Memorandum of Authorities

1. Rules 2 and 3 Rules of Civil Procedure
2. *Entegrity Wind Systems Inc.*, 2009 PEISC 25 (CANLII)
3. section 44 of the *Judicature Act*
4. F. Bennett, *Receiverships*, (Toronto: Carswell, 1985), p.14
5. *Bank of Nova Scotia* v. *Freure Village on Clair Creek*, 1996 CanLII 8258 (ON S.C.)
6. Rule 41 of the *Rules of Court*
7. *BIA*, s. 243
8. *Braid Builders Supply & Fuel Ltd.* v. *Genevieve Mortgage Corp.* (1972), 17 C.B.R. (N.S.) 305 at para. 1 (Man. C.A.).
9. *Robert F. Kowal Investments Ltd.* v. *Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 at paras. 13-14, 17, 20-21 (Ont. C.A.).

RULE 2

NON-COMPLIANCE WITH THE RULES

EFFECT OF NON-COMPLIANCE

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

(2) The court shall not set aside an originating process on the grounds the proceeding should have been commenced by an originating process other than the one employed.

ATTACKING IRREGULARITY

2.02 A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,

(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity.

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Chaisson (c.o.b. Safe Haven Guest House) v. McKeil (1996), 147 Nfld & P.E.I.R. 153 (P.E.I.S.C.-T.D.)

Applies *Read v. Read* infra.

Read v. Read et al. (No. 1) (1995), 131 Nfld. & P.E.I.R. 91 (P.E.I.S.C.-T.D.)

When documentation filed to initiate prejudgment garnishment proceedings does not comply with the Rules of Court the irregularities cannot be cured and it is necessary, in the interests of justice to set aside the proceedings.

Island Opry Inc. et al. v. Tweedy Ross (1996), Nfld. & P.E.I.R. 36 (P.E.I.S.C.-T.D.)

The purpose of Rule 2.01(1)(a) is to secure the just determination of the real matter in dispute and accordingly, the defendant was granted an adjournment to amend the statement of defence.

Dunphy v. Registrar of Motor Vehicles, 2001 PESCTD 28

The applicant, a minor, made an application for judicial review without the assistance of a litigation guardian. The trial judge applied Rule 2.03 and dispensed with the requirement of Rule 7.01 that a proceeding by a minor shall be commenced by a litigation guardian.

Wood v. Bonnell (1993), 104 Nfld. & P.E.I.R. 291 (P.E.I.S.C.-A.D.)

Rule 2.03 was relied upon to cure non-compliance with Rule 61 relating to the filing of documentation on an appeal.

RULE 3
TIME

COMPUTATION

3.01 (1) In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to time expressed as clear days, weeks, months, or years, or as "at least" or "not less than" a number of days, weeks, months, or years, the first and last day, week, month or year shall be excluded.

(b) in the calculation of time not expressed as clear days, or other period of time not referred to in clause (a), the first day shall be excluded and the last day included.

(c) where a period of seven days or less is prescribed, holidays shall not be counted;

(d) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(e) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday.

(2) Where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally.

EXTENSION OR ABRIDGMENT

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to the Court of Appeal may be made by a panel or by one judge of the Court of Appeal.

Consent

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

WHEN PROCEEDING MAY BE HEARD

Hearings Throughout the Year

3.03 Proceedings may be heard throughout the year, except that during July and August and from December 24th to the following January 6th, both dates inclusive, no trial of an action shall be held unless the consent of all parties is filed or the court orders otherwise.

Court Office Hours

3.04 (1) In these rules, "summer months" means the period commencing on the last Monday in May and ending on the last Friday in September each year.

(2) Court offices shall be open between 8:30 A.M. and 5:00 P.M. every day except a holiday and except during the summer months. During the summer months, court offices shall be open between 8:00 A.M. and 4:00 P.M. every day except a holiday.

Court Filing Hours

3.05 Filing hours for court documents shall begin at 8:30 A.M. and end at 4:00 P.M. every day except a holiday and except during the summer months. During the summer months, filing hours shall begin at 8:00 A.M. and end at 3:30 P.M. every day except a holiday.

Urgency

3.06 With the consent of the prothonotary, a court office may be open at any time where the relief sought requires urgency.

Ayangma v. City of Charlottetown, 2016 PECA 14

Rule 3.02
The court granted an application for an extension of time to file a Notice of Appeal. The court found that while the applicant did not meet the factors to be considered when granting an extension, it was in the interests of justice to do so.

Thomas v. Thomas Estates, 2016 PECA 13

Rules 3.02, 61.03, 61.03(1)
The court denied an application for an extension of time to commence two appeals. The court again cited the applicable factors:

1. Does the appeal have merit?
2. Was there a *bona fide* intention to appeal?
3 Is there a reasonable excuse for a delay in not filing within the prescribed time?
4. Are there exceptional or special circumstances justifying the extension of time?

Additionally, the court treats the question of whether the "*justice of the case*" requires that an extension be given as the governing principle and employs all of the mentioned factors, as well as prejudice to the other party, as factors. This approach facilitates a full assessment of the competing interests.

Ellis v. Callahan & Camp Abegweit 2006 PESCTD 52

The court granted an order extending the time for service of the statement of claim on a defendant. If the defendant is alleging prejudice to him as the basis to oppose the extension of time, he must show it is prejudice which has been caused by the delay.

Bentham v. Bentham (1999), 170 Nfld. & P.E.I. R. 273 (P.E.I.S.C.-A.D.)

Application for an extension of time to file a Notice of Appeal. The decision of Mitchell J.A. in *Bryant v. Fenton* (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.) was applied. Despite the fact the time for filing an appeal had elapsed twelve months prior to the application, an extension was granted on certain conditions.

Bryant v. Fenton (1998) 166 Nfld. & P.E.I. R. 109 (P.E.I.S.C.-A.D.)

The appellant sought an order, pursuant to Rule 3.02, to extend the time prescribed by Rule 61.07(1) for perfecting an appeal. Although a motion had been made to the Prothonotary pursuant to Rule 61.11(1) to dismiss the appeal, the Court extended the time for perfecting the appeal because it is desirable to have appeals decided on their merits and because the respondent would not suffer any prejudice by the granting of the extension. The appellant was, however, ordered to pay the costs of the respondent in making the motion for dismissal to the Prothonotary.

In the Matter of the Estate of Duncan MacCannell, [1995] 2 P.E.I.R. 87 (P.E.I.S.C.A.D.)

The court denied an application for an extension of time to file a notice of appeal because the applicant did not demonstrate he had an arguable case on appeal.

Ellis and Birt Ltd. v. Island Regulatory and Appeals Commission (P.E.I.) (1993), 105 Nfld. & P.E.I.R. 65 (P.E.I.S.C.-A.D.)

