Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD. FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

BOOK OF AUTHORITIES OF THE TRUSTEE

(motion returnable April 23, 2015)

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TAB 1

2008 BCSC 897
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bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.

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bcIMC Construction Fund Corporation (Petitioner) and Chandler Homer Street Ventures Ltd., Chandler Development Group Inc., Mark Chandler, Cooper Pacific II Mortgage Investment Corporation, P3 Holdings Inc., 636455 B.C. Ltd., Lower Mainland Steel (1998) Ltd., Susan Richards Investments Ltd., Susan Freeman, and Theodore Freeman a.k.a. Ted Freeman (Respondents)

bcIMC Speciality Fund Corporation (Petitioner) and Cook and Katsura Homes Inc., Chandler Katsura Developments Inc., Mark Chandler, Chandler Development Group Inc., 636455 B.C. Ltd., BCMP Mortgage Investment Corporation, Susan Richards Investments Ltd., Theodore Freeman a.k.a. Ted Freeman, and Susan Freeman (Respondents)

Burnyeat J.

Heard: March 27, 2008; April 14, 2008; May 29, 2008; June 9, 2008
Judgment: July 9, 2008 *
Docket: Vancouver H070700, H070699

Counsel: D.D. Nugent for Petitioner
H.M.B. Ferris for Bowra Group Inc., Receiver & Manager of Chandler Homer Street Ventures Ltd., Cook & Katsura Homes Inc.
S.R. Andersen for Farouk Ratansi, Salim Jiwa, Sui Chun Chao-Dietrich
G.J. Gehlen for 636455 B.C. Ltd.
A.H. Brown for Crestmark Holdings Corp.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure; Contracts; Property

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R. 47 — referred to

R. 50 — referred to

APPLICATION by receiver in two foreclosure actions for directions; APPLICATION by contract holder for liberty to commence action against receiver and developers for specific performance.

***Burnyeat J.*:**

1 These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security ("Receiver and Manager"), of all of the assets, undertakings and properties of Chandler Homer Street Ventures Ltd. ("Chandler") and Cook and Katsura Homes Inc. ("Cook"). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: "... manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor".

2 It was further provided in each of the Orders that:

> ... no proceeding or enforcement process in any Court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> ... no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph.

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3 Each of the Orders also provided the Receiver and Manager was empowered and authorized but not obligated to do any of the following where the Receiver considered it "necessary or desirable":

> (2)(c) manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtor; ...
>
> (k) market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (l) sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof out of the ordinary course of business . . .
>
>> (ii) with the approval of this Court in respect of any transaction in which the purchase price [exceeds $10,000.00] or the aggregate purchase price exceeds [$10,000.00] ...
>
> (m) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; ...
>
> (s) take any steps reasonably incidental to the exercise of these powers.

4 In both Actions, the Receiver and Manager now applies for "Directions" concerning either to disclaim certain contracts of purchase and sale ("Contracts") or to allow it to sell the strata lots involved at current market value free and clear of any obligation of Chandler or Cook that may arise under the Contracts on the bases that the discount contained in the Contracts constitutes payment of a pre-receivership unsecured claim or that the purchase price set out under the Contracts does not represent fair market value as at the date of those Contracts.

Background

5 Action H070699 relates to a 192 unit project in Yaletown ("Vancouver Project"). Action H070700 relates to two residential towers in Richmond ("Richmond Project"), being 9188 Cook Road ("Tower I") and 633 Katsura Road ("Tower II").

6 The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) *Vancouver Project*: $59,800,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); $3,500,000.00 (second charge holder); $6,300,000.00 (third charge holder); $20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project; (b) *Richmond Project*: $25,400,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); and $20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim $30,100,000.00 against the Vancouver Project and $32,300,000.00 against the Richmond Project. Approximately $30,000,000.00 of those amounts are said to be owing to the Respondent, Theodore Freeman a.k.a. Ted Freeman.

7 The Receiver and Manager estimates that the equity that will be available on Tower I of the Richmond Project will be $3,700,000.00 prior to the application of the debt owing under collateral security. The Receiver and Manager estimates that the equity that may be available on the Vancouver Project is $3,746,000.00 prior to the application of the debt owing under collateral security. Overall, the estimated shortfall to Gibrailt Capital under its *inter alia* charge after applying all equities available would be in the neighbourhood of $3,764,000.00.

8 There were a number of pre-sales on both the Vancouver Project and on the Richmond Project with those pre-sales occurring prior to the construction of the Projects. Because of escalating construction costs, it became apparent that the total purchase prices on the pre-sales were insufficient to allow the completion of the two Projects.

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9 After a review of the pre-sales that had been arranged by Chandler and Cook, it was the opinion of the Receiver and Manager that certain Contracts should be disclaimed as the pre-sales for many of the Units were significantly below the current market value at the time of the Contracts, at the time of the appointment of the Receiver and Manager, and presently.

10 In agreements in place between the Petitioner and Chandler and between the Petitioner and Cook, the Petitioner required that there be a number of firm and binding pre-sale agreements in place and that these agreements achieve a certain minimum price determined by the Petitioner prior to providing construction financing being made available to Chandler and to Cook. Regarding the Vancouver Project, the Petitioner advised that it was prepared to advance funds and to give partial discharges of its security if the sales proposed by Chandler for units met the criteria set out in the charge of the Petitioner. The Mortgages of the Petitioner in place as against the Vancouver Project and the Richmond Project include the following provisions:

3.3 Prepayment

(a) When not in default, the Mortgagor may prepay the Principal Amount, in whole or in part, prior to the Balance Due Date.

(b) Provided that:

(i) The Mortgagor is not in default in the payment of any amount owing to the Mortgagee hereunder;

(ii) The Lands have been subdivided by a strata plan approved by the Mortgagee and filed in the appropriate Land Title Office and separate titles have been issued for each lot or strata lot ("Strata Lot") created by the said strata plan;

(iii) The Mortgagor has entered into an unconditional bona fide agreement of purchase and sale for a Strata Lot created on the Lands with a purchaser or purchasers who are at arm's length to the Mortgagor and has provided the Mortgagee with a true copy of the agreement of purchase and sale; and

(iv) The Mortgagor has paid to the Mortgagee a partial discharge fee of $75.00 for each Strata Lot discharged from the charge of this Mortgage;

the Mortgagee will grant a partial discharge of this Mortgage from title to the Strata Lots so created upon payment of all interest due and payable to the date of payment and upon payment of 100% of the Net Sale Proceeds (hereinafter defined) for each of the Strata Lots, less Extra Costs (hereinafter defined) paid for by the Purchaser over and above the gross sale price of each of the Strata Lots. "Net Sale Proceeds" means the gross arm's length sale price of an individual Strata Lot less the aggregate of the following:

A. Any net GST included within the gross sale price (i.e., GST payable less rebate to be received by the Mortgagor or a purchaser);

B. Real estate commissions;

C. Reasonable legal fees and disbursements and GST and PST applicable thereto of the Mortgagor's solicitor for acting for the Mortgagor on sales of Strata Lots;

D. Normal closing adjustments between a vendor and a purchase[r] of real estate;

together with the holdback which a purchaser of a strata lot is permitted to retain pursuant to the provisions of the ***Strata Property Act*** provided that this holdback is maintained in trust by the solicitor or notary public acting for the Purchaser or the Mortgagor on his or her undertaking to forward the holdback to the Mortgagor's solicitor once the purchaser authorizes its release, and the Mortgagor irrevocably authorizes and directs its solicitors to forward and remit such holdback(s) when received to the Mortgagee.

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"Extra Costs" refers to items specifically requested and paid for by the purchaser and not included in the gross sale price of a Strata Lot.

(c) The Mortgagor shall not enter into an agreement of purchase and sale at prices less than the pro forma price list approved by the Mortgagee, without the prior approval of the Mortgagee, and the Mortgagee's obligation to provide a partial discharge of the Mortgage is conditional upon the sale prices for Strata Lots being not less than the prices listed in the price list (the "Price List") submitted by the Mortgagor to and approved by the Mortgagee or at such sale prices that the Mortgagee has approved in writing, provided that the sale price of each Strata Lot shall not be less than 95% of the listed price for such Strata Lot shown on the Price List.

11 The Petitioner takes the position that it is not prepared to grant partial discharges of its Mortgage relating to a number of the Contracts as they do not comply with that Mortgage provision. Partial discharges would be available where provisions of the Mortgage have been met.

12 The Contracts relating to these pre-sales all contained the same provisions. Those provisions include the following:

8. Completion

The completion of the purchase and sale of the Strata Lot shall take place on a date (the "**Completion Date**") to be specified by the Vendor which is not less than ten business days after the Vendor or the Vendor's Solicitors notifies the Purchaser or the Purchaser's solicitor that:

(a) the City of Vancouver [or the City of Richmond] has given permission to occupy the Strata Lot; and;

(b) the Strata Plan in respect of the Development has been or is expected to be fully registered in the New Westminster/ Vancouver Land Title Office prior to the Completion Date.

10. Delay

If the Vendor is delayed from completing the Strata Lot, depositing the Strata Plan for the Development in the Land Title Office or in doing anything hereunder as a result of fire, explosion or accident, howsoever caused, act of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour materials or equipment, flood, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, unforeseen geotechnical conditions, climatic conditions, acts or omissions of third parties, interference of the Purchaser, or any other event beyond the control of the Vendor, then the time within which the Vendor must do anything hereunder, and the Purchaser's Termination Option Date will be extended for a period equivalent to such period of delay.

16. Risk

The Strata Lot is to be at the risk of the Vendor to and including the day preceding the Completion Date, and thereafter al the risk of the Purchaser and, in the event of loss or damage to the Strata Lot deemed material by the Vendor and occurring before such time by reason of fire, tempest, lightning, earthquake, flood, act of God or explosion, either party may, at its option, by written notice to the other party cancel this Agreement and thereupon the Purchaser will be entitled to repayment of the Deposit together with all interest accrued thereon and neither the Vendor nor the Purchaser shall have any further obligation hereunder. If neither party elects to cancel this Agreement, the Purchaser shall be entitled to an assignment of insurance proceeds in respect of the material loss or damage to the Strata Lot, if any. All other remedies and claims of the Purchaser in the event of such damage are hereby waived.

25. Assignment by Purchaser

The Purchaser may not assign or list for sale on MLS (Multiple Listing Service) the Purchaser's interest in this Agreement until all Deposits contemplated under this Agreement have been paid in full and thereafter may not list without the prior

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written consent of the Vendor,. No assignment by the Purchaser shall release the Purchaser from his/her obligations hereunder. This Agreement creates contractual rights only between the Vendor and the Purchaser and does not create an interest in the Strata Lot The Purchaser shall pay the Vendor an administration fee of $2,000 plus GST for any assignment of this Agreement or conveyance of the Strata Lot other than to the Purchaser named herein provided that the Vendor shall waive such fee for an assignment to a Spouse, child or parent of the Purchaser on receipt of evidence of such relationship satisfactory to the Vendor.

26. Liability of Purchaser

In the event of an assignment in accordance with section 25, the Purchaser will remain fully liable under the Agreement and such assignment will not in any way relieve the Purchaser of its obligations under this Agreement.

28. Contractual Rights Only

This offer and the agreement which results from its acceptance creates contractual rights only and not any interest in land.

MPC Intelligence Inc. Report

13 The Receiver and Manager obtained a February 27, 2008 "Analysis" from MPC Intelligence Inc. ("MPC") relating to both Projects. The "Analysis" for the Vancouver Project and the "Analysis" for the Richmond Project contain the following "Forward":

The information provided in this pricing summary is intended for use by Bowra Group in the historical market analysis of the H&H development in Vancouver, BC and Garden City development in Richmond. This is not an appraisal. This report was prepared as an opinion of competitive conditions and is a past assessment of the market and the demand for such product. This is not an opinion of the market from a sales and marketing strategy perspective but a narrative of the previous climate and demand for the developments at time of launch.

All information and detail within the report is compiled through public sources or through the developers and property owners associated with each project. The data is deemed to be accurate at the time of assembly and delivery of the report. Every reasonable effort will be made to compile accurate and reliable information and the data contained within the report is deemed to be that. MPC Intelligence assumes no responsibility for inaccuracies provided by the developer, agents or other reporting parties.

14 The "Analysis" of MPC for the Vancouver Project was as follows:

... it is obvious that there are a selection of units that have been sold for well below the market value at the time. Determining the market value for a period of time starting almost two years ago is a difficult challenge because prices in the Downtown condo market have risen so quickly. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. This does not mean that the units that were sold initially were under priced, as the overall market can shift quite quickly as was experienced when the Woodward's project sold out at $600/sq ft and instantly increased what all other projects could achieve.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2006 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

15 The "Analysis" of MPC for the Richmond Project was as follows:

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When analyzing the sale prices of the units at Garden City there does not appear to be many units that were sold below market values. Determining the market value for a period of time starting over two years ago is a difficult challenge because prices in the Richmond condo market have rose very quickly from 2005 to 2007. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. The Richmond market is also unlike most of the other markets in the Lower Mainland when it comes to purchaser incentives. The Chinese buyer in this market almost always expects for there to be some sort of incentive or negotiation process to save money. This was seen in the second phase of Garden City with the first 20 buyers at the public grand opening receiving $5,000 off the purchase price along with no GST (4.48% value). This resulted in many of the units having credits of approximately $20,000 to $25,000. This is very typical in the Richmond market and is considered a cost of doing business.

From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2005 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

16 It is clear that the two reports are not appraisals. It is the position taken on behalf of counsel for the pre-sale Contract holders that the reports are inadmissible. While I find that the reports are inadmissible for the truth of their contents, I admit them into evidence for the purpose of ascertaining the grounds upon which the Receiver and Manager is of the belief that the market value at the time of the Contracts or the current market value is such that the Receiver and Manager should be in a position to either disclaim the Contracts or to allow the sale of the strata lots involved free and clear of any obligation of Chandler and Cook that may arise under the Contracts.

Applications of the Receiver and Manager

17 Originally, the Receiver and Manager sought directions to disclaim 17 Contracts relating to the Vancouver Project and 10 Contracts relating to the Richmond Project. The Motion of the Receiver and Manager is now restricted to Strata Lots 12 and 85 of the Vancouver Project and Strata Lots 12, 46, 85, 92 and 95 of the Richmond Project. The Petitioner supports most of the applications of the Receiver and Manager. However, the Petitioner does not support the application of the Receiver and Manager to disclaim the Contract relating to Strata Lot 12 in the Vancouver Project as it is satisfied that the proposed purchase price met the minimum pre-sale criteria set in the agreement reached with Chandler.

(a) Contracts of Siu Chun Chao-Dietrich

18 Ms. Chao-Dietrich had Contracts relating to Strata Lot 46 in the Richmond Project and Strata Lot 85 in the Vancouver Project. Strata Lot 46 has been complete and ready for occupancy since late 2007. Strata Lot 85 in the Vancouver Project will not be completed until the Fall of 2008.

19 Ms. Chao-Dietrich is a former employee of Chandler and is a licensed realtor. Ms. Chao-Dietrich states that she was instrumental in arranging for the purchase by Cook of the land that later would be the site of the Richmond Project. By reason of her efforts, Ms. Chao-Dietrich claims to be entitled to a fee of $200,000.00 and that this fee remains unpaid. In a September 20, 2006 agreement with Chandler, Ms. Chao-Dietrich was to receive a further $100,000.00 "... for deferring paying the commission which you earned on July 16, 2007. The owed commission and compensate [sic] payment in total of $300,000.00 shall be discounted from the purchase price." In her March 25, 2008 Affidavit, Ms. Chao-Dietrich states that the purchase price for Strata Lot 46 of the Richmond Project was to be further reduced in order to reflect $34,800.00 in commissions on previous sales

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in that Project and $6,000.00 to reflect late closing expenses relating to the "...original unit of that she was to have obtained in satisfaction of the amount owing in respect of the commission".

20 Ms. Chao-Dietrich states that Chandler verbally agreed in March of 2006 that the net purchase price of $349,000.00 for Strata Lot 85 would be made available to her. In this regard, a $100,000.00 "decorating allowance" was provided to Ms. Chao-Dietrich so that the original offer of $449,000.00 with a $5,000.00 deposit became a net offer of $349,000.00. Though Ms. Chao-Dietrich states that the price was agreed to in March of 2006, the Contract was not signed until July 6, 2007.

