richard Transcript at 60:22-60:27

40. All of the Auction Proceeds ought to have been credited to Ladacor, who was the owner of all the inventory. As a result, the financial situation represented by the Receiver for both Ladacor and Nomads is incorrect and will need to be amended by the Receiver.

41. Further or in the alternative, all inventory acquired during the period of January 2018 until May 2018 ought to be characterized as the property of Ladacor, as during that time all accounts payable and accounts receivable were flowing through Ladacor's BMO account, regardless of the project it was for. Accordingly, in this case the Receiver will need to re-assign the inventory after accounting for when the inventory was acquired.

D. Identification of Employees of Nomads and any claims (including WEPA)

42. For the purposes of determining the allocation of former employee claims, including the Wage Earner Protection Program ("WEPP") claims, the Receiver, with the advice and

assistance of Richard, determined whether each former employee worked for Ladacor or Nomads.

43. Richard claimed that "in many cases it was impossible to distinguish for which company an employee worked" and recommended the procedure that was used by the Receiver, which was that if an employee was hired prior to September 2017, he/she was deemed a Nomads employee. Anyone hired after September 2017 was deemed a Ladacor employee. There is no explanation for this approach.

Richard Affidavit at paras 31- 32

44. Using this approach, Nomads was deemed to have 66 former employees. Based on these numbers, the Receiver has already paid out $18,056 for priority WEPP claims for Nomads and there is further estimated $84,300 in unsecured WEPP claims assigned to Nomads. By contrast, Klisowky swore that Nomads has only 2 employees.

Supplement to the Fourth Report of the Receiver at para 27 and Appendix "C" and Klisowsky Affidavit at para 20

45. The approach used by the Receiver and Richard was arbitrary, unnecessary and not commercially reasonable. All former employees who have made WEPP claims or other claims, were employees of Ladacor, not Nomads. The following facts clearly establish this:

a) As of October 2017, all employees were paid entirely by way of the company PayWeb from the BMO Account which belongs to Ladacor. As of that time, all payroll and source deductions were paid by Ladacor as well;
b) All paystubs of employees as of October 2017 list Ladacor as the employer; and
c) All employees received T4 Forms for 2018 and 2017 listing Ladacor as the employer, showing the ease the Receiver has in reporting in 2018.

Second Supplemental Affidavit of Klisowsky at paras 2 – 5 and Exhibits A, B, and C ("**Klisowsky 2nd Supp Affidavit**") See also: Affidavit of Larry Slywka sworn 13 October 2019 at para 32 and Exhibits B-F

46. Although Richard acknowledged all the above factors, her evidence on cross-examination was that she did not feel it was proper to assign all employees to Ladacor because otherwise Nomads would only have revenue allocated to it and not costs for certain projects. The inherent problem with Richard's position is that as of January 2018, all revenues were in fact being received/attributed to Ladacor, along with everything else. Her misunderstanding compounded the reporting of matters to the Receiver.

Richard Transcript at 79:4-79:20

47. Richard also acknowledges that in Ladacor's financial reporting to BMO, all employees were listed as Ladacor employees. She did not separate employees into Ladacor or Nomads until after the receivership.

Richard Transcript at 70:12-71:27

48. Richard did not start her employment with Ladacor until December 2017, which was after the switch was made to have all employees paid by Ladacor through PayWeb. Richard therefore has no knowledge of what discussions were had or notices sent to employees at the time of the payroll change, and so her recommendations on how employees should be allocated is not proper or reasonable. There is in fact evidence that all employees received an email notice in September 2017 that all employees' employment was being moved to Ladacor.

Slywka Transcript at 5:11-5:20

49. Richard relies on the fact that there were no new employment contracts found on employee files following the change in payroll. This is irrelevant and a red herring, as Richard admits on cross-examination that she was not aware of any employees who raised issues with the payroll changes or requested a new employment contract. The lack of new employment contracts is therefore not relevant where the real issue was source of pay to employees, demonstrated by the government reporting on file.

Richard Transcript at 15:2-15:15

50. Richard acknowledged that the change of payroll systems to have everyone paid under Ladacor was one of the steps involved for bringing all business dealings under Ladacor. Notwithstanding that Richard acknowledged this payroll change actually occurred and the

reason for the change was to have everyone employed by Ladacor, Richard still made the recommendation to the Receiver to classify employees arbitrarily, as she did.