The Rule is applicable to an application to extend or abridge the time for filing a notice of appeal pursuant to s.13 of the **Island Regulatory and Appeals Commission Act** R.S.P.E.I. 1988 Cap. I-11.

D.B. and L.B. v. Director of Child Welfare (1992), 100 Nfld. & P.E.I.R. 333 (P.E.I.S.C.-A.D.)

On an application to extend or abridge the time for filing a notice of appeal the Court must address the following questions: (1) does the appeal have merit; (2) was there a bona fide intention to appeal; (3) is there a reasonable excuse for the delay in not filing within the prescribed time and; (4) are there exceptional or special circumstances justifying the extension of time?

2009 PESC 25
Prince Edward Island Supreme Court

Entegrity Wind Systems Inc., Re

2009 CarswellPEI 47, 2009 PESC 25, 179 A.C.W.S. (3d) 1029,
289 Nfld. & P.E.I.R. 347, 56 C.B.R. (5th) 1, 890 A.P.R. 347

In the Matter of the Notice of Intention to make a Proposal of: ENTEGRITY WIND SYSTEMS INC. (INSOLVENT PERSON)

PRICEWATERHOUSECOOPERS INC. (TRUSTEE)

In the matter of an Application by Entegrity Wind Systems Inc. having a place of business in Charlottetown, Prince Edward Island, to grant an extension for filing a Proposal pursuant to Section 50.4 of the Bankruptcy and Insolvency Act

Wayne D. Cheverie J.

Heard: August 14, 2009
Judgment: August 19, 2009
Docket: S1-BK-2429

Counsel: Krista MacKay, John Keith for Applicant
Michael Drake, Jeffrey Cormier for Respondent, Mercantile Finance Services Ltd.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Civil practice and procedure
XIV Practice on interlocutory motions and applications
XIV.4 Notice of motion or application
XIV.4.a Service
XIV.4.a.i Time for

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Insolvent company filed notice of intention to make proposal — Next day, company's largest creditor appointed own receiver and sought to waive ten day notice period required by Bankruptcy and Insolvency Act to move more quickly to realize on its security — Insolvent company brought motion for order under s. 50.4(9) of Act for extension of 45 days to file proposal — Motion granted — Insolvent company acted in good faith — Company attempted to address creditor's demands and used funds from projects and its own funds to maintain company while it moved on overall plan — In this context, allegation that company transferred equipment from existing contracts to other buyers over which creditor did not have security was not damaging — Insolvent company acted with due diligence — Since filing notice, company was distracted by actions of creditor which resulted in another court action and deployment of resources to answer those

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allegations — Insolvent company would likely be able to make viable proposal if extension was granted — No detailed proposal had been advanced by company — However, circumstances of case were not normal since creditor moved on its security — Company was not seeking to reduce its obligation to creditor — There was some case authority that this branch of test could be achieved without actual formal proposal in existence — Per diem owing to creditor of $1,880 per day over extension period did not amount to material prejudice given creditor's stated exposure in excess of $3 million.
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Abridging of time for service of motion.
Civil practice and procedure --- Practice on interlocutory motions and applications — Notice of motion or application — Service — Time for
Abridging of time in bankruptcy proceedings.

MOTION by insolvent company for order abridging time for service of motion; MOTION by insolvent company for extension of time to file proposal.

***Wayne D. Cheverie J.*:**

Introduction

1 This motion is brought by Entegrity Wind Systems Inc. ("Entegrity") for an order abridging the time for the service of the motion and, if granted, an order pursuant to s-s. 50.4(9) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended R.S.C. 1985, c. 27 first supplement ("BIA") for an extension of 45 days within which to file a proposal as per its notice of intention under s-s. 50.4(1) of the BIA. Entegrity is insolvent and has engaged the services of Pricewaterhousecoopers Inc. as Trustee.

2 The single largest creditor of Entegrity is Mercantile Finance Services Ltd. ("Mercantile"). It alone opposes Entegrity's motion for an extension of time. As will be seen from a discussion of the applicable law, Entegrity suggests it has discharged the burden of proof on it to satisfy the three part test set out by Parliament in s-s. 50.4(9) of the BIA, while Mercantile argues Entegrity has not met any of the branches of the test and, therefore, the extension ought not be granted and the motion should be dismissed, with costs.

3 Allow me first to dispose of the motion for an order abridging the time for service of this motion. This was not seriously contested by Mercantile and I am satisfied the interests of justice require abridgement of time as per Rule 2.03 of the *Rules of Civil Procedure*. Given the rapid pace of events involving Entegrity and Mercantile over the past six weeks or so, I am of the view the motion ought to be heard notwithstanding the strict time frames of the *Rules* have not been met.

The law

4 Entegrity filed its Notice of Intention to Make a Proposal pursuant to s-s. 50.4(1) of the BIA on July 15, 2009. By operation of s-s. 50.4(8) of the BIA, Entegrity is required to file a proposal within 30 days of that date unless it otherwise obtains an extension of time from the court within that 30 day period.

5 Parliament has set the rules for obtaining an extension of time for filing a proposal. Those rules are contained in s-s. 50.4(9) of the BIA which reads as follows:

> (9) Extension of time for filing proposal - The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;

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(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

The parties agree Entegrity's motion has been brought and heard within 30 days of filing. The parties also agree that the three part test is conjunctive and the onus on Entegrity is to establish all three prongs of the test. If Entegrity fails on any one branch, its motion must be dismissed. (See *Baldwin Valley Investors Inc., Re*, 1994 CarswellOnt 253 (Ont. Gen. Div. [Commercial List]) at para. 7.) As in so many cases, the applicable law is clear, it is the application of that law to the particular facts of each case which is more challenging. The case at bar is an example of that challenge.

Positions of the parties and discussion

6 At this juncture I shall identify each of the three parts of the applicable test, summarize the position of each party on that element, and arrive at a conclusion with respect to whether the particular test has been met.

(a) Has Entegrity acted in good faith and with due diligence?

7 Mercantile argues Entegrity has not acted in good faith nor has it proceeded with due diligence. Central to this argument is the affidavit of John F. Gundy, Vice President, Commercial Lending and Portfolio Management, for Mercantile, where in his affidavit of July 14, 2009 at para. 27 he deposes that James Heath, who is the President and Chief Executive Officer of Entegrity, disclosed to him at a June 8, 2009 meeting that he had arranged to have equipment transferred from existing contracts over which Mercantile held security to other buyers over which Mercantile did not have security. Gundy further deposes Heath indicated in no uncertain terms he had diverted Entegrity funds from Mercantile to Entegrity's accounts to pay bills and make payroll payments. Gundy alleges these funds were properly payable to Mercantile pursuant to the credit agreement between the parties and Mercantile's security. Therefore, says Mercantile, Entegrity was not acting in good faith.