21 It is the position of Ms. Chao-Dietrich that the discount was not a discount for "unpaid services" but, rather, was a price equal to a similar unit on a per square foot basis of a unit in the Vancouver Project sold to "Darren", another employee of Chandler. It is said that the units sold to "Darren" and to her reflected "employer's discount" given to employees. In this regard, Ms. Chao-Dietrich notes that the Receiver and Manager has not sought to disclaim the contract relating to that other unit even though that unit is of a comparable size. In a March 3, 2008 letter to the Receiver and Manager, Ms. Chao-Dietrich states: "in order to maintain the value of the Project, giving a decorating allowance instead of discounting off the purchase price seemed to be appropriate at the time".

22 It is the position of the Receiver and Manager that the market value for Strata Lot 85 at the time of the Contract was either $399,000.00 (based on the "Contract Analysis" prepared by MPC), or $424,000.00 (based on the comments relating to that unit prepared by a realtor advising the Receiver and Manager).

23 MPC gave the following "Analysis" relating to the market value of Strata Lot 85 at the time of the Contract:

Gross Selling Price $449,900	Net Selling Price $349,900	Incentives: $100,000

This unit was under priced because the identical unit one floor above (614) sold for $50,000 more when it sold six months previously. The market would have escalated in this time and there should only be a $5,000 discount for being located one floor below.

Estimated Market Value at time of Pre Sale	$429,900
Estimated Selling Discount	$80,000

24 Regarding Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich states that the purchase price was in the aggregate of $500,800.00 but that "Much of that consideration, however, was paid by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser". After deductions, the remaining amount owing is stated to be $160,000.00. It is this amount which is shown as the sale price in the Contract. A deposit of $40,000.00 was paid in two instalments: $32,000.00 on September 20, 2006 and $8,000.00 on April 30, 2007. The Richmond Project is now complete. On August 21, 2007, Ms. Chao-Dietrich received a Notice of completion.

25 While it has not been accepted by the Receiver and Manager, the Receiver and Manager states that it has received an offer on Strata Lot 46 in the amount of $469,200.00.

26 MPC gave the following "Analysis" relating to the market value of Strata Lot 46 at the time of the Contract:

Gross Selling Price $160,000	Net Selling Price $160,000	Incentives: $0

This unit was severely under priced. An example why would be the unit below (801) selling for $283,620 more 10 months later. Another example is the unit beside it (908) which is the same plan but with a SE instead of SW exposure sold for $378,259 more than it sixteen months previous. It is assumed that unit 901 could have sold for somewhere near what 908 sold for with

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the increase in the market over the four months being balanced by the fact that the 08 units were more popular and commanded a higher value.

Estimated Market Value at time of Pre Sale	$417,900
Estimated Selling Discount	$257,900

27 An action for specific performance of the Contract and for damages in the alternative relating to Strata Lot 46 in the Richmond Project was commenced and Certificate of Pending Litigation No. BB0207241 was filed against the Richmond Project by Ms. Chao-Dietrich on March 7, 2008. Ms. Chao-Dietrich states that those steps were taken on the basis that: "The Receiver has indicated that he will not be completing the Contract." That action was commenced without the "written consent of the Receiver or with leave of this Court". There is no Motion before the Court that Ms. Chao-Dietrich be at liberty to commence or to continue that action.

(b) Contract of Wayne Nikitiuk Assigned to Salim Jiwa and Farouk Ratansi

28 This Contract relates to Strata Lot 12 in the Vancouver Project. This unit is presently unfinished and is not scheduled to be finished until the Fall of 2008. Originally, Wayne Nikitiuk made an offer of $649,000.00 (excluding GST) and provided a deposit of $64,900.00. Mr. Nikitiuk was given a $32,450.00 "decorating allowance" so that the "net" purchase price reflected in the Contract was $616,550.00 (excluding GST).

29 By a July 29, 2007 assignment of the Contract between Mr. Nikitiuk and Messrs. Ratansi and Jiwa and with the consent of Chandler, the Contract was assigned to Messrs. Ratansi and Jiwa. The price paid by Messrs. Ratansi and Jiwa for that assignment was $150,900.00 and that sum has been disbursed to Mr. Nikitiuk. It was a term of the consent of Chandler that $2,000.00 of the assignment price was paid by Mr. Nikitiuk to Chandler.

30 MPC gave the following "analysis" relating to the market value of Strata Lot 12 at the time of the Contract:

Gross Selling Price $649,000	Net Selling Price $616,500	Incentives: $32,450

This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	$649,000
Estimated Selling Discount	$32,450

31 The Petitioner does not support the application to disclaim the Contract as the Contract would net $616,550.00 and this price met the minimum pre-sale criteria set by the Petitioner. In seeking to disclaim the Contract, the Receiver and Manager is of the view that the current market value of Strata Lot 12 is $730,000.00.

(c) Contracts of Crestmark Holdings Corp.

32 Applying pursuant to Rules 47 and 50 of the *Rules of Court* and the inherent jurisdiction of the Court, Crestmark Holdings Corp. ("Crestmark") seeks an order that it be at liberty to commence an action against Chandler, Cook, and the Receiver and Manager so that it may seek an order for specific performance, a Certificate of Pending Litigation and related relief in relation to August 10, 2007 Contracts relating to Strata Lots 12, 85, 92, and 95 in the Richmond Project.

33 In July of 2007, Chandler contacted Edward Wong & Associates Realty Inc. ("Wong") requesting that Wong submit a marketing proposal for the unsold units in Tower I and Tower II in the Richmond Project. On July 18, 2007, Wong signed an Exclusive Listing Agreement relating to the Richmond Project ("Listing Agreement"). 37 units in Tower I and 50 units in Tower

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II were unsold at the time of the Listing Agreement. The term of the Listing Agreement was to end on November 30, 2008 but Chandler had the right to terminate the Listing Agreement after December 15, 2007 if Wong had not sold 20 units by that time.

34 In accordance with the agreement in place, the Petitioner advised Chandler that it was prepared to give partial discharges of its security providing sales of the Units met the criteria set out in the Mortgage including that the gross sale price of any units was not less than 95% of the list sale price approved by the Petitioner for each phase of the construction of each phase of the Richmond Project. The list prices relating to the Strata Lots in issue were as follows: (a) Strata Lot 12 ($534,900.00); (b) Strata Lot 85 ($379,900.00); (c) Strata Lot 92 ($384,900.00); and (d) Strata Lot 95 ($498,900.00).

35 Chandler and Wong agreed to an amendment of the Listing Agreement which saw potential purchasers being offered a price discount of up to 10% off the then list price and a bonus of up to $250,000.00 to Wong. As at August 8, 2007, offers on 28 units had been received at prices discounted from between 6% to 10% and six units remained unsold. It is stated by Wong that all sales contracts showed the full list price with reductions recorded in the form of payment of cash or credit towards the purchase price on closing so that there would be no jeopardy to the pricing on the remaining unsold units.

36 In August, 2007, Chandler is stated to have requested that Wong purchase some units so that the goal of meeting the financial commitments set by the Petitioner could be met. It is stated that, as an additional incentive for Wong to purchase. A Mr. Aguirre on behalf of Chandler offered a 50% interest in his entitlement to purchase a unit in Tower II.

37 On August 10, 2007, Wong agreed through his company (Crestmark) to purchase four units with a 15% discount from the list price. Contracts were executed to reflect the following:

> (a) Strata Lot 12 — gross sale price of $498,800.00 with a "decoration allowance" of $74,820.00 ($423,980.00 net) with a deposit of $5,000.00;
>
> (b) Strata Lot 85 — gross sale price of $418,800.00 with a "decoration allowance" of $62,820.00 ($356,180.00 net) with a deposit of $5,000.00;
>
> (c) Strata Lot 92 — gross sale price of $421,800.00 with a "decoration allowance" of $63,270.00 ($358,530.00 net) with a deposit of $5,000.00; and
>
> (d) Strata Lot 95 — gross sale price of $513,800.00 with a "decoration allowance" of $77,070.00 ($436,730.00 net) with a deposit of $5,000.00.

38 In a February 12, 2008 letter to counsel for the Receiver and Manager, counsel for Crestmark stated:

> When construction of the Development was completed and our client received notice to close the purchase of the Units, [the] ... developer agreed to extend the closing date to November 30, 2007 "or within 5 business days after the Vendor has paid the commission bonus to Edward Wong & Associates Realty Inc. in an amount of $250,000.00 plus G.S.T. whichever occurs later". The bonus has not been paid, however our client is ready, willing and able to complete the purchase of the Units forthwith.

39 On August 22, 2007, Notices of Completion relating to Strata Lots 12, 85, 92 and 95 were issued. At that time, Wong asked for payment of his bonus under the amended Listing Agreement but was advised that, due to cash flow problems, the bonus could only be paid after the sale of all units in Tower I had been completed.

40 On October 11, 2007, a further addendum to the Listing Agreement was signed providing the following:

> (a) "The Completion Date is to be extended to Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + GST whichever occurs later."
>
> (b) "Upon closing, the Purchaser may elect to apply $62,500 + GST, being part commission ... due to Edward Wong & Asso. Realty Inc. ('EWA') towards the purchase price provided EWA authorizes to do so."

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41 Crestmark states that it has now agreed to waive as a condition of closing its entitlement to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots and that it is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95. In this regard, Edward Wong in his April 29, 2008 Affidavit states:

> I agree to cause both of those companies [Wong and Crestmark] to sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum. .... While my preferred completion date is June 30, 2008, Crestmark is ready, willing and able to complete the purchase of Strata Lots 12, 85, 92 and 95 at any time. In my opinion, taking into account the value to ... [Cook] of the services I have already caused ... [Wong] to perform, it would be extremely unfair to allow the receiver to disclaim or refuse to close on the sales of Crestmark's 4 units.

42 In the circumstances, Crestmark requests that the Court lift the stay contained in paragraphs 6 and 7 of the November 28, 2007 Order to allow it to commence an action for specific performance relating to Strata Lots 12, 85, 92 and 95.

43 The Petitioner supports the application of the Receiver and Manager to disclaim the proposed sale of Strata Lots 12, 85, 92 and 95 to Crestmark as those sales are said not to meet the minimum pre-sale requirements set by the Petitioner. The Petitioner also states that: "Even if the sales are not disclaimed, ... [the Petitioner] will not be issuing partial discharges for them."

44 The MPC "Analysis" relating to the market value of Strata Lots 12, 85, 92 and 95 at the time of the Contracts was as follows:

Strata Lot 12 Gross Selling Price $649,000 Net Selling Price $616,500 Incentives: $32,450

This unit was under priced as it sold for $12,550 more than TH2 which was the same plan type but was located in the alley which should have been less desirable.

Estimated Market Value at time of Pre Sale	$649,000
Estimated Selling Discount	$32,450

Strata Lot 85 Gross Selling Price $418,800 Net Selling Price $355,980 Incentives: $62,820

This unit was under priced because the unit below it (1506) sold for only $5,875 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 — 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$419,900
Estimated Selling Discount	$63,920

Strata Lot 95 Gross Selling Price $513,800 Net Selling Price $436,730 Incentives: $77,070

This unit was under priced because the unit below it (1601) sold for $72,070 more than it four months before. It is assumed that 1701 should have been able to sell at a premium to 1601.

Estimated Market Value at time of Pre Sale	$519,900

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Estimated Selling Discount	$83,170

Strata Lot 92	Gross Selling Price $421,800	Net Selling Price $358,530	Incentives: $63,270

This unit was under priced because the unit two levels below it (1506) sold for only $8,426 less 27 months before. Another comparable is a 808sqft resale unit in the Seasons high-rise project a short distance away; #1606 — 5088 Kwantlen St that sold for $402,300 ($480/sqft) on Sept 5, 2007.

Estimated Market Value at time of Pre Sale	$425,900
Estimated Selling Discount	$67,370

45 While these offers have not been accepted by the Receiver and Manager as yet, the Receiver and Manager has now received offers as follows: (a) Strata Lot 12 ($519,200.00); and (b) Strata Lot 95 ($504,200.00).

Should Contract Holders Have Been Given Notice of the Application to Appoint the Receiver and Manager?

46 It is the submission of Crestmark that, because the proposed purchasers under the Contracts were not parties to this action and were not served or given notice of the application by the Petitioner to appoint the Receiver and Manager, the November 28, 2007 Order is not binding on them and does not affect any interest in the Property held by them. In this regard, Crestmark relies on the decisions in *Lochson Holdings Ltd. v. Eaton Mechanical Inc.* (1984), 55 B.C.L.R. 54 (B.C. C.A.) and *Terra Nova Management Ltd. v. Halcyon Health Spa Ltd.* (2006), 25 C.B.R. (5th) 199 (B.C. C.A.).

47 In *Lochson, supra,* the issue was whether Lochson as the holder of the first and second mortgages against property should be bound by an order allowing the borrowing powers of a receiver to have priority over the interest of Lochson when that order was granted to a subsequent charge holder. The Court concluded that, subject to three exceptions not applicable here, a prior charge holder must have notice of or consent to any application purporting to grant priority to the borrowing powers of a Receiver. Of similar effect Is the decision in *Terra Nova, supra,* where the Court dealt with the priority of the proposed remuneration of a receiver and concluded that, because a prior charge holder had no notice of the application to appoint a receiver and manager with borrowing powers of $5,000.00, it was not bound by the priority given in that order (at para. 14).

48 I am satisfied that the decisions in *Lochson* and *Terra Nova,* both *supra,* have no application to the position of Crestmark. First, Crestmark is not a secured creditor. Second, Crestmark only takes whatever interest it may have from Chandler.

49 Assuming Crestmark is an unsecured creditor, there was no obligation to join unsecured creditors as parties or to provide them with notice of an application to appoint a receiver and manager. Once appointed, one of the duties of a receiver and manager is to ascertain what creditors have claims, the amount of those claims, and the priority of those claims. That duty is fulfilled after and not before the appointment. The secured creditor applying to appoint a receiver and manager will not have knowledge of the identity of all unsecured creditors or of the amounts owing. It would be impossible for all unsecured creditors to be given notice of an application for the appointment of a receiver and manager.

50 Assuming Crestmark has an equitable interest, that interest is by way of an assignment of the equity of redemption that was retained by Chandler or Cook when those entities mortgaged their interest in the two Projects in favour of the Petitioner. The foreclosure proceedings seek declarations that, if a certain amount is not paid to redeem the charges against the two Projects, the interest of Chandler or Cook will be foreclosed as will the interest of any parties claiming under them. As potential purchasers of an interest that Chandler and/or Cook might have in the two Projects, Crestmark would be in a position to apply to approve the sale of a particular part of the property if it could be shown that their offer represented fair market value at the time their application was made. Alternatively, Crestmark could request that the Receiver and Manager apply to Court to have their offer

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approved or could place its offer before the Court if the Receiver and Manager applied to Court to approve an offer which, in the view of the Receiver and Manager, represented fair market value at the time the application was made.

51 Whether Crestmark is an unsecured creditor or is a creditor claiming an interest in land, it was only after the appointment of the Receiver and Manager that the Receiver and Manager would know for certain what Contracts were in place. There was no obligation on the Petitioner, on Chandler, or on Cook to notify Crestmark or any other holders of Contracts that an application was being made to appoint a Receiver and Manager. It was not necessary to join Crestmark or any other holders of Contracts as parties to these proceedings. The preliminary position taken by Crestmark is rejected.

52 Quite properly, the Receiver and Manager has notified the holders of the Contract that applications would be made to either disclaim the Contracts or allow the Receiver and Manager to sell the Strata Lots at the current market value free of any obligation of Chandler and Cook that might arise under the Contracts so that the holders of the Contracts would be bound by any Order made. Holders of Contracts were entitled to no other notice.

Can the Receiver and Manager Disclaim Contracts?

53 I have concluded that the Receiver and Manager has the power to disclaim these Contracts. In this regard, the learned author of *Bennett on Receiverships*, 2nd Ed. (Toronto — Carswell) states:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. (at p. 341)
>
> In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages. (at p. 342)

54 There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the company. In *New Skeena Forest Products Inc., Re* (2005), 39 B.C.L.R. (4th) 327 (B.C. C.A.), the issue was whether the receiver and manager was entitled to disclaim "executory contracts" and apply to approve a better offer. Braidwood J.A. with Oppal J.A. concurring stated:

> In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:
>
> > The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341.
>
> (at para. 16)
>
> In another leading case, *Bayhold Financial Corp. v. Clarkson* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's

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powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or realizing upon the Assets or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> .....
>
> (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets ....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order.