Richard Transcript at 33:14-33:19

51. The Receiver's incorrect classification of Ladacor employees as those of Nomads has led to the mischaracterization of claims (including WEPP claims) by former employees being attributed to Nomads, as well as priority claims of the CRA (payroll) that have already been paid by the Receiver and attributed or charged back to Nomads. All claims by former employees should be listed as Ladacor creditors.

52. As a result, the financial situation represented by the Receiver for both Ladacor and Nomads is incorrect and will need to be amended.

E. Alberta Treasury Board & Finance Claim against Nomads

53. The alleged claims by Alberta Finance against Nomads for approximately $759,000 are in relation to Scientific Research and Experimental Development ("SRED") tax credits or refunds which were granted to Nomads sometime between 2011-2014, but then were subsequently reversed.

Richard Affidavit at 22:12-22:24

54. On cross-examination, Richard acknowledged that she did not make any inquiries into whether the quantum being claimed by Alberta Finance was correct, nor did she reach out to Alberta Finance to discuss if the amount claimed was negotiable. She sought to justify this inaction due to lack of personal knowledge, as this occurred prior to her employment and its Nomads' accountants that would have the specific knowledge of that.

Richard Transcript at 24:4-24:27

55. The Receiver has not indicated in any of its reports that it has conducted any investigations/inquiries into the quantum claimed by Alberta Finance, by contacting Nomads' accountants or otherwise, nor has the Receiver attempted to see if this amount is negotiable or otherwise commonly reduced. The Court should direct those inquiries, now.

56. Due to the nature of the unsecured debt, further investigation is needed into the details of why the SRED credits were reversed, whether that was proper, and if there is recourse for Nomads to appeal or dispute this decision. As this claim represents the most significant potential liability of Nomads (other than Liberty Mutual), it is commercially reasonable for such inquiries to be made by the Receiver.

F. Issues regarding proposed subrogation from Nomads and Ladacor to 236 Inc.

57. In its Fourth Report, the Receiver has made a proposed allocation of the remaining funds being held under the equitable principles of subrogation (see paras 73-76).

58. As a result of the necessary revisions to the allocation of the assets and liabilities of the debtors, as set out in this Brief, the proposed allocation of the Receiver is not accurate or appropriate. Once the Receiver has updated the allocation of assets and liabilities to Ladacor and Nomads, Klisowsky will be able to respond to any proposed subrogation.

59. With respect to the proposed subrogation in principle, any funds of Ladacor should be used in the first instance to pay towards any established liability to Liberty Mutual.

60. The preliminary creditor listing attached as appendix "C" to the Fourth Report of the Receiver includes a claim made by 1459428 Ontario Inc. o/a Steenhof Building Services Group ("**145 Inc.**") for $603,583.22.

61. Klisowsky denies that the claim by 145 Inc. is proper. After removal of the claim by 145 Inc., the claims against 236 Inc. are modest (other than the claim by Liberty Mutual).

Klisowsky 2nd Supp Affidavit at paras 7 and 8

62. The owner of 145 Inc., Jack Steenhof ("**Steenhof**"), swore an affidavit on 25 October 2019 in support of the claim by 145 Inc. as against 236 Inc. Steenhof claims that on or about 29 July 2016 145 Inc. loaned 236 Inc. $444,097.80 and there are other amounts owed in relation to the purchase of land in Sioux Lookout.

Affidavit of Jack Steenhof sworn 25 October 2019
at para 11 and 18 ("**Steenhof Affidavit**")

63. On cross-examination, it was put to Steenhof that the amount of $444,097.80 that was advanced was not a loan, but rather payment for additional shares that his company, J. Steenhof & Associates Ltd. ("**Steenhof & Associates**") had acquired in 236 Inc. A draft agreement was also put to Steenhof whereby he agreed to assign, on behalf of 145 Inc., a portion of a debt owing by 236 Inc. to 145 Inc., to Steenhof & Associates, in order to facilitate this arrangement. Steenhof denied agreeing to this. This denial creates an issue for trial.

Transcript of the Questioning of Jack Steenhof, on
5 November 2019 at 31:18-31:26, 22:18-23:8 and
Exhibit A for ID (the "**Steenhof Transcript**")

64. While Steenhof denies that the monies advanced were for the purchase of additional shares in favour of Steenhof & Associates, Steenhof's version of events is not supported by the corporate records of 236 Inc. Specifically, attached as Exhibit C to Steenhof's affidavit are the financial statements of 236 Inc. for the year ending in November 2016 (the "**2016 Financial Statements**"). Steenhof alleges in his affidavit that the 2016 Financial Statements are incorrect but is unable to show any corroborating evidence to support that he had ever formally raised these concerns before, nor could he confirm whether or not he initially approved the 2016 Financial Statements.