8 Entegrity's response to this allegation is contained in the affidavits of Heath of August 10, 2009 and August 13, 2009. The detail of Entegrity's response is contained in paras. 10 through 17 of Heath's latter affidavit. He denies any misappropriation or misdirection of company funds and refers to monies received from various projects and how they were dispersed. In one case funds were used for payment of employee health insurance and to complete two additional projects. In another case some funds were used to repay out of pocket expenses to US employees volunteering during this period of time. Further, Heath deposes that during this relevant period of time Entegrity generated a total of $271,000 CAN and that the cash received in July 2009 was approximately 90% of the July plan submitted to its trustee, a plan wherein Entegrity proposed to pay off Mercantile. I infer from these actions the direction of funds as detailed in Heath's affidavit were in the interests of keeping the company afloat, which objective, if achieved, would ultimately benefit its primary secured creditor, Mercantile.

9 In addition to the use of funds from various projects, Heath deposes at para. 17 of his August 13 affidavit that he provided an additional $600,000 of capital to Entegrity and began to use all funds for maintaining operations. His version of meetings with Gundy and others in Toronto differs in some respects from the version of events advanced by Mercantile. However, Heath says as a result of those meetings he called an emergency meeting of his board, hired an individual to assist the board in its fiduciary responsibility to creditors and then Heath made the requested interest and fee payment out of his own funds.

10 As I assess the allegations and responses from the parties with respect to good faith, I am not of the view Entegrity failed to act in good faith during this tumultuous period. Rather, it appears Entegrity was attempting to address Mercantile's demands and in the course of doing so, used funds from projects as well as its own funds to maintain the company while it moved on an overall plan to extricate itself from its difficulties. In this context, the allegation that Heath arranged to have equipment transferred from existing contracts to other buyers over which Mercantile did not

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have security is not quite as damaging. The allegation is not that Entegrity converted machinery over which Mercantile held security so much as it was a redeployment of equipment to other contracts in which Mercantile was not a financier.

11 Mercantile also argues Entegrity has not acted with due diligence. It argues that neither Heath nor Walter MacKinnon, the Trustee for Entegrity, has offered any particulars of the due diligence. Entegrity argues there are no details of the proposal being developed by it, to say nothing of the fact whether the proposal is viable or not. Mercantile's argument here spills over into its argument on the second branch of the test that Entegrity is not likely to be able to make a viable proposal even if the extension applied for were granted. It points to para. 12 of Heath's affidavit of August 10, 2009 as a bare assertion that Entegrity has had meetings with "an interested investor, Valmont Industries Inc." and that Valmont is "interested to go forward subject to the court's decision."

12 As argued by Mercantile, it is true Heath provides no details of the nature of his discussions with Valmont; the substance of those discussions; the nature and extent of any involvement proposed by Valmont; whether Valmont's interest includes a provision for paying out Mercantile; or any terms and conditions of Valmont's interest. Mercantile alleges this is nothing more than a bare assertion. This argument is equally applicable and intertwined with the allegation by Mercantile that there is no hope for a viable plan forthcoming from Entegrity if it is granted the extension of time sought.

13 Entegrity's response to the allegation of lack of due diligence is really contained in the chronology of events which have unfolded since the Spring of this year and particularly since it filed its Notice of Intention to Make a Proposal on July 15, 2009. Essentially, as I understand it, having filed the Notice of Intention, Entegrity then engaged the services of Pricewaterhousecoopers Inc. as Trustee as required by s. 50.4 of the BIA. It then complied with the filings required by s-s. 50.4(2) of the BIA including the development of a cash flow statement. It notified its creditors as required and provided the cash flow statement to its Trustee.

14 Walter MacKinnon, in his affidavit of August 10, 2009 indicates he has reviewed that cash flow statement and then he filed a Trustee's report on that statement on July 24, 2009. He kept unsecured creditors apprised of Entegrity's activities, all the while noting Mercantile appointed a private receiver, A.C. Poirier & Associates on July 16, 2009 who took possession of the assets of the company and issued the required notice under s. 245 of the BIA to creditors. Of note is the step taken by Mercantile to appoint its own receiver the day after Entegrity filed its Notice of Intention to Make a Proposal. I am advised by counsel, and it appears from certain documents filed in this motion, that another dispute was being addressed by Taylor J. of this Court. (Taylor J. rendered his decision on August 14, 2009 - *Mercantile Finance Services Ltd. v. Entegrity Wind Systems Inc.*, 2009 PESC 23 (P.E.I. S.C.).) Apparently that dispute focussed on the legality of the waiving of a ten day notice period required by the BIA so that Mercantile could move more quickly to realize on its security. I say that generally because I am not aware of the exact details, suffice to say the parties engaged counsel and the matter was vigorously litigated, taken under advisement by Taylor J. and subsequently determined by him.

15 The purpose of referencing that action is to provide some context for the activities of Entegrity since filing its Notice of Intention to Make a Proposal. It appears to me Entegrity was trying to act with due diligence during this time, but at the same time was distracted by the actions advanced by Mercantile, resulting in another court action, the requirement to deploy resources to answer those allegations, with the resultant lessening of time needed to address its proposal. In all of these circumstances, I am satisfied Entegrity acted with due diligence and, therefore, it has met the burden required in part one of the test.

(b) Whether Entegrity would likely be able to make a viable proposal if the extension being applied for were granted?

16 To a degree, the arguments of the parties under this part of the test have been at least partially addressed in the discussion of due diligence. It is clearly Mercantile's position that not only will Entegrity not be able to file a viable proposal, it is not likely to be able to file any proposal. In addition, Mercantile has made it quite clear that short of being paid out in full, it is not interested in any proposals forthcoming from Entegrity. It has simply lost faith in Heath who is the principal of Entegrity and no longer wishes to do business with him. It relies on *Baldwin Valley Investors Inc.* at para.

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4 for the proposition that a viable proposal should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor." As Farley J. pointed out:

> ...there is no indication of the names and substance of all these fall back partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal... I do not see the conjecture of the debtor company's rough submission as being "likely".

In *Baldwin Valley*, Farley J. was faced with the situation where a draft proposal had been advanced. Mercantile argues there is no such draft proposal in the present case but rather only what they characterize as the vague hearsay assertions of a potential interested investor and alleged discussions with a further unnamed investor. Mercantile further argues there is no evidence Entegrity is even working on a proposal of any kind, let alone a viable proposal.