(at paras. 19-21)

55 In the *Bayhold Financial Corp. v. Clarkson Co.* [1991 CarswellNS 33 (N.S. C.A.)] decision referred to, the Court dealt with a court appointed receiver and manager and the question of whether there was personal liability for breaching contracts entered into by the company prior to receivership. On behalf of the Court, Hallett J.A. referred to the decision in *Newdigate Colliery Ltd., Re*, [1912] 1 Ch. 468 (Eng. Ch. Div.) and stated:

... The *Newdigate* case is authority for the following valid proposition (p. 468):

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

In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

56 On the question of whether there was an obligation on the receiver and manager to honour contracts which were in existence prior to the receivership, Hallett J.A. stated:

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

> The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they*

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reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts.

(at paras. 55-6)

57 In *The Matter of the Receivership of Pope & Talbot Ltd.* [*Pope & Talbot Ltd., Re* (May 29, 2008), Doc. Vancouver Registry No. S077839 (B.C. S.C. [In Chambers])] (Vancouver Registry: S077839), Brenner C.J.S.C. in oral reasons for judgment in chambers on May 29, 2008 stated:

The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.

The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.

This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005, BCCA 154. That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:

Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.

In Braidwood J.A.'s opinion the foregoing clause determined the issue. (at paras. 17-8)

58 I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

59 Ms. Chao-Dietrich and Messrs. Ratansi and Jiwa submit that the content of the Order appointing the Receiver is determinative of the powers available to the Receiver and Manager and that paragraph 2(c) of the Order only granted the Receiver and Manager the power to "... cease to perform any contracts of the Debtor". They submit that no performance was

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required under their Contracts until completion dates came into effect and that the completion dates for the purchase of Strata Lot 85 by Ms. Chao-Dietrich and the purchase of Strata Lot 12 by Mr. Jiwa and Mr. Ratansi in the Vancouver Project has not been set because the units remain unfinished. Regarding the completion date for Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich submits that the completion date was September 14, 2007, that she was ready willing and able at that time to complete the purchase, a caveat was filed when Chandler did not complete the sale, and an action seeking specific performance was commenced. In the absence of a power given to disclaim, it is the submission that the remedy that will be available for anticipatory breach of contract is both a specific performance and/or a mandatory injunction and only in the alternative, for damages.

60 While I am satisfied that the power available to the Receiver and Manager to cease to perform any Contracts is sufficient to allow the Receiver and Manager to apply to the Court to be at liberty to disclaim the Contracts, I also note that the submissions of Ms. Chao-Dietrich and Mr. Ratansi and Mr. Jiwa ignore a number of powers given to this Receiver and Manager including the power to "... cease to carry on all or any part other [sic — of the] business" of Chandler or Cook. The business of these two companies was to create, enter into contracts to sell, and to sell condominium units. The refusal to proceed to complete Contracts is included within the power given to the Receiver and Manager to cease part of the business of Chandler and Cook. The power to "cease to perform any contracts" includes the ability to advise Contract holders that the Receiver and Manager will not proceed to complete the sales contemplated by the Contracts. The ability to "market any or all of the Property", the ability to "sell, convey, transfer, lease, assign or otherwise dispose of the Property or any part or parts thereof" and the ability to "apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof" must be taken to allow the Receiver and Manager to disclaim a Contract providing the Receiver and Manager seeks court approval to do so and providing the holders of the Contracts are notified of such an application.

61 I also note that paragraph 2(m) of the Orders appointing this Receiver and Manager is identical to the paragraph referred by the Chief Justice in *Pope & Talbot Ltd.*, *supra* and that it was this paragraph which was relied upon by the Chief Justice to conclude that the receiver there was in a position to disclaim an existing contract and proceed with an application to approve a different sale. In the circumstances, I am satisfied that the powers granted to this Receiver and Manager are sufficient to allow the Receiver and Manager to disclaim the Contracts.

62 The holders of the Contract also submit that the Receiver and Manager must maintain the goodwill of Chandler and Cook for their benefit. That submission cannot be maintained in view of the decision in *Bayhold Financial Corp.*, supra. Additionally, there is no goodwill to maintain here. First, it is clear that there will be a massive shortfall to one of the secured creditors even after both Projects have been completed and sold. Second, the unsecured debt is in excess of $30,000,000.00. Third, I anticipate that these companies were incorporated solely for the purpose of developing these two Projects so that the corporate entities will be abandoned by the shareholders once the Projects have been completed and the Units within the Projects sold.

Do the Contract Holders Have an Equitable Interest?

63 Paragraph 28 of the Contracts is specific. Any offer made and the agreement which results from the acceptance of the offer by Chandler and/or Cook creates: "... contractual rights only and not any interest in land." A similar provision was considered by Myers J. in *Romfo v. 1216393 Ontario Inc.*, [2006] B.C.J. No. 2897 (B.C. S.C.) where the clause in issue stated that the purchaser "... acknowledges and agrees that the Purchaser: (a) will not have any claim or interest in the Strata Lot, the Development or the Property until the Purchaser becomes the registered owner of the Strata Lot, and (b) the Purchaser does not now have and will not have at any time hereafter notwithstanding any default of the Vendor, any right to register this Offer or the Agreement, or any part of or right contained in this Offer to the Agreement against the Strata Lot, the Development or the Property in the Land Title Office." The effect of this provision was not determined because the plaintiffs had argued that the developer was estopped from reliance on the clause and Myers J. was of the view that estoppel issues should not be dealt with on a Rule 18A application.

64 The contract in *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.* (2007), 61 R.P.R. (4th) 277 (B.C. S.C.) contained this provision: "This offer and the agreement which results from its acceptance create contractual rights only

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and not any interest in land." In deciding that the certificates of pending litigation should not be discharged, Goepel J. made reference to that provision and concluded:

> The defendants submit that paragraph 2.1 of the Contracts that states the Contracts do not create "any interest in land" precludes such a claim. With respect, I disagree. At this stage the issue is not whether the plaintiffs can prove an interest in land; the issue is whether they are claiming such an interest. The Statement of Claim makes such a claim. That is all that is required to file a CPL.

65 While it would have been preferable for the clause used in *Romfo, supra,* to have been incorporated into these Contracts to more fully set out when and only when an equitable interest is created, I see no reason not to enforce paragraph 18 of these Contracts wherein the holders of the Contract forego any interest in land. If the Contract holders claim an equitable interest, should I ignore this clear provision in their Contracts? I have concluded that I should give effect to paragraph 28 in the Contract. The provision is clear and the Contract holders agreed to that provision when they signed the Contract. It is not submitted that Chandler or Cook is estopped from reliance on that paragraph.

66 On the assumption that I am incorrect in arriving at the conclusion that paragraph 28 determines the issue of whether they have any equitable interest, I will now consider the submissions made by the Contract holders. It is submitted on behalf of the holders of the Contracts that they have an equitable interest in the Property and the Strata Lots so that the Receiver and Manager should not be in a position to disclaim the Contracts. On this question, the Contract holders rely on the decision in *CareVest Capital Inc. v. CB Development 2000 Ltd.*, [2007] B.C.J. No. 1698 (B.C. S.C. [In Chambers]).

67 *CareVest* dealt with the fact that the prices available on 32 pre-sold units would not be sufficient to discharge the mortgages against the property. The holders of the pre-sale contracts took the position that the contracts created an equitable charge which was entitled to priority over the registered mortgage. While dismissing the application for a direction that the receiver and manager be permitted to disclaim the contracts, Pitfield J. ordered that the receiver and manager could sell each of the units but then hold in trust for CareVest and any purchasers under pre-sale contracts the excess of the sale price payable pending determination of: "... priority and/or entitlement thereto as between the pre-sale contract buyer and CareVest".

68 On the issue of whether the pre-sale buyers had an unregistered equitable charge, Pitfield J. stated:

> I do not think it is appropriate to attempt to resolve, on a summary application of this kind, the question of whether the presale buyers have an unregistered equitable charge which will entitle them to recover their damages out of the sale proceeds of the strata lot which they were to be the purchaser in priority to the registered second charge in favour of CareVest. That claim warrants more detailed consideration in the circumstances surrounding the financing of this development.
>
> (at para. 16)

69 The Contract holders also submit that the following statement of the learned author in *The Law of Vendor and Purchaser*, 3rd Ed. (Toronto: Thomson Canada Limited, 2007) applies:

> Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that *instanter* a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion. But it is then said that although the vendor becomes a constructive trustee, he does so *sub modo* only: (1) he is not a mere dormant trustee; (2) he is a trustee having a personal and substantial interest in the property: he has a right to protect and an active right to assert that interest if anything is done in derogation of it; (3) his right to protect his own interest is paramount and overriding, and until he is bound to convey he retains for certain purposes his old dominion over the estate.
>
> Further, the purchaser's status as equitable owner is contingent upon the contract being specifically enforceable.

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> It is clear, then, that the precise position in which the parties stand with respect to each other is *in fieri*, until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que trust* relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser. (at pp. 1-12 and 1-13) (footnotes omitted)

70 However, the status of a potential purchaser as having an equitable interest is contingent upon the contract being specifically enforceable: *Buchanan v. Oliver Plumbing & Heating Ltd.*, [1959] O.R. 238 (Ont. C.A.); *Cornwall v. Henson*, [1899] 2 Ch. 710 (Eng. Ch. Div.) at p. 714; *Miller v. Howard* (1914), 7 W.W.R. 627 (British Columbia P.C.) at p. 631; and *Central Trust & Safe Deposit Co. v. Snider* (1915), [1916] 1 A.C. 266 (Ontario P.C.) at p. 272. A purchaser has an equitable interest in land only as long as he or she would be entitled to specific performance of the agreement: *DiGuilo v. Boland* (1958), 13 D.L.R. (2d) 510 (Ont. C.A.); *Howard, supra*, at pp. 79-80; *Kimniak v. Anderson*, [1929] 2 D.L.R. 904 (Ont. C.A.); *Freevale Ltd. v. Metrostore (Holdings) Ltd.* (1983), [1984] 1 All E.R. 495 (Eng. Ch. Div.); and *St. James (Rural Municipality) v. Bailey* (1956), 21 W.W.R. 1 (Man. C.A.).

71 In *St. James*, the Court dealt with a request for a declaration that the defendants had no right, title or interest in property so that the plaintiff was entitled to a declaration that the defendants were trespassing upon the property. Regarding the question of whether a sale of property produced an equitable interest in the proposed purchaser, Adamson C.J.M. stated:

> When a binding agreement for sale of lands is entered into, the immediate effect of the contract is that the purchaser acquires an equitable estate in the land": *Remedies of Vendors & Purchasers, McCaul*, 2nd ed., p. 1; *Rose v. Watson* (1864) 10 HL Cas 672, 33 LJ Ch 385; *McKillop v. Alexander* (1912) 1 W.W.R. 871, 45 S.C.R. 551; *Thorn's Canadian Torrens System*, p. 129. (at para. 18)

72 A similar statement was made by Montague J.A.:

> I am of the opinion that in the light of all the circumstances in the instant case the defendants have acquired an equitable interest in the lands of such a nature that an action for trespass by the plaintiffs cannot succeed. The appeal therefore should be allowed and the action of the plaintiff dismissed with costs to the defendant Bailey.. (at para. 71)

73 The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest, supra*, Pitfield J. stated in this regard:

> It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.
>
> As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

74 The question which then arises is whether the holders of the Contracts have an equitable interest and, if so, whether the Receiver and Manager should still be provided with the Direction sought that it can disclaim the Contracts.

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Disclaiming Contracts Relating to the Vancouver Project

75 Regarding the Contracts of Ms. Chao-Dietrich (Strata Lot 46) and Salim Jiwa and Farouk Ratansi (Strata Lot 12) relating to the Vancouver Project, construction is not complete and stratification has not occurred. A purchaser is not entitled to specific performance until the time for the completion of the contract has arrived and all conditions precedent have been met. For the Vancouver Project, this would include a filing in the Land Title Office to subdivide the existing property into the Strata Lots which will constitute the Strata Plan.

76 Until a proper subdivision plan is registered, no interest in land is created: *Nesrallah v. Pagonis* (1982), 38 B.C.L.R. 112 (B.C. S.C.) where Taylor J. concluded that the right to create a leasehold interest arose only when a duly approved subdivision plan had been registered and that no interest in land was created prior to such a registration (at para. 14). Similarly, a contingent option granted prior to a strata corporation coming into existence was found to be unenforceable: *Strata Plan VIS2968 v. K.R.C. Enterprises Inc.* (2007), 74 B.C.L.R. (4th) 89 (B.C. S.C.).

77 As well, I am satisfied that it is not possible to imply a covenant or obligation on the part of Chandler to seek and obtain subdivision approval for the Vancouver Project: *International Paper Industries Ltd. v. Top Line Industries Inc.* (1996), 20 B.C.L.R. (3d) 41 (B.C. C.A.), being a decision involving whether a lease granted prior to subdivision approval was enforceable or not.

78 Because construction is not complete and because stratification has not taken place, Ms. Chao-Dietrich (Strata Lot 46) and Messrs. Jiwa and Ratansi (Strata Lot 12) have no equitable interest in the Vancouver Project. There is considerable construction to be undertaken by the Receiver and Manager to complete the Vancouver Project even before the preparation and filing of the documents which will be required before the subdivision plan and the Strata Plan can be registered in the Land Title Office. The property which is the subject matter of the Contracts does not yet exist. In order for it to exist, further funds must be borrowed by the Receiver and Manager, and those funds must be expended. The Receiver and Manager must "pick up" where Chandler left off. I am bound by the decisions in *New Skeena* and *Pope & Talbot*, both *supra*, so that the Receiver and Manager is in a position to disclaim the Contracts even if I could conclude that the holders of these Contracts had an equitable interest in the Contract or in the interest in land created by the Contract.

79 Even if I could conclude that Ms. Chao-Dietrich and Messrs. Jiwa and Ratansi had an equitable interest in the Vancouver Project and the Strata Lots which will eventually be created, I could not conclude that the Receiver and Manager should not be given the power to disclaim the Contracts relating to Strata Lots 85 and 12 in the Vancouver Project.

80 In coming to this conclusion, I rely on the following related to Strata Lot 85: (a) the $100,000.00 discount made available to Ms. Chao-Dietrich would amount to now preferring Ms. Chao-Dietrich in priority to other unsecured creditors of Chandler as she would be entitled to a fee for services rendered by a reduction of the purchase price agreed to on July 6, 2007; (b) there appears to be at least some evidence that the net selling price at July 6, 2007 was significantly less than the net selling price of $349,900.00 that was to be made available to Ms. Chao-Dietrich as the net selling price acceptable to the Petitioner was significantly higher than the price made available to Ms. Chao-Dietrich; and (c) I can find no obligation on the Petitioner to provide a partial discharge of its security in order to accommodate the contemplated sale to Ms. Chao-Dietrich.

81 For Ms. Chao-Dietrich and all other holders of Contracts, the notice set out in the Disclosure Statement was clear:

> The Developer will cause and each Lender will agree to provide the partial discharge of the Construction Security in respect of any Strata Lot and its undivided interest in the Common Property sold hereunder within a reasonable period after completion of the purchase and sale thereof provided a certain minimum purchase price is obtained and upon receipt of the net purchase price (after deduction of real estate commission and usual closing costs).

82 As well, holders of Contracts signed after the security of the Petitioner was registered had notice that partial discharges would only be provided in accordance with the net sale prices established in accordance with the provisions of the security.

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Additionally, now that the security of the Petitioner is in default, I am satisfied that there is no obligation on the Petitioner to provide partial discharges even if the net sale prices agreed to between Chandler and/or Cook and the Petitioner were being met.

83 I provide the Direction to the Receiver and Manager that it can disclaim the Contract relating to Strata Lot 85 or, alternatively, to offer for sale that Strata Lot at current market value free and clear of any obligation of Chandler that might arise under the Contract with Ms. Chao-Dietrich.

84 Regarding the Contract relating to Strata Lot 12, I cannot be satisfied that the price at the time of the Contract was so much lower than the then current market value so that the Receiver and Manager is correct in concluding that this is a Contract which should be disclaimed. However, I am satisfied that the current market value of Strata Lot 12 is such that the Receiver and Manager should be at liberty to offer that Strata Lot for sale free and clear of any obligation of Chandler that might arise under the Contract as I am satisfied that the purchase price set out under the Contract does not reflect the current market value of Strata Lot 12.

85 In this regard, I take into account not only the view of the Receiver and Manager that the current market value is $730,000.00 but also the view of Messrs. Jiwa and Ratansi that the current market value or, at least the market value as at July 29, 2007, is far in excess of the original Contract amount of $649,000.00. In the July 29, 2007 assignment of the Contract, it was the view of Messrs. Ratansi and Jiwa that the value was $767,450.00 made up of the original offer of $649,000.00 plus the $150,900.00 that they paid to Mr. Nikitiuk for the assignment. In view of the current market value, I am satisfied that the Receiver and Manager would be subject to criticism from the creditors having security against the Vancouver Project if it proceeded to complete the sale at $649,000.00.