Steenhof Affidavit at paras 13-18 and Exhibit C and
Steenhof Transcript at 36:12-37:3

65. While Steenhof denies executing an "Assignment of Receivable/Direction to Pay" and further denies that the 2016 Financial Statements are correct, all of the corporate records of 236 Inc., including the minute book, are in the possession and control of the Receiver or the Receiver's counsel. The corporate records should contain all executed documents, financial records, and additional information. Following the Steenhof questioning on his affidavit, a written request has made by Klisowsky's counsel to the Receiver's counsel for a copy of the minute book of 236 Inc., which has not yet been replied to.

66. The preliminary creditor listing for 236 Inc. needs to be amended to remove the claim of 145 Inc. Alternatively, further investigation is required into the legitimacy of the claim by 145 Inc.

67. Steenhof also denied having any knowledge of 236 Inc. executing a guarantee in favour of Liberty Mutual. Klisowsky had signing authority on behalf of 236 Inc. and executed the guarantee, claiming a phone meeting occurred before he did so.

G. Other issues concerning the conduct of the Receiver

68. The Receiver undertook significant steps to re-assign/re-allocate the inventory, employees, creditors and receivables of Ladacor and Nomads, most of which was unnecessary. These actions have significantly contributed to the Receiver's fees, the Receiver's counsel's fees, and the disbursements incurred in the Receivership. While certain of those accounts have been approved, at the time of the discharge, the totality of the outcome of this should be taken into consideration prior to the Receiver's discharge.

69. There are serious concerns with respect to the Receiver's conduct insofar as the Hythe Project is concerned. The Receiver's conduct was not commercially reasonable in that it failed to take reasonable steps to preserve a significant receivable within the Receivership, believing that the by insisting on particulars of which are set out in the affidavit of Larry Slywka. These concerns should be addressed prior to the Receiver's discharge.

70. This Court has ruled that a decision to affirm or disclaim a contract – such as the proposed contract that Ladacor planned to enter with Kor-Alta with respect to the Chateh Courthouse – includes an obligation "to have regard to equitable principles". Seen from this light, the decision not to proceed with the contract leaves each of the debtor companies and Donald Klisowsky unfairly exposed.

Royal Bank v Melvax Properties Inc.
2001 Carswell Alta 401 (per Veit J)
TAB 1

VI. CONCLUSION

71. While the Receivership Order grants the Receiver the power to assign the debtors into bankruptcy, this grave action should only be done when it is commercially reasonable to do so and once the Receiver has first discharged its duty to accurately demonstrate the financial portrait of the debtors.

72. As a result of the Receivers' incorrect characterization of assets, liabilities, and employees, the financial picture with respect to Ladacor and Nomads is not accurately represented in the Fourth Report of the Receiver, or at any earlier time.

73. As the financial status of each company is not accurately represented, the Receiver's recommendations are not supported by the facts now before the Court. The Receiver should be directed to complete a new report with the changes set out herein, along with any recommendations that may flow after these revisions are made.

74. After the allocation of assets and liabilities has been correctly assigned to Ladacor and Nomads, it is submitted that it will become apparent that Nomads should not be assigned into bankruptcy, nor should the remaining cash be distributed in the manner proposed by the Receiver.

VII. RELIEF SOUGHT

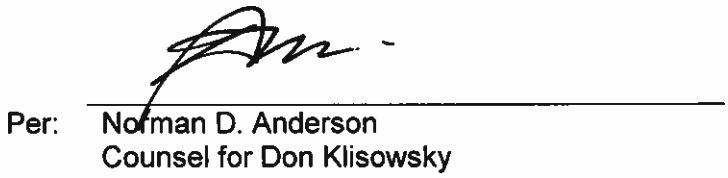
75. Stay the Receiver from assigning Nomads into bankruptcy, as the just debts of Nomads can be resolved, and claims maintained, at a far lower cost than that of a bankruptcy.

76. Direct that the Receiver revise or re-allocate the assets and liabilities of Ladacor and Nomads as set out herein, as the Receiver has failed to deal with the property of Nomads in a commercially reasonable manner.

77. Such further and other relief as counsel may request and this Honourable Court may deem appropriate.

All of which is respectfully submitted this 13th day of November, 2019.