17 Mercantile also referred the court to the Nova Scotia decision in *H & H Fisheries Ltd., Re*, 2005 CarswellNS 541 (N.S. S.C.) where Goodfellow J. wrote at paras. 22 and 23 with respect to what is meant by "viable." He wrote:

> [22] "Viable" in this context means a proposal which seems reasonable on its face to a reasonable creditor (Re Baldwin Valley Investors Inc., [1994] 23 C.B.R. (3rd) 219). Again, the court must be satisfied on a balance of probabilities that HHFL would likely. This at the very least means that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for.
>
> [23] Lack of detail and assurance of this kind was considered in St. *Isidore Meats Inc. v. Paquette Fine Foods Inc.*, [1997] O.J. No. 1863. In dismissing an application for an extension of time, Justice Chadwick stated (at para. 16):
>
> > ... [T]he debtors have not been able to put forth any meaningful financial plan which would support a proposal. There is a vague reference in the affidavit material that they have approached at least two prospective purchasers, however there is no evidence that any of these parties are interested in assisting the debtor either now or in the future.

18 At first glance it would appear the circumstances outlined by Goodfellow J. would sound a death knell to Entegrity in the case at bar. Certainly no detailed proposal has been advanced by Entegrity at this stage. However, their argument countering that of Mercantile must be considered carefully. Firstly, as already referred to in these reasons, Entegrity takes the position it has been preoccupied with the legal initiatives advanced by Mercantile requiring it to defend itself before another judge of this court and that action has not only drawn upon what meagre resources it has, but has also detracted from its ability to prepare its proposal within the strict 30 day legislative requirement.

19 However, Entegrity does not rely entirely on the circumstances facing it since July 15, 2009 as meeting its obligation under part two of the test. It points to the affidavit of its Trustee, Walter MacKinnon, and the cash flow statement attached thereto which it was required to file under the BIA. Further to this cash flow statement is the evidence of Heath in his August 10 affidavit wherein he deposes in para. 3 that the company has completed two projects since July 15, 2009 and has received another four orders since that time (no details provided), but in doing so Entegrity has achieved 90% of the cash receipts as set out in the cash flow statement even though it has not been able to access inventory since the Receiver has been put in place. Heath also deposes Entegrity reduced its staff in order to further cut costs.

20 In his August 13, 2009 affidavit, at para. 19, Heath outlines the actions taken by Entegrity to complete its proposal within the 30 day period. In para. 19 he advises the names of three individuals who have been working with him daily on a draft of the proposal. He advises the narrative or qualitative portion of the proposal is near completion and he anticipates the ability to complete the full proposal (including the quantitative or accounting aspects within 45 days). Furthermore, he says Entegrity's proposal contemplates Mercantile being repaid in full and to that extent Mercantile is protected. He again references the possible investment of Valmont Industries and others unnamed and he says they have done all this despite the fact they are contesting Mercantile's private receivership and alleged premature enforcement.

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21 In normal circumstances, I would expect to see more detail from Entegrity of its proposal, and to that extent I would be in agreement with Mercantile's argument that therefore it would be unlikely Entegrity would be able to make a viable proposal if time were extended. However the circumstances of this case do not appear to be normal. As soon as Entegrity filed its Notice of Intention to Make a Proposal, Mercantile moved on its security and appointed a receiver. Entegrity then lost the ability to deal in an unfettered way with its operation, but did proceed to make efforts to attract other investors. All the while it was embroiled in legal proceedings with Mercantile.

22 I accept the proposition advanced by Entegrity that the proposal contains two parts - a narrative or qualitative portion and a second quantitative or accounting portion. I also note Entegrity's proposal is not one which seeks to reduce its obligation to Mercantile, but rather it is proposed to pay Mercantile out. If that is the case then Mercantile is saved harmless.

23 In its argument on this branch of the test, Entegrity relied on and referred the court to the case *Cantrail Coach Lines Ltd., Re*, 2005 BCSC 351 (B.C. Master). The headnote indicates the British Columbia Master saying it was disingenuous for a secured creditor to oppose a proposal even before the proposal was made. That is relevant to the case at bar since that is the position taken by Mercantile. In paras. 14, 15 and 16 of the decision, the court articulates why taking such a position is inconsistent with the BIA. The legislation reflects Parliament's direction that in these circumstances the insolvent person has the right to set out a proposal to its creditors, and the BIA describes the process to be followed. And then the court goes on to say this at para. 17:

> Here, as indicated, there are 81 creditors. There is no proposal as of yet. The trustee has set out in a lengthy affidavit and letter attached to it the possibility of a buy-out of this operation, or a merger, and even the possibility of a refinancing. **There is a possibility, though as of yet uncertain, that Volvo could be paid out in full.** It is in my view somewhat disingenuous for the secured creditor to say that they would vote no to any proposal under any circumstances when on the facts here there is no evidence of bad faith and there is no determination at this stage as to what the proposal will actually be. **It may be a proposal which gets them out of the picture completely by some form of payout** — a proposal which if they voted against they would probably be viewed as irrational businesspeople.
>
> (Emphasis added.)

In the *Cantrail* case, as in the case at bar, there was a possibility, though uncertain, that the creditor could be paid out in full. This was held not to be a bar to a viable proposal.

24 After considering the peculiar circumstances of this case and the fact there is some case authority to support the proposition this branch of the test may be achieved without an actual formal proposal in existence, I am satisfied on the balance of probabilities that Entegrity again has discharged the burden on it and they would likely be able to make a viable proposal if the extension were granted.

(c) Will any creditor be materially prejudiced if the extension being applied for were granted?

25 The emphasis in this part of the analysis must be on the phrase "materially prejudiced." As I read the law, it is not a question of simply a creditor being prejudiced by an extension of time, but rather that creditor must be materially prejudiced. The only creditor opposing the application for extension is Mercantile. Therefore I must examine whether it will be materially prejudiced if the extension is granted.

26 Mercantile argues Entegrity has been in default of its obligations to it since May, 2009 and that the total secured indebtedness to Mercantile as at July 9, 2009 was in excess of $3 million with a per diem since that time of over $1,880. This clearly amounts to some prejudice to Mercantile, but can it be said to materially prejudice Mercantile? It is clear from the evidence that Mercantile wishes to part company with Heath. They repeat on numerous occasions that they have lost all confidence in the ability of James Heath to manage Entegrity's affairs and business operations. However,

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at the time of this hearing, Mercantile, acting on its security, had taken control of Entegrity such that any prejudice to it would be minimized.

27 Entegrity conceded that if the pending decision of Taylor J. allowed the BIA to prevail, there "may" be some prejudice to Mercantile, but it would be minimal. It argues Mercantile does not trump the other creditors and that by filing a Notice of Intention to Make a Proposal and now seeking an extension to make good on the details of that proposal, Entegrity has put itself under the pressure of a process which has dire consequences for it if it does not meet with the approval of all the creditors.