86 Whether or not I am correct in coming to the conclusion that Messrs. Jiwa and Ratansi do not have an equitable interest because an action for specific performance is not available to them, I provide the Direction that the Receiver and Manager will be permitted to sell Strata Lot 12 at current market value free and clear of any obligation of Chandler or Cook that might arise under the Contract originally with Mr. Nikitiuk. However, any offer on Strata Lot 12 which is accepted by the Receiver and Manager shall only be accepted subject to Court approval. Notice of any application to approve a sale shall be provided to Messrs. Jiwa and Ratansi.

Disclaiming Contracts Relating to the Richmond Project

87 The question which then arises is whether the Receiver and Manager should be allowed to disclaim the Contracts relating to the Richmond Project. Regarding the Contract of Ms. Chao-Dietrich relating to Strata Lot 46, I am satisfied that it is in order for the Receiver and Manager to disclaim the Contract. First, the considerable discount of $340,800.00 that was made available to Ms. Chao-Dietrich for what was described as payments: "... by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser" would create a significant preference to Ms. Chao-Dietrich if the Contract was allowed to stand. Second, the "analysis" of MPC even though flawed allows me to conclude that a similar unit in the floor below Strata Lot 46 sold for $283,620.00. Third, the proposed price to Ms. Chao-Dietrich is well below the net sale price agreed to between the Petitioner and Chandler which I take to be an indication of the market value at the time. Fourth, the inability to provide a discharge of the security against Strata Lot 46. All of those factors allow me to conclude that the Receiver and Manager is not acting arbitrarily in the exercise of its discretion to request a Direction that it be at liberty to disclaim this Contract. I provide that Direction to the Receiver and Manager. If Ms. Chao-Dietrich does not volunteer to remove the Certificate of Pending Litigation filed against Strata Lot 46 in the Richmond Project, then I will hear any application on behalf of the Receiver and Manager that the Certificate of Pending Litigation be discharged from title.

88 Regarding the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95, I am satisfied that Crestmark does not have an equitable interest in those Strata Lots as the Contracts are not specifically enforceable. Even if I could be satisfied that Crestmark had an equitable interest, I would be satisfied that the Direction should be given to the Receiver and Manager that those Contracts be disclaimed.

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89 The doctrine of specific performance continues to apply where a deadline has passed even in the presence of a "time is of the essence clause" where the conduct of the parties has waived the requirement to close by the given deadline and a closing date has been extended. In this regard, see *Cheema v. Chan*, [2004] B.C.J. No. 2222 (B.C. S.C. [In Chambers]).

90 Once a deadline for closing has been extended by the conduct of the parties even in the presence of a "time is of the essence" clause, the deadline must be reset with reasonable notice of the new deadline before a party can rely upon the failure to close by that date as a ground for treating the contract as being at an end or for permitting an action for specific performance. For time to be of the essence again, the person wanting a new date must specify a reasonable new completion date in such a manner that the other person would realize that he or she is now bound by the new date: *Ambassador Industries Ltd. v. Kastens* (B.C. S.C. [In Chambers]); *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145 (B.C. C.A.); and *Abramowich v. Azima Developments Ltd.* (1993), 86 B.C.L.R. (2d) 129 (B.C. C.A.).

91 Under the Crestmark Contracts, the original completion dates were to be not less than ten business days after Crestmark had been notified that the City of Richmond had given permission to occupy the Strata Lot and the Strata Plan was fully registered in the Land Title Office. That date would have been sometime in August or September of 2007. While the dates for completion set out in the Contracts may well have already expired, Crestmark and Chandler agreed in the October 11, 2007 Addendum that the completion date was to be extended to: "... Nov 30, 2007 or within 5 business days after the vendor has paid the commission bonus to Edward Wong & Ass. Realty in an amount of $250,000.00 + G.S.T. whichever occurs later." November 30, 2007 has passed and the sale of Strata Lots 12, 85, 92 and 95 were not completed. To date, the amount of $250,000.00 has not been paid. It is more than probable that the $250,000.00 will never be paid.

92 While Mr. Wong states that he has agreed to "sign any documentation that might be required to satisfy the Receiver and the Court that I am bound by that waiver [a waiver of the condition to apply the amount of the unpaid $250,000.00 bonus against the purchase price of the four Strata Lots] and will pay the full purchase prices payable under the 4 agreements without the deduction of the bonus contemplated in the October [11, 2007] Addendum ....", there was nothing in evidence which would allow me to conclude that there has been an addendum executed by Crestmark amending the completion date agreed upon, there is nothing executed by Crestmark making time of the essence again, and there is nothing in evidence executed on behalf of Chandler which either changes the completion date to make time of the essence again or accepts an addendum to the Contract to provide for a completion date other than in accordance with the October 11, 2007 Addendum.

93 While I recognize that it would not be necessary for the Receiver and Manager to sign a further addendum accepting reasonable notice from Crestmark of the new date for completion, I am satisfied that it would be necessary for the Receiver and Manager to sign a further addendum relating to these Strata Lots to amend the purchase price so that the "decoration" allowances of $74,820.00 (Strata Lot 12), $62,820.00 (Strata Lot 85), $63,270.00 (Strata Lot 92), and $77,070.00 (Strata Lot 95) are removed so that the price to be paid does not reflect decoration allowances totalling $277,980.00 which were added to provide Crestmark with its "bonus". If these decoration allowances are not removed, then the unsecured amount said to be payable to either Wong or Crestmark would be available as a preference if the four sales were to complete.

94 I can find no contractual obligation requiring the Receiver and Manager to execute a further Addendum. Specific performance is not available to Crestmark. Accordingly, it is clear that an equitable interest is not available because there are further steps to be taken before it could be said that an equitable interest exists.

95 There is another reason why specific performance would not be available. There is nothing about these Strata Lots which would allow me to conclude that they are of a unique character and of particular value to Crestmark: *Behnke v. Bede Shipping Co.*, [1927] 1 K.B. 649 (Eng. K.B.). It is clear that specific performance will only be generally available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) where Sopinka J. on behalf of the majority stated:

> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v.*

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Seal Oil & General Corp., [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

96 I cannot conclude that the Strata Lots are of an unique character and of particular value to Crestmark. Even if I could conclude that Crestmark had an equitable interest, I would also conclude that it was appropriate for the Receiver and Manager to disclaim the Contracts relating to these four Strata Lots. The four August 10, 2007 Contracts provide for "decoration" allowances totalling $277,980.00. Unless Crestmark and the Receiver and Manager are prepared to execute a further Addendum removing those decoration allowances, the significant reductions from the "gross sale price" agreed to and the significant reduction from the "minimum pre-sale requirements set by the Petitioner" allows me to conclude that, if the Contracts are not disclaimed, Crestmark and Wong will receive significant preferences not otherwise available to other unsecured creditors of Chandler or Cook. Assuming that Crestmark has an equitable interest in the four Strata Lots, equity would require that I not approve any sales which would incorporate such significant preferences. The "analysis" performed by MPC and the minimum pre-sale requirement set by the Petitioner allow me to conclude that the Contracts were at prices not in accordance with fair market value at the time of the Contracts.

97 Accordingly, I provide the Direction to the Receiver and Manager that it can disclaim the Contracts of Crestmark relating to Strata Lots 12, 85, 92, and 95 of the Richmond Project or alternatively, offer for sale those Strata Lots at current market value free and clear of any obligation of Chandler that might arise under the Contracts with Crestmark.

The Application of Crestmark

98 The application is that Crestmark be at liberty to commence an action against Chandler, Cook and the Receiver Manager for specific performance. The application of Crestmark pursuant to Rules 47 and 50 of the Rules of Court and the inherent jurisdiction of the Court is dismissed to the extent that the order sought relates to an action claiming specific performance. Regarding the proposed action against the Receiver and Manager, there is nothing before me which will allow me to conclude that the Receiver and Manager has adopted the Contract and has agreed to perform pursuant to it. Accordingly, there can be no action against the Receiver and Manager for specific performance. Regarding the proposed action against Chandler or Cook, Crestmark will be at liberty to commence an action claiming damages against either or both of those companies. However, Crestmark will not be at liberty to commence an action against either Chandler or Cook for specific performance. Crestmark has not met the onus of establishing a reasonable cause of action is disclosed.

Costs

99 The Receiver and Manager will be at liberty to speak to the question of costs against Crestmark Holdings Corp., Farouk Ratansi, Salim Jiwa, and Sui Chun Chao-Dietrich.

Order accordingly.

Footnotes

* A corrigendum issued by the court on October 16, 2008 has been incorporated herein.

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TAB 2

2009 CarswellOnt 5202
Ontario Superior Court of Justice

Royal Bank v. Penex Metropolis Ltd.

2009 CarswellOnt 5202, [2009] O.J. No. 3645, 180 A.C.W.S. (3d) 258

Royal Bank of Canada (Applicant) and Penex Metropolis Ltd.et al. (Respondents)

G.R. Strathy J.

Heard: August 24, 2009
Judgment: September 4, 2009
Docket: CV-09-8157-00CL

Counsel: David Foulds, Jonathan Davis-Sydor for Van Wagner Communications Company, Canada
Hilary Clarke, Larry Crozier, Lisa Brost for Reciever, Ernst & Young Inc.
Liz Pillon for EPR Metropolis Trusts, Metropolis Entertainment Holdings Inc.
Fred A. Platt for Cambrian Court

Subject: Corporate and Commercial; Estates and Trusts; Property

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Bank of Montreal v. Scaffold Connection Corp. (2002), 2002 ABQB 706, 36 C.B.R. (4th) 13, 2002 CarswellAlta 932 (Alta. Q.B.) — referred to

Bayhold Financial Corp. v. Clarkson Co. (1991), 10 C.B.R. (3d) 159, 108 N.S.R. (2d) 198, 294 A.P.R. 198, (sub nom. *Bayhold Financial Corp. v. Community Hotel Co. (Receiver of)*) 86 D.L.R. (4th) 127, 1991 CarswellNS 33 (N.S. C.A.) — considered

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd. (2008), 72 R.P.R. (4th) 68, 2008 CarswellBC 1421, 44 C.B.R. (5th) 171, 2008 BCSC 897, 86 B.C.L.R. (4th) 114 (B.C. S.C. [In Chambers]) — referred to

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Citadel General Assurance Co. v. Lloyds Bank Canada (1997), 152 D.L.R. (4th) 411, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805, 66 Alta. L.R. (3d) 241, [1999] 4 W.W.R. 135, 19 E.T.R. (2d) 93, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 206 A.R. 321, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada)* 156 W.A.C. 321, 219 N.R. 323, 47 C.C.L.I. (2d) 153, 35 B.L.R. (2d) 153 (S.C.C.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 154, 2005 CarswellBC 578, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) — referred to

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — referred to

Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd. (2001), 2001 BCCA 268, 2001 CarswellBC 965, 42 R.P.R. (3d) 53, 155 B.C.A.C. 1, 254 W.A.C. 1 (B.C. C.A.) — referred to

***G.R. Strathy J.*:**

1 There are two motions before the Court. First, Van Wagner Communications Company, Canada ("Van Wagner") moves for an Order declaring that Ernst & Young Inc., the Court-appointed Receiver (the "Receiver") of the Respondents [1] is not entitled to disclaim the Exclusive Sales Agency Agreement between Van Wagner and the Respondents (the "Agreement"). Van Wagner also seeks a declaration that certain funds are held in trust by the Receiver for the benefit of Van Wagner, pursuant to the Agreement.

2 Second, the Receiver brings a cross-motion for a declaration that the Agreement is not binding on a purchaser of the business of the Respondents and that the Receiver is entitled to sell the assets of the business free and clear of any obligations under the Agreement.

Factual Background

3 This proceeding concerns a 13-floor, 332,000 square foot, mixed use, multi-media entertainment, retail and office complex located on the northeast corner of Yonge-Dundas Square in Toronto (the "Property") that is owned by Penex Metropolis Ltd. ("Penex"). Yonge-Dundas Square, which is said to be modeled after Times Square in New York and Piccadilly Circus in London, is home to a number of digital and billboard-type signs. The Property itself is covered on all sides by approximately 25,000 square feet of digital and static signage used for outdoor advertising. Penex is the legal owner of the Property.

4 Van Wagner is in the business of developing, marketing and selling outdoor advertising signage. It is an affiliate of one of the largest privately held out-of-home communications companies in North America.

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5 Royal Bank of Canada ("RBC") acts as agent for a syndicate of lenders that provided financing for the construction of the Property and is the first secured creditor. The second secured creditor is a subsidiary of Entertainment Properties Trust, a REIT with its head office in Kansas City, Missouri. The second secured creditor has entered into a strategic alliance with the parent of Penex.

6 Van Wagner and Penex entered into an Exclusive Third Party Exterior Signage License Agreement (the "Joint Venture Agreement") for the Property in June, 1999. Under the Joint Venture Agreement, Van Wagner was to own 35% of the signs and receive 35% of the advertising revenue from the signs, while Penex would own 65% of the signs and receive 65% of the advertising revenue. Among other duties, Van Wagner would exclusively market the signs.

7 The Property was delayed in construction and in the fall of 2005 had just started above ground construction. In September of 2005 Penex purported to terminate the Joint Venture Agreement. Van Wagner commenced litigation against Penex, which was settled in the summer of 2006 when Penex and Van Wagner entered into the Agreement that is the subject of this litigation.

8 The Agreement provides that Van Wagner is to be Penex's exclusive sales agent for the marketing and sale of advertising on a number of static signs located at the Property. Van Wagner is a non-exclusive sales agent on the "tri-vision" sign, which rotates through a maximum of three advertisements on the same sign. Van Wagner has no rights or responsibilities with respect to the digital video board.

9 The only exception to Van Wagner's exclusive agency rights on static signs relates to tenant advertising and sponsorship opportunities. Pursuant to paragraph 2C of the Agreement, these remain exclusive to Penex. Accordingly, should any tenant or sponsor of the Property require signage rights on any one of the static signs, Penex has the right to grant such signage rights (per paragraph 2F of the Agreement), but must pay Van Wagner a sales commission as detailed below. This commission is in recognition of Van Wagner's surrender of its rights to part ownership of the signs and the limitations placed on Van Wagner's marketing efforts.

10 As consideration for the services to be provided by Van Wagner as Penex's exclusive sales agent, paragraph 4A of the Agreement provides that Penex is to pay Van Wagner a sales commission equal to:

> 22.5% of "Net Advertising Revenues" (as defined in paragraph 4C of the Agreement) derived from signs sold by Van Wagner; and 20% of Net Advertising Revenues derived from signs other than sign 2 or sign 3 that are sold to sponsors and tenants by Penex.

11 As a result of allegations that Penex had breached the Agreement by causing its personnel to sell advertising on static signs in competition with Van Wagner, Van Wagner commenced an action in this court against Penex to enforce the Agreement.

12 Van Wagner also sought an interim and interlocutory injunction to prevent Penex from violating the exclusivity provisions of the Agreement until trial. That motion was heard before Patillo J. on December 5, 2007, following the exchange of extensive affidavit materials and cross-examinations.

13 After a full day of argument, Patillo J. agreed that if Penex was allowed to continue breaching the Agreement, Van Wagner would be irreparably harmed and granted Van Wagner an injunction until trial. Following the language of the Agreement, the injunction is binding on any successors or assigns of Penex.

14 Penex sought leave of the Divisional Court to appeal the decision of Patillo J. In a decision released April 23, 2008, Carnwath J. found that there was no good reason to doubt the correctness of the decision and denied Penex's motion for leave to appeal to the Divisional Court.

15 Van Wagner alleged that Penex continued to breach the Agreement in spite of the order of Pattillo J. As a consequence, Van Wagner brought a motion for appropriate relief. This motion was ultimately settled on consent in March, 2009, with the parties agreeing to an Order setting out the terms of the relationship between Van Wagner and Penex until trial. This Order was issued by Lederer J. on March 10, 2009.

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16 On April 27, 2009, RBC applied to this Court to appoint Ernst & Young as the Receiver of all of the assets, undertakings, and properties of Penex, including the Property. This Court granted the relief sought. The initial appointment order (the Initial Order) is based on the model receiving order of the Commercial List, and contains the following standard provisions:

> 3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> . . . . .
>
> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

17 Neither Van Wagner nor its counsel was provided with notice of the application to appoint a receiver. Van Wagner was not informed of RBC's application until the afternoon of Friday, May 1, 2009, when Van Wagner received a letter from the Receiver attaching a copy of the Initial Order and advising that the Receiver did not intend to perform the Agreement. The letter further stated that the Receiver would not require Van Wagner's further services, and would not be making any payments or be responsible for any amounts payable under the Agreement.