Anderson James McCall



Per: Norman D. Anderson
Counsel for Don Klisowsky

2011 ABQB 167
Alberta Court of Queen's Bench

Royal Bank v. Melvax Properties Inc.

2011 CarswellAlta 401, 2011 ABQB 167, [2011] A.W.L.D. 1810, 200 A.C.W.S. (3d) 319, 75 C.B.R. (5th) 294

Royal Bank of Canada (Plaintiff) and Melvax Properties Inc. (Defendant)

J.B. Veit J.

Heard: March 14, 2011
Judgment: March 14, 2011
Docket: Edmonton 1003-16924

Counsel: Lorena K. Harris for Receiver
Tiffany L. Dueck (Student-at-Law) for Donald Brekkan
Mark D. Tims, Q.C. for 16 investors

Subject: Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Disclaiming contracts — Receiver brought application to disclaim investor's sales contract relating to purchase of unit in condominium complex being constructed by M Inc. prior to that company going into receiverships and to return his deposit — Application granted — Investor asserted that he was assured by his realtor that current market value upon completion would be greater than purchase price of unit — There was problem relating to opinion of value of unit as it related to value at some uncertain future date — Weight of investor judgment was against investor; all other investors in project consented to receiver's proposal — Investor had not established that he would necessarily suffer loss if receiver's application was allowed — Order made in this matter specifically authorized receiver to disclaim contracts.
Table of Authorities
Cases considered by *J.B. Veit J.*:
New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2004), 19 C.B.R. (5th) 45, 2004 CarswellBC 3540, 2004 BCSC 1818 (B.C. S.C.) — referred to
North America Steamships Ltd., Re (2007), 2007 BCSC 267, 2007 CarswellBC 414, 32 C.B.R. (5th) 35 (B.C. S.C.) — referred to
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243 — referred to
Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

APPLICATION by receiver to disclaim investor's sales contract relating to purchase of unit in condominium complex being constructed by company prior to that company going into receiverships.

***J.B. Veit J.*:**

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1 Mr. Brekkan opposes the receiver's application to disclaim his sales contract relating to the purchase of a unit in a condominium complex being constructed by Melvax Properties Inc. prior to that company going into receivership and to return his deposit. Mr. Brekkan, whose deposit totalled $2,500.00, asserts that he has been assured by his realtor that the "current market value, upon completion" of his unit "will be approximately $178,000.00" compared to the $115,000.00 purchase price of the unit.

2 Mr. Brekkan's objection is denied.

3 The court obviously has the power to deny the receiver's application. The receiver's obligation when determining whether it will affirm or disclaim a contract includes the obligation to have regard to equitable considerations: see, for example, *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2004 BCSC 1818, [2004] B.C.J. No. 3009 (B.C. S.C.). The issue here is whether the court's discretion to deny the receiver's application should be exercised in the circumstances here.

4 In addition to the technical problem with the affidavit presented on Mr. Brekkan's behalf (the affidavit being sworn by a student-at-law in the firm which represents Mr. Brekkan, and is therefore not capable of being the subject of questioning), and the substantive problem relating to the opinion of the value of the unit (the opinion relates to the value at some uncertain future date in as yet uncertain circumstances), Mr. Brekkan faces three additional problems:

5 First, the weight of investor judgment is against him. All of the other investors in the project consent to the receiver's proposal. A purposive interpretation of the *BIA* requires the court to acknowledge that the *BIA* is business-oriented legislation which respects business judgments on matters relating to financings, etc. and which only allows the court to interfere with business judgments where the law or equity would interfere with a business judgment. Here, all of the other investors who made down payments on the project, and whose investments total $75,000.00, in comparison to Mr. Brekkan's $2,500.00, are in favour of the receiver's proposal, deeming it to be the best way in the circumstances to put an end to what they describe as a long and painful saga.

6 Second, he has not established that he will necessarily suffer a loss if the receiver's application is allowed. Indeed, he may have a claim against the Melvax estate: see, for example, *North America Steamships Ltd., Re*, 2007 BCSC 267, [2007] B.C.J. No. 390 (B.C. S.C.), at para. 16.

7 Lastly, the order made in this matter on October 8, 2010, pursuant to s. 13(2) of the *Judicature Act* and *s. 243* of the *Bankruptcy and Insolvency Act* specifically authorized the receiver to disclaim contracts, see s. 3(c) of the order, and such authority is well established in the law.

8 For those reasons, his objection is denied.

Application granted.

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