28 It is true the per diem owing to Mercantile is clicking at the rate of $1,880 per day. I do not intend to trivialize this amount, but in the overall scheme of things, given its stated exposure in excess of $3 million, $1,880 per day over the extension period does not in and of itself amount to material prejudice to Mercantile. It still has its security. The BIA allows for proposals to be advanced by companies like Entegrity found in circumstances like the present. If Parliament did not wish to provide a window of hope for companies like Entegrity, it would not have enacted the provisions of the BIA which allow for the advancement of proposals to creditors short of immediately bankrupting the company. Likewise, Parliament chose the wording in subsection 50.4(9) carefully and in the third prong of the test was concerned about a creditor who would be materially prejudiced upon the granting of an extension, not a creditor who would be simply prejudiced. Again, on the balance of probabilities, I am satisfied Entegrity has met the burden placed on it and the third part of the test has been met.

Conclusion

29 Based on the evidence before me, I have asked myself whether it is more likely than not that Entegrity has acted, and is acting, in good faith and with due diligence; whether Entegrity would likely be able to make a viable proposal if the extension being applied for were granted; and whether any creditor would be materially prejudiced if the extension being applied for were granted; and in each case I am satisfied Entegrity meets the test.

30 For all of these reasons, I exercise the discretion reposed in me under s-s. 50.4(9) of the BIA and I extend the time allowed for Entegrity to file its proposal for 45 days from August 14, 2009 when its initial 30 day period was due to expire. My calculation of the 45 day extension allows Entegrity up to and including September 28, 2009 to complete its proposal.

31 In its notice of motion, Entegrity has not sought its costs, nor were costs sought by counsel at the hearing. However, Entegrity shall have its costs of this motion in the cause.

Motions granted.

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PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

JUDICATURE ACT

COMMON LAW AND EQUITY

39. Rules of law and equity

(1) The courts shall administer concurrently all rules of equity and the common law.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of common law, the rule of equity shall prevail. *2008,c.20,s.39.*

40. Declaratory orders

The courts may make binding declarations of right whether or not any consequential relief is or could be claimed. *2008,c.20,s.40.*

41. Relief against penalties

The courts may grant relief against penalties and forfeitures on such terms as to compensation or otherwise as are considered just. *2008,c.20,s.41.*

42. Damages in lieu of injunction or specific performance

The courts have jurisdiction to grant injunctions or order specific performance and may award damages in addition to, or in substitution for, such remedies. *2008,c.20,s.42.*

43. Vesting order

The courts may, by order, vest in any person an interest in real or personal property that the courts have authority to order be disposed of, encumbered or conveyed. *2008,c.20,s.43.*

INTERLOCUTORY ORDERS

44. Injunctions and receivers

(1) A court may

(a) by interlocutory order,

(i) grant an injunction, or

(ii) appoint a receiver or receiver and manager; and

(b) make a mandatory interlocutory order,

where it appears to the court to be just or convenient to do so.

Terms

(2) An interlocutory order made under subsection (1) may include such terms as the court considers to be just. *2008,c.20,s.44.*

45. "labour dispute" defined

(1) In this section, "**labour dispute**" means a dispute or difference concerning

(a) the terms, tenure or conditions of employment; or

RECEIVERSHIPS

by

Frank Bennett
B.A., LL.B., LL.M.
of the Ontario Bar

The Carswell Company Limited
Toronto, Canada
1985

for the necessity of a court-appointed receiver and manager; namely, the enforcement of rights between the parties, the preservation of assets pending judgment or a serious apprehension about the safety of the assets. It is only in exceptional circumstances that an order will be made without notice to the debtor.[2] Alternatively, a notice of application for the appointment of a receiver and manager may be made under certain legislation such as the Securities Act[3] in order to protect the property from some danger although no action has been commenced.

On the hearing, the court may make an order appointing a receiver and manager where it is "just or convenient" to do so for the protection of all the creditors, including protection of the rights of the security holder initiating the motion. Usually, the order appoints the receiver and manager over all the debtor's property that is charged in favour of the security holder and all other property owned by the debtor.

The typical order appointing a receiver and manager will set out his duties and powers which in many cases will correlate to those contained in a security instrument. The order relates back to the commencement of the action with respect to crystallizing a floating charge contained in a security instrument providing for after-acquired property.

However, if there is an appointment by instrument preceding the court appointment, crystallization of a floating charge will occur at an earlier time. This date is often important in determining priorities *vis-à-vis* prior and subsequent creditors whose rights were acquired between the date of the granting of the security and the date of the private appointment.

A court appointment may become necessary where the privately appointed receiver encounters problems in taking possession of the debtor's property or where there are numerous creditors exercising their remedies simultaneously against the debtor. Alternatively, where the security holder anticipates difficulties of this nature, it may proceed directly for a court appointment. The court appointment in these situations ensures that the protection of the assets is sanctioned by the formal authority of the court.

Once a court appointment is invoked, the court-appointed receiver, the security holder and any person who has a vested interest in the debtor's equity may apply to the court for advice and directions.

While a court-appointment regularizes the receivership, it presents two major drawbacks. Firstly, the action to enforce the security is in itself a delay in the proceedings to collect the debt. The debtor will be given time to redeem and a forum to defend. The receiver will in most cases be required to seek court approval in disposing of the debtor's assets. Each motion to the court affords the debtor more time to attempt to reorganize.

Secondly, a court-appointed receivership can be very expensive. The costs of the receiver in preparation of a motion and report to the court are time-consuming but obviously essential to the court's disposition of the matter.

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2 *Re Cornell Bros. Ltd.; Wilson v. Cornell Bros. Ltd.* [1971] 1 C.B. 731 (Ont. S.C.).

3 R.S.O. 1980, c. 466.

4 See Chapter 5, "Status of the Receiver and Manager".

5 *In Re Dell Bank v. Valle Dairy Ltd. et al.* [1955] O.R. 70 (H.C.). However, if the debtor contests the enforcement of the security instrument, crystallization will probably not occur until the making of the order. See Chapter 4, "Acts of Crystallization".

Most Negative Treatment: Distinguished
Most Recent Distinguished: M & K Construction Ltd. v. Kingdom Covenant International | 2015 ONSC 2241, 2015 CarswellOnt 5609, 252 A.C.W.S. (3d) 642 | (Ont. S.C.J., Apr 20, 2015)

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles
Headnote
Receivers --- Appointment — Application for appointment — General
Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.
The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.
Held:
The motions were granted.
The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

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Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

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6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issues exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately $20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

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14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 $^{1}/_{2}$ years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

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Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

1996 CanLII 8258 (ON SC)

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

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[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

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they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

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1996 CanLII 8258 (ON SC)

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[10] The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act,* R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

1996 CanLII 8258 (ON SC)

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[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

1996 CanLII 8258 (ON SC)

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

1996 CanLII 8258 (ON SC)

RULE 41

APPOINTMENT OF RECEIVER

DEFINITION

41.01 In Rules 41.02 to 41.06, "receiver" means a receiver or receiver and manager.

HOW OBTAINED

41.02 The appointment of a receiver under section 44 of the *Judicature Act* may be obtained on motion to a judge in a pending or intended proceeding.