The Issues

18 There are three issues before me: First Issue: Was the Receiver entitled to disclaim the Agreement? Second Issue: Are the fees due to Van Wagner by Penex held in trust? Third Issue: Does the Agreement bind a purchaser of the Property?

19 I will discuss these in turn.

Discussion

First Issue: Was the Receiver entitled to disclaim the Agreement?

20 The Appointment Order authorizes the Receiver to cease to perform any contracts of Penex. This reflects the established law and practice: *Bank of Montreal v. Scaffold Connection Corp.*, 36 C.B.R. (4th) 13, [2002] A.J. No. 959 (Alta. Q.B.) at para. 11. A receiver must have the ability to refuse to adopt contracts in order to give meaning to its power to convey the assets free and clear of other parties' interests: *New Skeena Forest Products Inc., Re*, 9 C.B.R. (5th) 267, [2005] B.C.J. No. 546 (B.C. C.A.) at paras. 18 and 20.

21 There is little dispute about the principles concerning disclaimer of contracts by a receiver. The real issue is the application of those principles to the facts of this case. I will begin, however, by briefly outlining the principles.

22 Both counsel refer to the leading text, *Bennett on Receiverships*, 2nd ed. (Toronto: Thompson Canada Limited, 1999) in support of the proposition that the receiver is an officer of the court. The learned author states at p. 180:

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court disclosing not only facts favourable to pending applications, but also facts that are unfavourable.

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23 The author notes that a court-appointed receiver is not bound by existing contracts, but the receiver must exercise discretion before disclaiming a contract. If it seeks to break a *material* contract, it must seek leave of the court. At p. 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court.

24 I also accept the general proposition, set out in *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1752 (Alta. Q.B.) affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (Alta. C.A.), at para 40, that a receiver is not entitled to prefer the interests of one creditor over another. Its duty is to act for the benefit of all interested parties:

> The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

25 A receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. In deciding whether or not to adopt a contract, the duty of the receiver is to exercise the care "comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own": *Bayhold Financial Corp. v. Clarkson Co.*, 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (N.S. C.A.) at para. 15; *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.) at para. 21.

26 If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court. As noted by the Ontario Court of Appeal in *Ravelston Corp., Re*, 24 C.B.R. (5th) 256, [2005] O.J. No. 5351 (Ont. C.A.) at para. 40.

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable differences. These decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others...The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

See also *Royal Bank v. Soundair Corp.*, 4 O.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at para. 14.

27 A receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (B.C. S.C. [In Chambers]) at para. 96.

The Receiver's Position

28 The Receiver says that after its appointment it considered the Agreement for the purpose of determining whether it should continue to perform it. As part of its analysis, the Receiver says that it:

(a) reviewed the terms of the Agreement;

(b) reviewed the historical sales revenue generated from all signage by both Van Wagner and Penex;

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(c) had discussions with the former manager of the Property, regarding signage issues and with the individuals who formerly managed the signage;

(d) on the recommendation of the Receiver's court-approved property manager, had discussions with a Toronto signage company, about the signage business, including the market conditions for signage, the market participants and the locations within Dundas Square;

(e) reviewed with Penex: (i) signage contracts to which Penex was party on the Receivership Date; (ii) signage contracts that were out for signature on the Receivership Date; (iii) Penex's process for dealing with Van Wagner; and (iv) the amounts owed to Van Wagner by Penex as at the Receivership Date;

(f) met with representatives of Penex's second secured creditor, who are familiar with the signage at the Property;

(g) reviewed the websites of certain major signage companies operating in Canada as well as industry associations, to obtain market information;

(g) had discussions with representatives from Brookfield Financial Real Estate Group Limited ("Brookfield") regarding the sales process previously undertaken by Penex regarding the Property, including the impact of the Agreement on that sales process;

(h) reviewed an appraisal report dated January 30, 2009 that set out information on current utilization of the signage and the signage market; and

(i) reviewed pleadings in the 2007 litigation between Penex and Van Wagner as well as the decision of Patillo J. in that litigation.

29 The Receiver reports that after considering this information, it concluded that it was not in the interests of Penex or its stakeholders to continue to perform the Agreement. Broadly speaking, there were three reasons for this decision.

30 First, the Receiver had concerns that there were terms of the Agreement that were not in the interests of Penex or its stakeholders: (a) there was an indemnification clause in the Agreement that requires Penex to indemnify Van Wagner for claims arising in connection with the operation of the sign structures except in cases of Van Wagner's gross negligence - the Receiver felt that this term was excessively onerous; (b) the Receiver concluded that the rate of 22.5% for third party sales commissions was above market, which it considered to be in the range of 15%; (c) the Receiver concluded that the exclusivity provisions in the Agreement had a negative effect on Penex's ability to earn advertising revenue, created inefficiencies and confusion in the marketplace, and limited Penex's marketing options; and (d) the Receiver concluded that performance of the Agreement would require the Receiver and its advisors to work closely with Van Wagner in relation to the signage issue. In view of the history of the relationship between Van Wagner and Penex, which the Receiver considered to be "plagued by recriminations, acrimony and disagreements", the Receiver was concerned that there would be continued discord and that a viable business relationship would not be possible.

31 Second, the Receiver had concerns about Van Wagner's performance of the Agreement, including: (a) it had only one sales representative in Canada; (b) sign utilization appeared to be considerably less than market; and (c) since the opening of the Property in 2008, static signage revenues were about $3.75 million, of which Van Wagner was responsible for only about a third, the balance being generated through sales to tenants of the Property or leads of Penex staff or other agents.

32 Third, the Receiver considered that adoption of the Agreement would give Van Wagner a higher interest than it had prior to the making of the appointment order. The Receiver says that the first and second secured lenders provided financing before the Agreement came into effect and were unaware of the Agreement. They, and other secured creditors, are entitled to sell the Property free of any claims of unsecured creditors. The Receiver believes that Van Wagner's pre-receivership claim is an unsecured claim against Penex and does not anticipate that the proceeds of sale of the Property will be sufficient to satisfy the claims of any unsecured creditors. The Receiver says that Van Wagner is seeking payment of its pre-receivership claim

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and the effect of this would be to elevate that claim above the claims of the secured creditors, who had negotiated for and took security in the property.

Van Wagner's Position

33 I will briefly summarize the arguments made on behalf of Van Wagner. They are set out extensively in the factum filed by counsel on behalf of Van Wagner and my summary is not intended to be exhaustive, nor is it in precisely the same order as addressed by counsel.

34 First, Van Wagner says that the Receiver should have sought court approval for the disclaimer of the Agreement, because the contract was a material one.

35 Second, it submits that the Receiver had no experience in the signage market and it should have made greater investigations of the market and should not have relied upon advice received from Penex employees, whose views about Van Wagner were biased and who were themselves the cause of the disruptive relationship between the parties.

36 Third, it says that in light of the history of the relationship between the parties and Van Wagner's knowledge of the market, the Receiver should have discussed the issues with Van Wagner before terminating the contract and should have given Van Wagner an opportunity to respond to the Receiver's concerns.

37 Fourth, Van Wagner says that the Receiver erroneously concluded that the Agreement was not advantageous to Penex and the 22.5% commission rates in the Agreement were "well above market rate". Van Wagner says that while rates may be lower where the agreement is for brokerage only, this was not a simple brokerage contract and therefore it has a higher rate. As well, Van Wagner says that the rate is partly for the purpose of compensating Van Wagner for the loss of part ownership of the signs as a result of Penex's breach of the earlier Joint Venture Agreement.

38 Fifth, Van Wagner takes issue with the Receiver's conclusion that the Agreement is detrimental to the stakeholders and fundamentally disagrees with the Receiver's analysis of the Agreement. I will not set out the various arguments made by Van Wagner under this heading, which occupy some five pages of the factum and took up a considerable part of oral submissions.

39 Sixth, Van Wagner says that its performance to date has not been detrimental to the Property and that the Receiver's investigation of this issue was neither balanced nor informed. Van Wagner says that the Receiver relied upon tainted information from former Penex employees whose conduct was responsible for the prior litigation between the parties that was successfully resolved in favour of Van Wagner. Again, the submissions on this issue were extensive.

40 Seventh, the Receiver failed to give adequate consideration to the impact of termination of the Agreement on Van Wagner, particularly in light of the previous conclusion of Patillo J. that Van Wagner would suffer irreparable harm if the Agreement was breached.

41 Eighth, Van Wagner says that continued performance of the Agreement is actually financially beneficial to the stakeholders.

42 Ninth, the disclaimer of the Agreement has the effect of expropriating the commissions that were earned by Van Wagner and transferring them to the secured lenders. It is alleged that this is unfair to Van Wagner and confers a windfall on the secured lenders.

Conclusion on the First Issue

43 Having considered the Receiver's reasons and the concerns raised by Van Wagner, I have come to the conclusion that, although there are points to be made on both sides as to whether the Agreement was advantageous or not, it cannot be said that the Receiver acted in a commercially unreasonable manner, unfairly, or in bad faith in deciding to disclaim the Agreement. On the contrary, the Receiver's report indicates that the Receiver made appropriate inquiries and investigations prior to disclaiming the contract. Based on the evidence before me, the Receiver could reasonably conclude that the rates paid to Van Wagner under

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the Agreement were above market value and included a premium to compensate Van Wagner for rights it had given up under the Joint Venture Agreement. The Receiver could also reasonably conclude that the exclusivity provisions of the Agreement fettered its ability to negotiate signage agreements with potential users, limited the flexibility that it would require to deal with signage issues, and was potentially cumbersome, inconvenient, and inefficient.

44 This is precisely one of those cases, referred to in *Ravelston Corp., Re*, above, in which a receiver must choose between several courses of action, none of which is obviously preferable to another. While I do not necessarily accept every reason advanced on behalf of the Receiver on this issue, or reject every one of Van Wagner's objections, I cannot conclude that the Receiver acted unreasonably, arbitrarily or inappropriately in disclaiming the Agreement.

Second Issue: Are the fees due to Van Wagner held in trust for Van Wagner?

45 In support of its submission that the fees are held in trust, Van Wagner refers to paragraph 4D of the Agreement, which provides, in part:

> All Gross Revenue shall be made payable to the Owner and deposited in a designated chequing account with Royal Bank of Canada in Toronto (with statements to both parties), or such other bank as is designated by Owner, with cheque signing to be a person representing and designated by the Owner. The Fee due to Van Wagner shall be held in such account in trust for Van Wagner and shall be remitted to Van Wagner, and the balance of the Gross Revenue shall be remitted to Owner, in each case, within fifteen (15) days following the end of each calendar month together with a statement showing the amounts collected and the manner in which compensation is calculated. [...] The parties shall hold all funds received in trust for the benefit of the parties hereunder in accordance with their interests. Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time and the parties hereto agree to follow such other payment and banking procedures as reasonably may be required by Owner's lenders from time to time and which are consistent with the principles set forth in this Agreement and are approved by Van Wagner (which approval shall not be unreasonably conditioned, withheld or delayed).
>
> [emphasis added]

46 Van Wagner submits that the "three certainties" required to establish a trust are present -certainty of intention, certainty of subject matter, and certainty of object: see: *Air Canada v. M & L Travel Ltd.*, [1993] S.C.J. No. 118 (S.C.C.); *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92 (S.C.C.). It submits that paragraph 4D shows a clear intention to create a trust, that the subject matter of the trust is clear (fees owing to Van Wagner), and the object of the trust is clear (Van Wagner).

47 The difficulties with Van Wagner's submissions are set out in the Receiver's factum. First, clause 4D itself contemplates that the trust arrangement was subject to the approval of Penex's lenders. It provides:

> ... Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time ...

48 There is no evidence that the lenders approved the trust arrangement and at least some evidence that one lender did not approve it. There is certainly an argument that a condition-precedent to the establishment of a trust was not satisfied.

49 The second problem with Van Wagner's submission on this issue is that no trust account was in fact established, and that Van Wagner was either aware, or ought to have been aware, that one had not been established. One could conclude from this that the parties never gave effect to their intention to create a trust.

50 The third problem is that revenues from sales of static signage advertising space, from which Van Wagner was entitled to fees, were in fact deposited in Penex's general operating account where they were co-mingled with other funds. The Receiver submits that the co-mingling of the trust funds is fatal to the existence of a trust: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 7 C.B.R. (5th) 202, [2005] O.J. No. 589 (Ont. C.A.).

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51 These concerns are serious and more than simply technical objections. I have concluded, however, that it is not necessary to resolve the issue at this time. I accept the submission of counsel on behalf of the Receiver that this issue should be addressed when the Court is asked to make an order regarding the distribution of the proceedings of the Property. That motion will be made on notice to all potential claimants and can be considered, if necessary, on a more complete evidentiary record than exists before me.

Third Issue: Does the Agreement bind a purchaser of the property

52 Van Wagner takes the position that any purchaser of the Property must assume and be bound by the Agreement. The Receiver reports that, having consulted with the financial adviser engaged and approved by the Court to sell the property, it is concerned that uncertainty about the existence of a legal obligation to assume the Agreement will have a detrimental affect on the marketability of the Property. Based on this submission, I agree that the issue should be resolved at this time and not deferred until offers to purchase the Property have been submitted.

53 Van Wagner relies upon paragraph 13(k) of the Agreement, which provides:

> This Agreement shall be binding upon and inure to the benefit of [Penex] and its successors and permitted assigns, <u>including, without limitation, any subsequent fee owner of the Building</u> and shall be binding upon and inure to the benefit of Van Wagner and its successors and permitted assigns.
>
> [Emphasis added]

54 Van Wagner submits that, in light of the history between the parties, it would be fair and equitable to require the Receiver to abide by this term of the Agreement.

55 Apart from this, Van Wagner offers no authority for the proposition that the Agreement runs with the Property, such that a purchaser would be bound to assume it.

56 Paragraph 13(k) is, with variations, a standard clause in many forms of agreement, including agreements for the supply of services. It cannot reasonably be construed as creating an interest in land so as to bind a subsequent purchaser from the Receiver. I accept the submission of counsel on behalf of the Receiver that in order to run with the land, two conditions must be met. First the covenant must be negative in substance and a burden on the covenantor's land: *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, [2001] B.C.J. No. 852 (B.C. C.A.), at para. 16; *Amberwood Investments Ltd. v. Durham Condominium Corp. No. 123*, 58 O.R. (3d) 481, [2002] O.J. No. 1023 (Ont. C.A.) at paras. 18 and 20. A positive covenant does not run with the land. Second, in order to run with the land, the Agreement must touch and concern the land. This covenant does not concern the Property. It concerns services to be provided to the owner of the Property.

57 It is not disputed that the Appointment Order gives the Receiver the authority to market the Property, to sell the Property, and to "apply for a vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property." In view of the authorities cited by counsel for the Receiver, and in the absence of any authority put forward by counsel for Van Wagner, I find that the Agreement does not run with the Property. The Receiver is entitled to a declaration that a purchaser of the Property is not bound by the Agreement.

Conclusion

58 For these reasons, Van Wagner's motion is dismissed and the Receiver's motion is granted. If costs cannot be agreed upon, they may be addressed by brief written submissions, including a costs outline, addressed to me care of Judges' Administration. Counsel for the Receiver and for EPR Metropolis Trusts shall serve and file submissions within fifteen days. Counsel for Van Wagner shall file responding submissions within fifteen days of receipt of the other parties' submissions. Those parties may file brief reply submissions, if necessary, within five days thereafter.

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Footnotes

1 The Respondents are Penex Metropolis Ltd., in its capacity as general partner of, and as nominee and trustee of, and for, Metropolis Limited Partnership and Metropolis Limited Partnership.

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TAB 3

2005 BCCA 154
British Columbia Court of Appeal

New Skeena Forest Products Inc. v. Kitwanga Lumber Co.

2005 CarswellBC 578, 2005 BCCA 154, [2005] B.C.W.L.D. 2755, [2005] B.C.W.L.D. 2957, [2005] B.C.J. No. 546, 137 A.C.W.S. (3d) 1137, 210 B.C.A.C. 185, 251 D.L.R. (4th) 328, 348 W.A.C. 185, 39 B.C.L.R. (4th) 327, 9 C.B.R. (5th) 267

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

And In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

And In the Matter of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation, Kitwanga Lumber Co. Ltd. (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd., and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd. and 9753 Acquisition Corporation (Respondents / Petitioners) And Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd. (Appellants / Respondents)

And In the Matter of the Bankruptcies of New Skeena Forest Products Inc., Orenda Forest Products Ltd., Orenda Logging Ltd., and 9753 Acquisition Corporation (Respondents / Petitioners) And Main Logging Ltd. (Appellant / Respondent)

Southin, Braidwood, Oppal JJ.A.