FORM OF ORDER

41.03 An order appointing a receiver shall,

(a) name the person appointed or refer that issue in accordance with Rule 54;

(b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of his duties, or refer that issue in accordance with Rule 54;

(c) state whether the receiver is also appointed as manager and, if necessary, define the scope of his managerial powers; and

(d) contain such directions and impose such terms as are just.

REFERENCE OF CONDUCT OF RECEIVERSHIP

41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54.

DIRECTIONS

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee.

DISCHARGE

41.06 A receiver may be discharged only by the order of a judge.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. | 1975 CarswellOnt 123, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 9 O.R. (2d) 84 | (Ont. C.A., Apr 23, 1975)

1972 CarswellMan 9
Manitoba Court of Appeal

Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp.

1972 CarswellMan 9, [1972] M.J. No. 31, 17 C.B.R. (N.S.) 305, 29 D.L.R. (3d) 373

Braid Builders Supply & Fuel Ltd., B.A.C.M. Limited and Winters Plumbing & Heating Ltd. v. Genevieve Mortgage Corporation Limited

Freedman C.J.M., Dickson and Hall JJ.A.

Judgment: June 27, 1972

Counsel: *C. K. Tallin, Q. C.*, and *G. M. Pullan*, for appellant.
N. Nurgitz, for respondents Braid Builders Supply & Fuel Ltd. and Winters Plumbing & Heating Ltd.
L. M. Smordin, for respondent B.A.C.M. Limited.
J. S. Lamont, for receiver.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.i General principles
Headnote
Receivers --- Remuneration of receiver — Remuneration
Receiver — Appointed by court — Compensation — Payable out of assets under administration.
A mortgagee with a claim greater than the proceeds of sale of a certain property appealed from an order which provided that the fees and disbursements of a receiver appointed by the court should be paid out of the proceeds of sale.
Held, the appeal should be dismissed.
A receiver appointed by the court is an officer of the court and his fees and disbursements, in the absence of an order to the contrary, become payable out of the assets subject to the administration of the court.

The judgment of the Court was delivered by *Dickson J.A.*:

1 The disposition of this appeal does not present any difficulty if one bears in mind that a receiver appointed by the court is the receiver of the court, not the receiver of the parties who sought the appointment: *Boehm v. Goodall*, [1911] 1 Ch. 155, followed by the British Columbia Court of Appeal in *Johnston v. Courtney*, [1920] 2 W.W.R. 459. In the performance of his duties the receiver is subject to the order and direction of the court, not the parties. The parties do not control his acts or his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the court and not from the pocket of those who sought his appointment. This is subject, however, to the proviso that, at the time of the appointment, the court may direct that one or other of the parties be responsible for such remuneration, as was done in *Howell v. Dawson* (1884), 13 Q.B. 67.

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2 Mr. F. G. Patrick was appointed receiver of all of the undertaking, property and assets of Redman Construction Limited (Redman) on 30th March 1970 at the nadir in the affairs of that company. Work on the apartment block which Redman was constructing had stopped. The block was far from complete; creditors were clamouring for payment; sub-contractors were removing equipment which was on site but not installed. The secured creditor Genevieve Mortgage Corporation Limited (Genevieve) had begun mortgage sale proceedings, the result of which, if carried to foreclosure, would wipe out the claims of unsecured creditors. There were unresolved questions of priorities between Genevieve and unsecured creditors: vide the judgment of this Court in *Winnipeg Supply & Fuel Co. v. Genevieve Mortgage Corpn.; Wiebe v. Dominion Bronze Ltd.*, [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160. It was desirable to vest someone with authority to complete construction if this were found to be feasible. In this confused and somewhat frenetic state of affairs the appointment of a receiver was not a surprising development. Additionally, the evidence before the Court at that time indicated that if completed at an estimated additional cost of $669,000, the apartment block would have a sale value of $2,200,000 to $2,400,000. The secured claim of Genevieve amounted to $1,100,000. There was therefore promise of some equity from which unsecured creditors could recover at least part of their claims totalling $1,193,000.

3 When all the smoke had cleared, it turned out that the apartment block, sold in March 1972 in its incomplete state, realized only $1,035,000, which was less than Genevieve's mortgage claim. Hunt J. therefore ordered that the fees of the receiver and his counsel, totalling $20,000, and the disbursements of the receiver, aggregating $25,000, be paid from the sale of an apartment block in Selkirk owned by Redman, against which Genevieve had a mortgage claim exceeding the value of the block. Genevieve concedes that $18,733.68 of the disbursements of the receiver are properly payable out of the proceeds of the sale of the Selkirk property but contends that the balance of the disbursements, and all of the fees, should be borne by the three respondents who, on behalf of the unsecured creditors, brought the motion for the appointment of the receiver.

4 Genevieve submits that the judgment appealed from is erroneous in several respects.

5 (1) The estimates of the value of Redman's assets were unrealistic. It is far too late to advance that argument. At the time of the appointment of the receiver estimates of value were contained in an affidavit of Mr. W. G. Braid filed in support of the motion. Genevieve did not file affidavit evidence refuting these estimates, nor did it appeal the order of Hunt J. appointing the receiver. It is late in the day now to challenge the estimates. It may be that in light of what later transpired the estimates were sanguine but there were circumstances which may have affected the final sale price of the block. After the appointment of the receiver a tender was received for the purchase of the block at $1,376,500, subject to financing. The financing could not be arranged due to a substantial increase in interest rates shortly after the appointment of the receiver. Also, the block stood vacant for a period of two years prior to sale. We are unable to say that the estimates made in March 1970 were unrealistic. In any event, Hunt J. was entitled to rely on them and did so.

6 (2) The Judge erred in holding that any action of the receiver protected the property of Redman or resulted in any value being realized from the Selkirk property greater than Genevieve itself could have achieved. We would question the relevance of this contention, even if valid, as a consideration to be taken into account in determining by whom the fees of the receiver are to be paid, particularly as the quantum of such fees has not been questioned. The contention is not valid. The Judge held that the receiver did protect the property and that his actions did result in the sale of the Selkirk property at a price, apparently some $20,000, in excess of the amount which others, including Genevieve, were prepared to accept, and there was evidence upon which such findings could be made.