Heard: February 17, 2005
Judgment: March 18, 2005
Docket: Vancouver CA032519, CA032539, CA032528

Proceedings: affirmed *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.* ((December 13, 2004)), Doc. Vancouver L033220 ((B.C. S.C.))

Counsel: P. Voth, Q.C., M.S. Oulton for Appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging & Construction Ltd.
R.A. Millar for Respondents, Ernest & Young Inc.
F.M. Kirchner for Respondents, Coast T'simshian Resources
S.B. Jackson for Appellant, Main Logging
R. Leong for Attorney General of Canada
D.J. Hatter for H.M.T.Q. in Right of British Columbia
S.R. Ross for Intervenor, Truck Loggers Association

Subject: Natural Resources; Insolvency

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Generally — referred to

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Generally — referred to

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Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

s. 12(4)

APPEAL by logging companies from order allowing receiver to dispose of assets of company under protection of Companies' Creditors Arrangement Act.

***Braidwood J.A.*:**

1 This is an appeal from an order of Brenner C.J.S.C. in which he vested all assets of New Skeena Forest Products Inc. ("New Skeena") in the court-appointed receiver of New Skeena, Ernst & Young (the "Receiver"), free and clear of the interests of all creditors and contractors.

2 There are two main issues in this case. First, there is a question of the relationship between the replaceable contract scheme under the *Forest Act*, R.S.B.C. 1996, c. 157, which is intended to give financial security to contractors in the forest industry, and bankruptcy proceedings. Specifically, the appeal concerns the rights of the appellant forestry contractors to continue their harvesting contracts on Tree Farm Licence 1 ("TFL-1") after a sale by the Receiver of the TFL. Second, there is an issue of the power of the Receiver to disclaim contracts like the contracts held by the contractor appellants.

Facts

3 The continuing saga of Skeena Forest Products is well known in this province, and indeed in these courts. The respondent New Skeena, the newest corporate incarnation of Skeena Cellulose Inc., after several reorganization attempts filed for bankruptcy in August 2004. Subsequently, a court appointed the Receiver in September 2004 and the Receiver thereafter commenced liquidating New Skeena's assets. The appellants, Don Hull & Sons Contracting Ltd. and K'Shian Logging and Construction Ltd., had contracts with New Skeena under which they harvested trees from TFL-1. TFL-1 is a forest licence granted by the Province to New Skeena under which New Skeena has the exclusive harvesting rights over certain lands around Terrace. The TFL is a significant asset of the company.

4 In November 2004, the Receiver entered into an asset purchase agreement for TFL-1 with the respondent Coast Tsimshian Resources Limited Partnership ("Coast Tsimshian"). The agreement is contingent on Coast Tsimshian taking TFL-1 free and clear of any obligations to the appellants under the replaceable contracts. In the court below, Chief Justice Brenner found the Coast Tsimshian offer for TFL-1 "highly favourable". Indeed, none of the other offers made to the Receiver came close to the Coast Tsimshian offer. The other offers also required cancellation of the appellants' replaceable contracts.

5 The replaceable forest licence scheme is set out in the *Forest Act* and *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/1996 [*Timber Harvesting Regulation*]. Chief Justice Brenner described the replaceable forest licence scheme at paragraph 13 of his reasons for judgment. According to his Lordship:

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> The essential policy behind this regime is that it imposes an obligation on holders of replaceable licences such as TFL-1 to harvest a proportion of the timber from the licence through contractors that have entered into these replaceable contracts. The replaceable contract is, in essence, a contract that will continue so long as the contractor's performance under the contract is satisfactory. Provided that continues to be the case, the contractor is entitled to receive replacement contracts from the licence holder under substantially similar terms for as long as the licence subsists.

6 On 2 June 2004, the Province amended the *Timber Harvesting Regulation* to remove the requirement that future contracts under a replaceable licence must also be replaceable. However, the amendment also grandfathered any replaceable contracts, such as the appellants', in existence on the date of the amendments. In addition, the amendments added s. 12(4) to the regulation. Section 12(4) reads:

> If a replaceable contract has been terminated by a licence holder for default by the contractor, that licence holder must enter into one or more replaceable contracts with other contractors, which contractors must in aggregate specify an amount of work equal to or greater than the amount of work specified in the terminated contract.

The appellants attached much significance to this addition to the regulation both in this Court and in the court below.

Trial Judgment

7 In his reasons for judgment, Chief Justice Brenner noted that a court-appointed liquidator is entitled to disclaim executory contracts, and persons who have contracted with the bankrupt thereafter have a claim in the bankruptcy for damages. He observed that the court-appointed receiver must have regard to equitable considerations when deciding whether to disclaim a contract, and a court considering an application to transfer assets to a receiver must also weigh equitable considerations when deciding whether to transfer assets to a receiver free of contractual obligations. His Lordship then reviewed the equitable considerations supporting the respective positions of the contractors and the Receiver. The appellants appear to take no issue with his weighing of the equities.

8 Regarding the effect of the June 2004 regulatory amendments, Chief Justice Brenner considered the key question was whether the regulatory amendment conferred a statutory right or a right greater than a simple contractual right for the benefit of the appellants. In his view, the amendments did not, with one proviso. Under s. 12(4) of the *Timber Harvesting Regulation*, there is a new statutory right in the event of termination because of default. However, as contractor default was not in issue in the case before him, his Lordship was not of the view that the regulation created an *in rem* or proprietary right that attached to the tree farm licence itself or would run with the tree farm licence in the event of a bankruptcy.

Analysis

9 The appellants argue in this Court that Chief Justice Brenner erred first in finding the *Forest Act* and the *Timber Harvesting Regulation* did not give rise to an ongoing statutory duty on the part of New Skeena to enter into replaceable contracts unless the contractor is terminated for cause; and, second, in finding that the *Timber Harvesting Regulation* did not create an *in rem* or proprietary right that attaches to the tree farm licence and runs with the licence in bankruptcy.

10 In the appellants' submission, forest contractors have a crystallized statutory right because under the legislation licencees must use replaceable contracts for at least 50 per cent of their harvesting, must re-issue replaceable contracts on their termination or expiry, and must ensure replaceable contracts are offered on substantially the same terms and conditions as a contract they replace. According to the appellants, the addition of s. 12(4) to the regulation further clarifies that the obligation to enter into a replacement contract is not personal to the licence holder, but rather integral to the licence itself.

11 On the other hand, both respondents say an earlier decision of this Court involving Skeena and other logging contractors with replaceable contract rights, *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.), is binding on this Court. In *Skeena Cellulose Inc., Re*, which involved the issue of Skeena's ability to terminate replaceable contracts during a reorganization under the *Companies Creditor Arrangement Act*, Madam Justice Newbury concluded that the elimination of the contractors'

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replaceable contract rights did not amount to overriding the licence-holder's statutory obligation to replace the contracts, and that accordingly, in approving an arrangement in which the debtor corporation terminated a replaceable logging contract, a court did not override provincial legislation. (The appellants, of course, argued vigorously that *Clear Creek* could be distinguished for several reasons, notably because it concerned a reorganization rather than a bankruptcy.)

12 The respondents also argue that nothing in the 2004 amendments elevated the rights enjoyed by the appellants from the contractual rights described by Madam Justice Newbury to statutory rights claimed by the appellants.

13 The intervenor Truck Loggers Association submits that allowing the termination of replaceable contract rights during a bankruptcy will reduce the number of replaceable contracts in the province, and thus undermine an important protection against financial uncertainty for logging contractors. It argues that the 2004 amendments were intended to maintain a province-wide pool of replaceable contracts except where they are cancelled pursuant to specific provisions of the legislation, and that even if this Court does not find the appellants' replaceable contracts must be assumed by the purchaser, the new licence holder for TFL-1 should be obligated to replace the appellants' contracts with other new replaceable contracts.

14 After considering the parties' submissions on the issue of the nature of the contractors' replaceable contract rights, I agree in substance with Chief Justice Brenner's reasons. I see no error in principle in what he has said on the matter. In addition, I find these comments of Mr. Justice Thackray, who was then a judge of the Supreme Court, in the context of an earlier reorganization by New Skeena, persuasive:

> I do not accept that allowing the petitioner to terminate renewable contracts is a striking down of provincial legislation. I mentioned several times to Mr. Ross that I could and do go so far as to find that there is legislat[ive] involvement in replaceable contracts under the *Forest Act*. However, I cannot accede to the position taken by Mr. Ross that these contracts attain some classification that makes them almost statutory contracts and thereby subject to some different rule of the law than general commercial contracts....

(See *Repap British Columbia Inc., Re* (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.), at para. 7). In my view, there is nothing in the recent amendments that changes this basic proposition.

15 However, the Intervenor raises another question, which is the power of the Receiver to disclaim contracts like those at issue in this case. It submits that as there is no statutory power for trustees to disclaim contracts, there is no such power in the Receiver. The Intervenor relies on a decision of Donald J., as he then was, in *Erin Features No. 1 Ltd., Re* [1991 CarswellBC 498 (B.C. S.C. [In Chambers])] 15 C.B.R. (3d) 66 [*Erin Features*]. In *Erin Features*, Donald J. "[a]ssumed without deciding that a trustee in bankruptcy generally possesses a power to disclaim" (at para. 3). However, he observed that a trustee's power to disclaim is only "weakly supported" by *dicta* in Canadian authorities (at para. 4) and that the issue was "fraught with difficulty" (at para. 6).

16 However, Ernst & Young in this case is not a trustee, but rather a court-appointed receiver, and the situation is somewhat different in such a case. In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, 2002 ABQB 706 (Alta. Q.B.), Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:

> The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999) at 169, 341.

17 Frank Bennett in his text, *Bennett on Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341 writes:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

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18 I also observe that in *Erin Features*, Donald J. did not appear to take issue with the assertion of the applicant trustee in that case that "a receiver... can confidently be said [to] possess the right to disclaim an executory contract" (at para. 6).

19 In another leading case, *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S. C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.

20 The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:

> The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or *realizing upon the Assets* or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
>
> . . . . .
>
> > (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets....
>
> [Emphasis added.]

In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order. It is conceivable there may be an issue regarding whether the replaceable contracts fall within the bounds of clause 14(c), but as no argument was advanced on this ground, I do not think it necessary to address the issue.

21 Although it is not necessary for me to decide for the purposes of this case, in light of the Intervenor's submissions on the confusion in the law regarding the power of trustees to disclaim contracts, and with a view to clarifying the matter, I make these observations.

22 There is no provision in the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3 that gives a trustee power to disclaim contracts. The *Act* only addresses those powers that may be exercised with permission of inspectors. Thus, under s. 30(1)(k) of the *Bankruptcy & Insolvency Act* the trustee may disclaim a "lease of, or other temporary interest in, any property of the bankrupt".

23 The power to disclaim contracts has been included in statutes in other common-law jurisdictions. Notably, s. 23 of the English *Bankruptcy Act, 1869* (32 & 33 Vict.), c. 71 first gave trustees the power to disclaim contracts of the bankrupt. The modern English statute, *Insolvency Act 1986* (U.K.), 1986, c. 45, s. 315 confers the same right upon a trustee. Similarly, in both Australia (*Bankruptcy Act 1966*, (Cth.), s. 133) and the United States (11 U.S.C. § 365) there is a statutory power for trustees to disclaim contracts.

24 However, the power of trustees to disclaim contracts has its roots in the English law where there was a common-law power in assignees (who took control of debtor property prior to use of trusteeships in bankruptcy) to disclaim contracts. There is a weight of authority supporting the existence of such a power prior to the enactment of the *1869 Act*.

25 In his 1922 text, Lewis Duncan, in *The Law and Practice of Bankruptcy in Canada* (Toronto: Carswell, 1922) at 304-5, cites several venerable English cases for the proposition that:

> There is no section in the Canadian *Act* corresponding with section 54 of the English *Act* [earlier s. 23] which gives the trustee the right to disclaim onerous contracts or property. The law under *The* [Canadian] *Bankruptcy Act* will be the same

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as the law in England before the Act of 1869 was passed, with the exception that section 44 of the *Bankruptcy Act* gives a right of proof against the estate of the debtor with respect to contracts entered into before the date of the receiving order or authorized assignment. The law under the *Bankruptcy Act* would seem to be that a trustee may at his option perform the contract into which the bankrupt has entered or he may abandon it.

26 In *Sneezum, Re* (1876), 3 Ch. D. 463 (Eng. C.A.), at 472, James L.J. said that at common law, prior to the passing of the *1869 Act*, assignees in bankruptcy had the option of deciding whether or not to carry on with performance of an executory contract.

27 To similar effect, in *Gibson v. Carruthers* (1841), 8 M. & W. 321 (Eng. Ex. Ct. Pleas), at 326 -27, a case in which the assignees wished to assume a contract under which the defendant, who had contracted with the bankrupt, had agreed to deliver 2000 quarters of linseed to a charter ship, Gurney B. said:

> ...it is clear that assignees of a bankrupt are entitled to the benefit of all contracts entered into by the bankrupt and which are in fieri at the time of the bankruptcy. They may elect to adopt or reject such contracts, according as they are likely to be beneficial or onerous to the estate.

28 In Canada, the Ontario Supreme Court Appellate Division in *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.) recognized such a power; see also *Denison v. Smith* (1878), 43 U.C.Q.B. 503 (U.C. Q.B.); *Stead Lumber Co. v. Lewis (No. 2)* (1957), 37 C.B.R. 24, 13 D.L.R. (2d) 34 (Nfld. T.D.), at 43; *Salok Hotel Co., Re* (1967), 11 C.B.R. (N.S.) 95, 66 D.L.R. (2d) 5 (Man. Q.B.), at 8.

29 In more recent times, L.W. Houlden & G.B. Morowetz in their text *Bankruptcy and Insolvency Law of Canada*, 3d ed, looseleaf (Toronto: Thomson Carswell, 2004) at F§45.2 state quite unequivocally that a trustee may disclaim a contract entered into by the bankrupt. Similarly, in a case comment on *Potato Distributors Inc. v. Eastern Trust Co.* (1955), 35 C.B.R. 161 (P.E.I. C.A.), at 166, L.W. Houlden writes:

> It is well established law that a trustee may elect to carry on with a contract entered into prior to bankruptcy, provided he pays up arrears and is ready to perform the contract. The trustee could also, if he saw fit, elect not to go on with the contract in which event the vendor would have the right to prove a claim for damages.

30 I observe that several Canadian commentators have recently opined that in the absence of an express statutory power, trustees in Canada may not disclaim executory contracts, specifically licences: see Piero Ianuzzi, "Bankruptcy and the Trustee's Power to Disclaim Intellectual Property and Technology Licencing Agreements: Preventing the Chilling Effect of Licensor Bankruptcy in Canada" (2001) 18 C.I.P.R. 367; Gabor F.S. Takach and Ellen Hayes, "Case Comment," *Re Erin Features #1 Ltd.* (1993) 15 C.B.R. (3d) 66 (B.C.S.C.); Mario J. Forte and Amanda C. Chester, "Licences and the Effects of Bankruptcy and Insolvency Law on the Licensee" (2001) 13 Comm. Insol. R. 25. However, the position taken by the authors of these articles departs from the traditional understanding of the law in this area.

31 In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

32 I observe that recently, in its 2002 *Report on the Operation of the Administration of the* Bankruptcy and Insolvency Act and the *Companies' Creditors Arrangements Act*, Industry Canada's Marketplace Framework Policy Branch considered the extent to which insolvency law should intervene in private contracts to ensure fair distribution or maximize value during an insolvency. The Report notes there is not universal support for the enactment of a detailed statutory provision like the American one. In a 2001 report on business insolvency law reform, the Insolvency Institute of Canada and the Canadian Association of Insolvency & Restructuring Professionals proposed the enactment of more detailed rules for both powers of trustees to disclaim executory contracts (*http://www.insolvency.ca/papers/2001ReportScheduleA.html*). Ultimately, it may therefore be preferable for the legislature to move to include a power in the statute, but until that time, in my view, trustees enjoy the power protected by the common law.

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33 In the result, the order of 20 September 2004 grants the Receiver the power here exercised and I see no reason in principle that would cause me to alter that result.

Disposition

34 Accordingly, I would dismiss the appeal and order costs payable to the Receiver by the appellants.

***Oppal J.A.*:**

I agree.

***Southin J.A.*:**

35 I have had the privilege of reading in draft the reasons for judgment of my colleague, Braidwood J.A., concurred in by my colleague, Oppal J.A.

36 While I am uneasy, without the opportunity for further study, as to his conclusions on both issues, further study would require time. Being alive both to the importance to the parties of a decision being pronounced promptly and to the lack of practical value either to the parties or to the law of a dissent, if that is where I arrived after further study, I do not dissent from his conclusion that the appeal should stand dismissed.

Appeal dismissed.

End of Document

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TAB 4

1991 CarswellNS 33
Nova Scotia Supreme Court, Appeal Division

Bayhold Financial Corp. v. Clarkson Co.

1991 CarswellNS 33, [1991] N.S.J. No. 488, 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 294 A.P.R. 198, 30 A.C.W.S. (3d) 832, 86 D.L.R. (4th) 127

BAYHOLD FINANCIAL CORP. LIMITED v. CLARKSON COMPANY LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.

Jones, Hallett and Matthews JJ.A.

Heard: September 18, 1991
Judgment: December 2, 1991
Docket: Doc. S.C.A. 02376

Counsel: *Douglas Caldwell, Q.C.*, and *Joel E. Fichaud*, for appellant.
Harry E. Wrathall, Q.C., and *Stephen Kingston*, for respondents.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

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Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.) — *referred to*

Newdigate Colliery Ltd., Re; Newdegate v. The Co., [1912] 1 Ch. 468 (C.A.) — *applied*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

R. v. Consolidated Churchill Copper Corp., 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C. S.C.) — *referred to*

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.) — *distinguished*

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Appeal from judgment of Kelly J. dated October 2, 1990, reported (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.), dismissing action for damages against receiver-manager.

The judgment of the court was delivered by *Hallett J.A.*:

1 This is an appeal from a decision of Kelly J. [reported at 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.)] dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited ("Community") which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver-manager to take possession of the assets of Community; that is, the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver-manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist season and thus obtain a good price for the hotel as a going concern. The hoped-for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981, at $623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for $200,000. The sum of $157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of $42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at $109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of $63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

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

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

4 The agreement of sale was to close on May 2, 1983. Bayhold was aware that under the Burchell order, Clarkson had a prior charge against the chattels for $63,117.50. Despite repeated requests by Clarkson to Bayhold to purchase the chattels, Bayhold did not respond. Clarkson threatened to remove the chattels. On April 29, 1983, Clarkson engaged a private security firm and the chattels were removed from the hotel. On May 2, 1983, Equitas offered to buy the chattels from Clarkson for about $30,000. The respondent, Mr. Scouler, the chartered accountant with Clarkson who was Clarkson's directing mind in this receivership, refused the offer. He felt the chattels were worth about $150,000. He advised Equitas it would have to purchase the chattels at auction. On May 2, 1983, Equitas advised Bayhold it would not complete the purchase. Bayhold did not re-open the hotel and on November 29, 1983, sold it for $450,000 to a Sydney businessman.

5 Bayhold commenced action against Scouler, Clarkson and its successor firm, the respondent Ernst & Young Inc., claiming damages for breach of duties as receiver-manager up to a maximum amount of $808,339.21 plus prejudgment interest from November 29, 1983 (the date Bayhold sold the hotel) to April 3, 1990 of $519,425.47. The learned trial judge dismissed all the

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claims, essentially finding that Clarkson was not negligent in the performance of its duties. The appellant Bayhold identified six issues on the appeal; I will deal with each in the order raised by the appellant.

Issue 1

6 The appellant asserts that the respondents Clarkson, Scouler and Ernst & Young are liable for damages to Bayhold for breach of fiduciary duty for failing to apply to the court in April 1981 after Clarkson as receiver-manager had borrowed in excess of $50,000. The appellant asserts that Clarkson was limited, pursuant to the terms of the receivership order, to borrow an amount not exceeding $50,000.

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

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

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

8 Specific powers granted the receiver are set forth in cl. 6 of the order:

> 6. THAT the said Receiver and Manager be and it is hereby empowered from time to time to do all or any of the following acts and things until further order of this Court or a judge thereof:
>
> > (a) To carry on and manage the businesses of all of the Respondents, in all phases whatsoever;
> >
> > (b) To enter into negotiations for the sale, conveyance, transfer, assignment, mortgaging or other disposition of the real property and/or shares of the Respondent Companies, owned, legally or beneficially, by any of the Respondents, in such manner and at such price as the Receiver and Manager, in its discretion, may determine, provided that the Receiver and Manager may not enter into any agreement or commitment to sell, convey, transfer, assign, mortgage or otherwise dispose of the real property and/or shares of the Respondent Companies, without prior approval of the Court;
> >
> > (c) To pay such debts of the Respondents, as the Receiver and Manager deems necessary or advisable to properly operate and manage the businesses of the Respondents and all such payments shall be allowed the Receiver and Manager in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents in priority to any other person, company, or corporation, secured or unsecured;
> >
> > (d) For the purpose of carrying out the powers and duties hereunder, to employ, retain, or dismiss such agents, assistants, employees, solicitors and auditors as the Receiver and Manager may consider necessary or desirable for the purpose of preserving and realizing on the said property and assets of the Respondents, and carrying on the businesses and undertakings of the Respondents, and to enter into agreements with any person or corporation respecting the said businesses or properties and that any expenditure which shall be properly made or incurred by the said Receiver and Manager in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents, in priority to any other person, company, or corporation, secured or unsecured;
> >
> > (e) To receive and collect all monies now or hereafter owing to the Respondents;
> >
> > (f) To take such other steps as the Receiver and Manager deems necessary or desirable to preserve and protect the real and personal property of the Respondents, in its custody.

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9 The court, pursuant to cl. 7 of the receivership order, authorized the borrowing of up to $50,000 which would be secured against the property and assets of all the respondents, which of course included Community. That clause of the order provided as follows:

> 7. THAT for the purpose of exercising the powers and performing the duties hereunder, the said Receiver and Manager be and it is hereby empowered from time to time to borrow monies not exceeding $50,000.00 by way of revolving credit which may be borrowed and re-borrowed provided that the said limit is not exceeded at any time and that as security therefor the whole of the said properties and assets of the Respondents, together with all other assets and properties which may hereafter be in the custody or control of the said Receiver and Manager, do stand charged with the payment of the sum or sums so borrowed as aforesaid together with interest thereon in priority to all claims of the Applicant or any other person, secured or unsecured, by which the assets and properties of the Respondents may be encumbered.

10 The receivership was funded by Revenue Canada which advanced funds to Clarkson or reimbursed Clarkson for moneys Clarkson borrowed from the Toronto-Dominion Bank during the period Community was in receivership. By April 1981, Clarkson had borrowed in excess of $50,000. The appellant argues this was a breach of the terms of the order and therefore a breach of fiduciary duty that Clarkson, as receiver-manager, owed not only to the court but to all the creditors and the debtors. The appellant argues that Clarkson was required by law to go back to the court to obtain increased borrowing authority and that Clarkson's failure to do so deprived Bayhold of an opportunity to make representations to the court that there were other options the receiver-manager could pursue rather than continue with its strategy to keep the hotel open so as to take advantage of the hoped-for increase in occupancy in the tourist season.

11 The premise for this argument is that a receiver-manager must obtain approval of the court before it exceeds the borrowing authorized by the court pursuant to a clause such as cl. 7 of the receiving order and that the failure to do so is a breach of a fiduciary duty that gives rise to the liability of a receiver-manager for unpaid amounts due to creditors of the debtor. In my opinion, that proposition is not valid. The purpose of cl. 7 of the receiving order and like clauses which are common in such orders was to authorize the receiver-manager to borrow up to $50,000 and with respect to such borrowings the receiver-manager would have a charge against the undertaking property and assets of the debtor in priority to other creditors. The only result of a failure to get approval for further borrowings would be that the receiver-manager would have no assurance that the court would retroactively grant the receiver-manager a prior charge against the assets for such excess borrowings. The failure to obtain court approval does not automatically result in the receiver-manager becoming personally liable for the existing contractual obligations of the debtor. In this case, Clarkson was being indemnified by Revenue Canada for funds borrowed to operate and manage the hotel business. The receiving order, read as a whole, shows that there was no prohibition against borrowing in excess of $50,000. The receiver-manager was given broad management powers and could borrow up to $50,000 and have a charge against the assets for such an amount. If the receiver-manager chose to borrow more without obtaining court approval, the only repercussion would be that Clarkson would not have the comfort of a charge against the assets of the hotel for such excess borrowing.

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

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

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> If there is no provision in the order authorizing the receiver to borrow moneys, the court may infer such power from the other provisions in the order, particularly the power to carry on the business.

13 Further at p. 216, the author states:

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

14 The decision of the Manitoba Court of Appeal in *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.*, (sub nom. *Rothburg v. Federal Business Development Bank)* 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 is illustrative that the courts regularly consider whether a receiver should be retroactively indemnified for exceeding the borrowing limits under clauses similar to cl. 7 of the receiving order granted in the case we have under consideration. There are no cases cited by the appellant to support its position that the failure to return to court to have the court authorize borrowing in excess of $50,000 could result in the receiver-manager becoming personally liable for obligations under contracts including the liabilities accruing under mortgages that existed prior to the receiver-manager being appointed.

15 Insofar as the appellant's arguments focus on breaches of perceived duties of receiver-managers, it is important to consider what are the duties of a receiver-manager. The essential duty of a receiver-manager as an officer of the court is to discharge those duties prescribed by the order appointing the receiver-manager. (See *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476.) Bennett, at p. 118, explains the extent of a receiver-manager's duties as follows:

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

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

17 In summary, the receiving order gave the receiver-manager broad power of management. Read in the context of the receiving order and the law, cl. 7 did not prohibit Clarkson from borrowing in excess of $50,000 while operating the hotel. Therefore, there was no breach of duty giving rise to the liability that the appellant seeks to impose. Accordingly there is, in my opinion, no merit to the first issue raised by the appellant.

Issue 2

18

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

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

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

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

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

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

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

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

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

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

26 At p. 119 of text, Bennett states:

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

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

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

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

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

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

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

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

32 The point being that while a receiver-manager is empowered to carry on the debtor's business, it is contemplated that eventually there will likely be a liquidation notwithstanding that the receiver-manager has a duty to preserve the property and the goodwill of the business. The trial judge found in this case there was no goodwill at the time when Clarkson made its decision to close the hotel. The evidence could lead to no other conclusion. In my opinion, the failure to apply to the court for approval to close the hotel on the facts of this case did not breach any duty Clarkson owed to Bayhold. Furthermore, the law is clear that if a debtor or creditor feels adversely affected by any action of a receiver-manager the person may apply to the court

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to protest the action and the complainant must prove the receiver is in breach of his duties. Bayhold made no such application but continued with its foreclosure action. I reject the argument by the appellants that this proceeding is Bayhold's complaint. The time to apply would have been in November 1981, not years later when this action was commenced.

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

34 In summary, the essence of a receiver's powers is to liquidate the assets. On the other hand, a receiver-manager is vested with the additional power to manage the business, but this does not derogate from his power to realize on the assets. His management duty, if I can call it that, is to act with the care an owner would exercise in the running of his own business subject of course to the terms of the court order appointing him receiver-manager. In this receivership, as in most, the powers to manage are broad. There is nothing in the order that required the receiver-manager to obtain court approval before closing the hotel. Justice Kelly found this was a valid business judgment considering all the circumstances and I agree. The receiver-manager had the power pursuant to cl. 6(f) of the order to preserve the assets; the hotel was losing money, the receivership had turned out to be a financial disaster and closing it to await the foreclosure sale was a reasonable judgment to preserve the property. The receiver-manager did owe a duty to act reasonably in the conduct of the hotel business so as to preserve the goodwill and the property of Community in the interests of not only Community but all the creditors, including the appellant. The fact that Clarkson did not apply for court approval of the closure is not a breach of his duty to preserve the goodwill of Community in view of the finding of the trial judge that there was no goodwill, a fact which the receiver was well aware of at the time of the closure. Furthermore, even if Clarkson had breached its duties, the learned trial judge found as a fact that the closure did not cause any loss to Bayhold. There was evidence to support this conclusion. There is no need to go into detail with respect to this finding, as I have disposed of Issue 2 on the ground there was no breach of any duty owed by Clarkson to Bayhold. Therefore I reject the appellant's argument that on this ground the respondents are liable to Bayhold for $808,339.21 plus prejudgment interest.

Issue 3

35

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

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

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

38 The trial judge clearly directed himself to the appropriate question when he rhetorically stated at p. 129 of his decision [p. 145 N.S.R.]:

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

39 After dealing with a number of issues raised by Bayhold on this question, the trial judge decided as follows (p. 132 [p. 146 N.S.R.]):

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

40 The trial judge, in effect, found that the seizure of the chattels by Clarkson was not the cause of Bayhold's losing the sale to Equitas as there was no requirement in the agreement of sale that the chattels be even in existence let alone in the hotel. The learned trial judge found that Bayhold didn't satisfy him that there was a collateral agree ment (outside the written agreement between the parties) that the hotel would be a going concern on May 2, 1983, the closing date. The trial judge found that Bayhold could comply with the requirements of the written agreement. The evidence is clear that Bayhold did not sue Equitas on the agreement. The trial judge found that the conduct of both Bayhold and Clarkson with respect to events surrounding the proposed sale to Equitas was somewhat tainted. He stated (pp. 131-132 [p. 146 N.S.R.]):

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

41 The appellant asserts that the trial judge erred when he seemed to conclude that Bayhold would have had to sue Equitas before coming against Clarkson. This argument is based on the following statement by the trial judge at p. 132 [p. 147 N.S.R.]:

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

42 I tend to agree with Bayhold's assertion that there was no requirement that Bayhold sue Equitas on the agreement before pressing any claim it might have against the receiver-manager for damages arising from the removal of the chattels. However, that does not assist the appellant. The trial judge was not satisfied the removal of the chattels was the cause of Bayhold losing the sale to Equitas. There is evidence to support such a finding as despite the removal of the chattels from the hotel on April 29, 1983, Equitas was prepared to buy the chattels from Clarkson for $30,000 on May 2, 1983. Therefore, the removal per se was not the fact which caused Equitas to refuse to complete. It would appear that the reason this sale fell through was that Bayhold did not own the chattels and Equitas was unable to buy the chattels from Clarkson for a price Equitas was prepared to pay. While technically Clarkson had no right to enter the hotel premises in the possession of Bayhold and remove the chattels without a recovery order, Bayhold was well aware that the chattels were owned by Community and aware of Clarkson's prior

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secured claim to the chattels. In addition, Clarkson had repeatedly requested a decision from Bayhold as to whether it intended to purchase the chattels and, if not, Clarkson would remove them. The trial judge found that Mr. Scouler mistakenly believed the order of Burchell J., dated January 6, 1983, in which the receiver-manager was granted a prior charge against the hotel and the chattels to the extent of the preservation expenses was sufficient authority from the court to seize the chattels on April 29, 1983. I would note that the order provided as follows:

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

43 At most, the trespass was technical. Under the circumstances that existed on or about April 29, 1983, it is likely that Clarkson could have obtained from the court a recovery order to remove the chattels from the hotel premises as Bayhold had no legal right to retain them as title to the chattels was still vested in Community and Bayhold knew its interest in the chattels as mortgagee was subject to the prior charge of Clarkson in the amount of $63,117.50. Equitas knew Bayhold was not warranting even the existence of the chattels, so Equitas ought to have been alert although not fully informed by Bayhold that there was a problem with respect to the transfer of the chattels that were in the hotel. The trial judge's conclusion that the seizure of the chattels was not the cause of Bayhold losing the sale to Equitas was based on the trial judge's view that there was no agreement between Bayhold and Equitas that the sale of the hotel was to be as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of Bayhold under the sale agreement. The terms of the agreement support this conclusion.

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

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

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

Issue 4

47 The appellant sets out this issue as follows:

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

48 The short answer is "no"; the receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver-manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:

> I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is un der any liability to the persons who have entered into

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> them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

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

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

50 In support of the argument that the receiver-manager is obliged to pay mortgage interest to Bayhold, the appellant relies on certain statements by Bennett, *Receiverships*, and Sir R. Walton and M. Hunter, *Kerr on Receivers and Administrators*, 17th ed., (London: Sweet & Maxwell, 1989), the essence of which is that a receiver-manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver-manager is obliged to preserve (*Kerr*, pp. 31, 207, 219-220; *Halsbury's Law of England*, 4th ed., vol. 39 (London: Butterworths, 1982) (Receiverships) at para. 982; Bennett's *Receiverships* (1985), pp. 119, 110 and 118).