7 (3) The Judge erred in charging the costs of the receiver on property in which Redman had no equity. The argument is that a receiver can only receive his remuneration and costs from property in which an equity remains. No authority was quoted in support of this proposition. There are cases to the contrary: *Strapp v. Bull Sons & Co.; Shaw v. London School Board*, [1895] 2 Ch. 1; *Re Glasdir Copper Mines Ltd.; English Electro-Metallurgical Co. v. Glasdir Copper Mines Ltd.*, [1906] 1 Ch. 365. It would seem to us that if appellant's argument is sound, one would be hard put to find anyone willing to be a receiver; he would be denied recovery of his fees and disbursements out of property under his administration if the mortgage load borne by that property exceeded the value of the property. The true worth of property under

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administration can rarely be determined at the time of appointment. The court itself has no funds from which to pay a receiver. If his fees cannot be paid from assets under administration of the Court the receiver would be in the untenable position of having to seek recovery from the creditor who, on behalf of all creditors, asked for the appointment. This could work a grave injustice on the receiver and on the petitioning creditor. Why should the latter bear all of the costs in respect of an appointment made for the benefit of all creditors, including secured creditors, for the purpose of preserving the property? The argument also appears to proceed on the assumption that when property subject to a mortgage becomes of a value less than the mortgage debt against it, it ceases to belong to the debtor. Property of a debtor, whatever the amount of the mortgage debt against it, remains the property of the debtor until all steps have been taken in law to foreclose the interest of the debtor. All of the debtor's property under administration of the court, and not merely the equity of the debtor in that property, is available by order of the court to meet the fees and disbursements of a receiver.

8 (4) The receiver's costs should be borne by those at whose request he was appointed. This argument is largely repetitive and we would say only in response that the appointment is a court appointment; when made, the appointee becomes an officer of the court; his fees and disbursements, in the absence of an order to the contrary, become payable out of the assets subject to the administration of the court.

9 The appeal is dismissed with costs to each Braid Builders Supply & Fuel Ltd. and B.A.C.M. Limited.

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Most Negative Treatment: Not followed
Most Recent Not followed: Pyrogenesis inc., Re | 2004 CarswellQue 2292, J.E. 2004-1981, REJB 2004-70374, [2004] R.J.Q. 2769, 5 C.B.R. (5th) 286 | (C.S. Qué., Sep 1, 2004)

1975 CarswellOnt 123
Ontario Court of Appeal

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.

1975 CarswellOnt 123, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 9 O.R. (2d) 84

Robert F. Kowal Investments Limited and Randy Construction Company Limited v. Deeder Electric Limited

Jessup, Lacourcière and Houlden JJ.A.

Judgment: April 23, 1975

Counsel: *H. L. Morphy* and *S. R. Block*, for appellant Monte Denaburg.
J. G. Reid, Q.C., for respondents.
L. Klug, for respondent receiver.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.ii Priority of fees
Headnote
Receivers --- Remuneration of receiver — Remuneration — Priority of fees
Receivers — By court appointment — Winding-up of partnership — Fees and disbursements of receiver — Priorities.
The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. *Boehm v. Goodall*, [1911] 1 Ch. 155 applied. Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71 applied. There are certain exceptions to the general rule. The first exception is this: if a receiver has been appointed at the request, or with the consent or approval, of the holders of security, the receiver will be given priority over the security holders. In these circumstances the order permitting the receiver to borrow would ordinarily provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him. *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1 applied.
The second exception is this: if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him. In such a case, also, one would expect that an order permitting borrowing by the receiver would make it clear before the fact, not after the fact, that the receiver could give as security for his borrowing a charge upon all the assets in priority to the security of secured creditors. *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, [1894] 2 Ch. 205 applied. When an order is sought for this type of borrowing, notice will ordinarily be given to the secured

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creditors whose rights will be affected: *Greenwood v. Algesiras (Gibraltar) Ry. Co.*, supra, applied, and it will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. *Re Thames Ironworks, Shipbuilding & Engineering Co. Ltd.; Farrer v. Thames Ironworks, Shipbuilding & Engineering Co. Ltd.*, [1912] W.N. 66; *Braid Builders Supply & Fuel Ltd. v. Geneviève Mortgage Corpn. Ltd.* (1972), 29 D.L.R. (3d) (Man. C.A.) applied.

The third exception is this: if the receiver has expended money for the necessary preservation or improvement of the property, he may be given priority for such an expenditure over secured creditors. *Re Oriental Hotels Co.; Perry v. Oriental Hotels Co.* (1871), L.D. 12 Eq. 126; *Re Regent's Canal Ironworks Co.; Ex parte Grissell* (1875), 3 Ch. D. 411 at 427; Clark on Receivers, vol. 2, s. 640, p. 1078 applied. In order to be payments made for preserving property, the payments must be made for the benefit of all parties including secured creditors. If the receiver has been obligated to pay taxes to prevent a tax seizure, that would be for the benefit of all parties. But a payment to a mortgagee of sums to which he is legally entitled under his charge falls in a different category: it is not made to preserve the property for *all* interested parties but only to preserve the property for a certain group of interested parties, namely, the partners and the unsecured creditors. In such a case the receiver would be entitled only to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make payments on the mortgage.

Appeal from the judgment of Holland J., 13th December 1974.

The judgment of the Court was delivered by *Houlden J.A.*:

1 This is an appeal from an order of Holland J. dated 13th December 1974, which declared that Jerry Friedman was entitled, on his discharge as receiver, to priority for $24,043.26 over a land titles charge held by the appellant, the sum of $24,043.26 being the total of payments of principal and interest made by the receiver to the appellant on his charge during the period of the receivership.

2 On 30th November 1971 a charge under The Land Titles Act, R.S.O. 1970, c. 234, was given on the property municipally known as 2010 Jane St. in the Borough of North York. The charge was in the principal sum of $400,000. It was registered in the Office of Land Titles at Toronto on 1st December 1971, as instrument B-306317. By transfer of charge dated 31st December 1971, and registered in the Office of Land Titles at Toronto on 17th January 1972, as instrument B-310301, the charge was transferred to the appellant Monte Denaburg.

3 In February 1972 the premises at 2010 Jane St. were purchased by Robert F. Kowal Investments Limited, Randy Construction Company Limited and Deeder Electric Limited in partnership. On the property there was located a car wash. At the time of the purchase, the three limited companies entered into a partnership agreement with respect to the operation of the car wash.

4 In January 1974 serious differences arose between the partners concerning the management of the business. On 17th January 1974 the defendant Deeder Electric Limited gave notice to the plaintiffs of its desire to terminate the partnership. On 7th February 1974 the plaintiffs issued a writ against Deeder Electric Limited claiming, inter alia, the dissolution of the partnership, the appointment of a receiver and an accounting.

5 By a consent judgment dated 13th March 1974 Wright J. made an order dissolving the partnership and appointing Jerry Friedman as receiver of the partnership affairs. Prior to accepting the appointment, Friedman obtained from the plaintiffs an agreement to be responsible for his fees, costs, charges and expenses in acting as receiver insofar as he was unable to recover them from the assets of the partnership.

6 On 9th May 1974 Goodman J. made a consent order varying the judgment of 13th March 1974. Paragraph 13 of the order of 9th May 1974 provided:

> 13. AND THIS COURT DOTH FURTHER ORDER that the said receiver and manager be at liberty and he is hereby empowered to borrow monies from time to time as he may consider necessary, not exceeding the principal amount of Twenty-Five Thousand Dollars ($25,000.00), including money already expended, at an interest rate not

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> to exceed prime plus 3 per cent. for the purpose of protecting and preserving and selling the undertaking, property and assets of the partnership and carrying on the business and undertaking of the said partnership and for the purposes of paying presently existing mortgage payments as they fall due, and that as security therefor and for every part thereof, the whole of the undertaking, property and assets of the partnership together with all assets and property which may hereafter be in the custody and control of the receiver and manager as such, do stand charged with the payment of the monies so borrowed by the receiver and manager.

7 Although para. 13 referred to the "receiver and manager", the original judgment and the amending order appointed Friedman as receiver only of the partnership assets. Pursuant to the authority given by para. 13, the receiver borrowed $25,000.

8 The appellant was not served with notice of any of the foregoing proceedings in the partnership action. However, there is no doubt that shortly after 13th March 1974 the appellant was aware of the appointment of the receiver. From March to September 1974 the appellant received payments on his charge from the receiver in the total amount of $24,043.26.

9 By notice of motion dated 18th October 1974 the receiver applied to the Court for permission to borrow a further $15,000 on the same terms as in para. 13 of the order of 9th May 1974, and for an order that the sum so borrowed and the $25,000 already borrowed should be a first charge on the whole of the undertaking, property and assets of the partnership in priority to the appellant's charge. The appellant was served with notice of this application. On 24th October 1974 Holland J. dismissed the application without written reasons.

10 By notice of motion dated 9th December 1974 the receiver applied to the Court for an order discharging him as receiver. In addition, he asked for an order granting him priority over the appellant's charge for his remuneration and legal costs and for expenditures made and obligations incurred by him. The appellant received notice of this application. On 13th December 1974 Holland J. made an order discharging the receiver and granting him priority over the appellant's charge for the mortgage payment of $24,043.26. It is the order granting priority to the receiver over the appellant's charge which is attacked in this appeal.

11 The mortgage payments made by the receiver to the appellant were proper payments for the receiver to have made. If they had not been made, the appellant would likely have taken steps to enforce his security and if this had occurred, the potential recovery of the partners and the unsecured creditors could have been seriously affected. The receiver was, therefore, clearly entitled to priority over the claims of the partners and the unsecured creditors for the moneys he had borrowed to make the payments on the appellant's charge. However, the issue that we are called on to decide is whether the receiver should receive priority over the secured claim of the appellant for the borrowed moneys.

12 The receiver of a partnership business must look to the assets under his control for payment of his charges and expenses. In *Boehm v. Goodall*, [1911] 1 Ch. 155, a receiver and manager of a partnership in carrying on a business made payments which the assets of the firm were insufficient to satisfy in full; he brought an application for an order that the partners should personally indemnify him for the balance owing to him. In dismissing the application, Warrington J. said (at p. 161):

> I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.

13 Not only is the receiver's right to indemnity restricted to the assets under his control, but it is also confined to the equity of the partnership in those assets. As a general rule, the receiver of a partnership will have no power to subject the security of secured creditors of the partnership to liability for disbursements made by him. Clark on Receivers, 3rd ed., vol. 2, s. 638, pp. 1070-71, sums up the position regarding general receivers (a general receiver being "a receiver who

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takes custody of all the property of an individual or corporation for the purpose not only of preserving it and making it available to satisfy a judgment of the plaintiff in the case, but also that the assets and property of the defendant may be collected, administered and distributed to all claimants who may present their claims to the receiver": vol. 1, s. 22, p. 25) in this way:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lien-holder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.

14 There are certain exceptions to the general rule. (I do not propose to give an exhaustive list of such exceptions but to refer only to the exceptions which, in my opinion, have some relevance for the facts of this case.) The first exception is this: if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders. One would ordinarily expect that in these circumstances the order permitting the receiver to borrow would clearly provide that the security given by the receiver for his borrowings would have priority over the claims of secured creditors. However, even if the order failed to so provide, if the secured creditors have applied for, consented to or approved of his appointment, the receiver will have priority for charges and expenses properly incurred by him.

15 The priority which is given to a receiver in this type of situation is illustrated by *Strapp v. Bull, Sons & Co.; Shaw v. London School Bd.*, [1895] 2 Ch. 1. In that case a building company became involved in serious financial difficulties. Receivers and managers were appointed at the request of debenture holders of the company. The receivers and managers obtained permission to borrow £5,000 by way of a first charge in priority to the security of the debenture holders. Certain proceedings were then taken by unsecured creditors as a result of which an agreement was made whereby unsecured creditors agreed to advance two-thirds and the plaintiff Strapp, who was a debenture holder, agreed to advance one-third of the moneys that the receivers and managers wished to borrow. In due course, the receivers and managers borrowed £1,750 from Strapp and £2,500 from the unsecured creditors. The receivership worked out badly, and in completing certain contracts, the receivers and managers used up all the moneys they had borrowed and, in addition, incurred substantial further indebtedness. The receivers and managers applied for an order that they were entitled to priority for the debts they had incurred not only over the security of the debenture holders, but also over the security held by Strapp and the unsecured creditors for the £4,250 that the receivers and managers had borrowed. This application was dismissed by Vaughan Williams J., but on appeal his decision was reversed and the receivers and managers were granted the priority they had requested. With reference to the position of the persons who had advanced the £4,250, A. L. Smith L.J. said (at p. 11):

> Under these circumstances it seems to me that these people who have advanced the money stand in the same position as second debenture-holders. They have acquiesced in this form of carrying on the business by their receivers and managers, and I think, therefore, the law as laid down by Pearson J. and the Master of the Rolls, Sir George Jessel, in the two cases to which I have referred [*Batten v. Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317; and *Re Bushell; Ex parte Izard* (1883), 23 Ch. D. 75], applies, and consequently they [the receivers and managers] are entitled to be paid their charges.

16 However, the exception to the general rule enunciated in *Strapp v. Bull*, supra, has no application to this case. Here, there was no acquiescence by the appellant in the appointment of the receiver. As has been pointed out, the appellant was given no notice of the proceedings which led to the appointment of Jerry Friedman as receiver. It was not until after

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