51 The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver-manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver-manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from *Kerr* at pp. 219-220 with emphasis by the appellant as follows:

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

52 The appellant's factum does not highlight the sentence which states that "[a]ny breach [of pre-existing contracts] will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business." This statement in *Kerr on Receivers and Administrators* is consistent with the views expressed by the justices who rendered opinions in the *Newdigate* case.

53 The reasons a receiver-manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver-manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver-

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manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver-manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver- manager only in the general sense that the receiver-manager must honour them to preserve the goodwill of the business. In Bennett on *Receiverships*, at p. 223, the author states:

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

[Emphasis added.]

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

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

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

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

[Emphasis added.]

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

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conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

Issue 5

58

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

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

60 The learned trial judge found that there was no automatic crystallization and that Bayhold would have to have intervened by appointing its own receiver to have crystallized its floating charge. The appellant asserts that the trial judge considered none of the case law in support of their position that the floating charge had crystallized upon the appointment of Clarkson as receiver-manager. The appellant cites the following cases [and authorities] in support of the argument:

Bank of Montreal v. Glendale (Atlantic) Ltd. (1977), 20 N.S.R. (2d) 216 (sub nom. *Glendale (Atlantic) Ltd. v. Gentleman*), 1 B.L.R. 279, 76 D.L.R. (3d) 303 (C.A.), at pp. 250-251 [N.S.R.];

Palmer's Company Law, Clive M. Schmitthoff and James H. Thompson, 21st ed. (London: Steven & Sons Limited, 1968) pp. 396-397;

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.), at p. 220 [C.B.R.];

Kerr on Receivers and Administrators, 17th ed., pp. 50-51;

Evans v. Rival Granite Quarries Ltd., [1910] 2 K.B. 979 (C.A.), at p. 1000;

Re Crompton & Co. Ltd.; Player v. Crompton & Co., [1914] 1 Ch. 954;

Bennett, *Receiverships* (1985), p. 48;

Gough, *Company Charges* (London: Butterworths, 1978), pp. 84-86;

Lightman, G. & G. Moss, *The Law of Receivers and Companies* (London: Sweet & Maxwell, 1986), p. 28.

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

> Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it 'crystallizes', and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallize on the appointment of a

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receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ...

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

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

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

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

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

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

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

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

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

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

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

71 To the extent there are conflicting views as to when a floating charge crystallizes and the effect of the same, I am attracted to the reasoning of Berger J. in *R. v. Consolidated Churchill Copper Corp.*, 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C.S.C.) that before the floating charge in favour of a mortgage or debenture holder crystallizes,

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that is becomes fixed on all the assets and undertakings of the debtor, the holder must intervene by going into possession or by bringing an application for the appointment of a receiver.

72 In that case, Berger J. analyzed the decisions which deal with the subject of automatic crystallization including the decision in *Evans v. Rival Granite Quarries*, supra, and concluded that it was only Buckley L.J. in the *Evans* case who took the view, in obiter, that a floating charge might crystallize without intervention. Berger J. referred to L.C.B. Gower, *Modern Company Law*, 3rd ed. (1969) in which the author stated at p. 421:

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

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

> But there has been no judgment rendered on the question in Canada. The matter is one of first impression. So policy considerations should be placed on the scales. These considerations weigh heavily against the adoption of the motion of self-generating crystallization. In the case at bar there were numerous acts of default, going back to 1972. Brameda did not, until 14th April 1975, take the position that the floating charge had crystallized. If in truth it had crystallized back in 1972, when Brameda acquired the bank's interest in the debenture, Brameda did not treat the company thereafter as if its licence to carry on business was at an end. Brameda sought to have it both ways: to attain priority over the province's lien without putting Churchill into receivership. This shows the parlous state of affairs which would result if the concept of self-generating crystallization were to be adopted. The requirements for filing by a receiver under the *Companies Act* would be rendered a dead letter. The company would not know where it stood; neither would the company's creditors. How is anyone to know the true state of affairs between the debenture-holder and the company unless there is an unequivocal act of intervention? How can it be said that the default by the company terminated its licence to carry on business when in fact it was allowed by Brameda to carry on business for three years thereafter? If the argument were sound, the debenture-holder would be able to arrange the affairs of the company in such a way as to render it immune from executions. The debenture-holder would have all the advantages of allowing the company to continue in business and all of the advantages of intervening at one and the same time, to the prejudice of all other creditors. This contention was rejected in the *Evans* case: see Vaughan Williams L.J. at pp. 989-990, and Fletcher Moulton L.J. at p. 995.
>
> It is my view that not in the older cases nor in the recent cases nor in the exigencies of policy is there any justification for the adoption of a concept of self-generating crystallization. If there is any practical scope for such a theory it does not extend to a case where the conduct of the debenture-holder is inconsistent with the assertion of any such claim.
>
> This brings me back to the wording of the floating charge in the case at bar. It says that 'such floating charge shall in no way hinder or prevent the company ... until the security hereby constituted shall have become enforceable from ... dealing with the subject matter of such floating charge in the ordinary course of its business.' Condition 6 of the debenture says: 'If the security hereby constituted shall become enforceable the Banks (Brameda) may be instrument in writing ... appoint any person ... to be a receiver ... of the property and assets hereby charged.' The point is that default by the company renders the floating charge enforceable. To that extent, default is a hindrance to the company, i.e., the debenture-holder has the right to intervene when he pleases. But in order to terminate the company's licence to carry on business, the debenture-holder must in fact intervene. This is provided for by the very language of the debenture itself. While the security may become *enforceable* on default, still the debenture-holder must intervene to *enforce* his security before it crystallizes.

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

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

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

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

78 Bayhold also argues that because it did not get notice of Revenue Canada's application to the court to appoint Clarkson receiver-manager, Bayhold is entitled to all moneys received by Clarkson during the receivership. The appellant relies on the case of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.). The *Kowal* case does not support the appellant's argument. In the *Kowal* case the Ontario Court of Appeal simply said a receiver-manager could not have a charge against the mortgagee's security for the amounts that the receiver-manager had paid to the mortgagee during the period of the receivership as the payments were not made for the preservation of the property and therefore not for the benefit of all the creditors. In the case we have under consideration, Clarkson's expenditures in operating the hotel were for the benefit of all the creditors and Clarkson did not get priority over Bayhold against the hotel assets except to the extent of the preservation expenses in the amount of $109,608.73. Bayhold, by commencing foreclosure proceedings and having the real property sold by the sheriff, realized on its security against the real property. However, the surplus from the sheriff's sale and the realization from the sale of the hotel chattels was insufficient to pay Clarkson's "preservation expenses". Other than with respect to the "preservation expenses", the receiver-manager did not subject Bayhold's security to recover the receiver-manager's expenditures in operating the hotel; these expenses were paid out of the borrowings from the Toronto-Dominion Bank and advances from Revenue Canada. In summary, the *Kowal* case does not stand for the proposition that all revenues or realizations on the sale of assets during a receivership must be turned over to a creditor with an uncrystallized floating charge against the assets and undertaking of the company in receivership simply because the holder of the floating charge was not given notice of the application to appoint a receiver-manager.

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

Issue 6

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

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81 During receivership there were two fires which caused damage to the boiler room and the Sadat Room (a conference room). Clarkson received and kept the fire insurance proceeds of $13,773.07. Clarkson did not repair all the damage to the boiler room because it was not necessary for the operation of the hotel.

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

83 As Bayhold wished to sell the hotel as a going concern, it allowed Mr. Rahey to go into possession and operate the hotel. Mr. Rahey repaired most of the fire and flood damage caused during the receivership. The appellant asserts that Mr. Rahey did so at a cost of $125,000 and that Mr. Rahey was setting this off against Community's outstanding mortgage debt to Bayhold. Bayhold claims $125,000 from the respondents which it says it owes to Rahey for the work to repair the fire and flood damage. The learned trial judge found that the care of the hotel by Clarkson in this period was adequate under the circumstances and that none of the physical damage was caused by the negligence of Clarkson. The trial judge also concluded that Bayhold had not suffered recoverable damages as a result of the actions even if Clarkson had been negligent.

84 With respect to the claim of $125,000 the respondents make the following points in their factum:

> Bayhold claims that in 1982-83 Rahey repaired damages sustained by the hotel during the receivership, at a cost of some $125,000.00. Bayhold further claims that Rahey is now 'setting-off' these repairs as against his debt to Bayhold. It seeks damages in the same amount as against Clarkson as a result. Clarkson makes the following points in response:
>
> > (a) The learned trial judge found as a matter of fact that Clarkson had maintained adequate precautions and performed adequate remedial measures and was not responsible in negligence for any physical damage to the hotel;
> >
> > (b) Little or no evidence was provided with respect to repairs performed by Rahey, or the value of any such repairs;
> >
> > (c) Little or no evidence was provided with respect to any attempt by Mr. Rahey to set-off the amount of any such repairs as against Bayhold. Mr. Rahey had not claimed the cost of repairs as against Bayhold in the eight years which had elapsed since repairs allegedly took place;
> >
> > (d) Both Alan Feldman and Gordon MacLean testified that Rahey operated the hotel on the basis that he would contribute necessary repairs, pay mortgage interest, and pay most operating expenses and, in return, be entitled to keep all hotel revenue. *By Bayhold's own evidence, accordingly, Rahey has no basis to claim the cost of any repairs as against Bayhold.*

[Emphasis added.]

85 I am satisfied based on the points made by the respondents, as set out above, that the learned trial judge did not commit error when he concluded that Clarkson was not responsible to Bayhold for the $125,000. The evidence does not support a finding for the appellant on this issue. By Bayhold's own evidence the damage was repaired by Rahey pursuant to the agreement they made with him. Based on that agreement alone, Mr. Rahey has no right of recovery against Bayhold for any expenditures made to repair the fire and flood damage while he was operating the hotel. Mr. Rahey has not commenced an action in which he has made such a claim. The evidence supports the trial judge's conclusion that Bayhold did not suffer recoverable damage as a result of the actions of Clarkson.

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

Appeal dismissed.

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TAB 5

2008 BCSC 1000
British Columbia Supreme Court [In Chambers]

Pope & Talbot Ltd., Re

2008 CarswellBC 1726, 2008 BCSC 1000, [2008] B.C.W.L.D. 6618, [2008] B.C.W.L.D. 6657, 171 A.C.W.S. (3d) 118, 46 C.B.R. (5th) 34

IN BANKRUPTCY AND INSOLVENCY

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

AND IN THE MATTER OF THE RECEIVERSHIP OF POPE & TALBOT LTD. AND THE PETITIONERS LISTED IN SCHEDULE "A"

Brenner J.

Heard: May 29, 2008

Oral reasons: May 29, 2008 *
Docket: Vancouver S077839

Counsel: K. Jackson for Receiver, PriceWaterhouseCoopers
N. Hughes for Columbia Pulp & Paper
J. Ross (Articling Student) for Canadian Forest Products Ltd.
P. Rubin for Ableco
S. Golick for Wells Fargo Financial Corp. Canada
B. La Borie for Canexus Chemicals Canada LP, Canexus U.S. Inc.
S. Banister for United Steel Workers
D. Rogers for CEP 1092

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Brenner J.*:

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 154, 2005 CarswellBC 578, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) — considered

Statutes considered:

Forest Act, R.S.B.C. 1996, c. 157
Generally — referred to

APPLICATION by receiver for declaration that it was at liberty to sell assets free of claims arising from purchase agreement; CROSS-MOTION by purchaser's assignee to have receiver complete agreement.

***Brenner J.*:**

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1 This is an application by the Receiver for certain declarations in connection with an asset purchase agreement entered into February 5, 2008 between Pope & Talbot Ltd., as seller, and Pindo Deli Pulp & Paper Mills as purchaser. The Receiver seeks a declaration from the court that it is at liberty to market and sell these assets free and clear of any claims of Pindo Deli and/or its assignee, Columbia Pulp and Paper Ltd.

2 There is a cross motion by Columbia seeking to have the Receiver complete the February 5 asset purchaser agreement.

3 As part of the Chapter 11 and CCAA proceedings, Pope & Talbot Ltd. and Pope & Talbot Inc. initiated a court-approved sale process in respect of the Fort St. James sawmill. On February 5, 2008, Pope & Talbot and Pindo Deli entered into an agreement for the purchase of that sawmill. Subsequently, Pindo Deli assigned its interest to Columbia. The asset purchase agreement was approved by this court on February 20, 2008, and by the U.S. Bankruptcy Court on February 25, 2008.

4 Under the terms of the agreement, the termination date was set at April 30, 2008. The closing date was defined to be the third business day after satisfaction of the conditions precedent to closing. If the closing date was after the termination date either party was at liberty to terminate the asset purchase agreement prior to closing. In the event of termination, the asset purchase agreement became void. Any amendments had to be in writing and any extensions of time for performance of obligations under the agreement would only be valid if set forth in writing signed by the party to be bound thereby.

5 The parties here proceeded with a planned closing date of April 30, 2008, which coincided with the termination date. There were a number of conditions precedent to Pope & Talbot's obligations to complete the asset purchase agreement. These included various notices to proceed and other consents required under the *Forest Act*, and other governmental matters.

6 These were not completed by the closing date: the notice to proceed was not received by Columbia until the middle of the day of the closing on April 30, 2008. At that point it became impossible for the parties to close the transaction before the termination date.

7 After the closing date had gone by, the parties continued discussions concerning the agreement. There were communications between the parties through which various document drafts were exchanged. These exchanges continued for a number of days after April 30th.

8 Between May 1 and May 8, there were a number of e-mails exchanged with electronic documents attached, which, in my view, make it clear that the parties were still attempting to finalize the terms of the various documents associated with this transaction. On the closing date itself, April 30, 2008, numerous documents were emailed between counsel for Pope & Talbot and counsel for the purchaser. The inquiry that accompanied that e-mail said, "Please let us know if these changes are acceptable to you and whether you will execute the signature pages."

9 On May 6, 2008, another e-mail was sent from the purchaser's lawyer, to Pope & Talbot's lawyer, inquiring, "with respect to FSJ (the sawmill), have you signed off on our other recent comments to the APA amendment."

10 On May 10, 2008, the Receiver was appointed. In the days leading up to that appointment, counsel for Pope & Talbot started to disengage from the process of exchanging documents and/or trying to settle the terms of the documents associated with this transaction. On May 8, Ms. Frizzley of Shearman and Sterling, sent an email to Ms. Sym, counsel for the purchaser, advising that the court in Canada would be appointing a receiver either the next day or on Saturday and that the U.S. court would be appointing a Chapter 7 trustee. She went on to say, "We think it best that any further discussions await their appointment as the company has limited authority or capacity to take any action."

11 On May 9, counsel for the purchaser in Vancouver sent an e-mail to counsel for the monitor (who was appointed the Receiver the following day) in which counsel advised that they would be preparing a package for the benefit of the Receiver to be appointed that would outline "the few remaining items that need to be addressed to complete the transaction."

12 On Sunday, May 11, counsel for the purchasers sent another e-mail outlining a list of outstanding matters that needed to be dealt with for closing.

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13 On May 14, 2008, there was an exchange between counsel for the purchaser, Columbia, and counsel for the Receiver. Counsel for Columbia wrote to set out his client's position "regarding the sawmill agreement in the hopes that a prompt closing of the transaction can occur." On the second page he advised that: "We do not know what the Receiver's intentions are regarding the sale of the Ft. St. James sawmill." He went on to express the hope that the transaction would close.

14 Later that day, a reply was sent by counsel for the Receiver to the purchaser's solicitor, advising that the Receiver was not a party to the agreement between Pope & Talbot and Pindo Deli or its assignee, that the Receiver had not adopted the agreement and was not obliged to close the transaction referenced in it. On the second page, the Receiver purported to disclaim the sawmill agreement, confirming that it would not be adopting it or otherwise proceeding to closing or, alternatively, if it was bound in some way by the sawmill agreement and not entitled to disclaim, it gave notice of termination of the agreement and reliance on paragraph 8.01(a) of the agreement.

15 Finally, on May 22, counsel for Columbia Pulp and Paper advised the Receiver that Columbia waived all the conditions precedent required to be performed by the counter party under the asset purchase agreement and that it was ready, willing and able to complete the transaction.

16 The Receiver takes the position that the asset purchase agreement was terminated in accordance with its terms, and secondly, takes the position that the Receiver was entitled to disclaim the asset purchase agreement. In the submission of the Receiver, even if the court is not satisfied that the asset purchase agreement was validly terminated, the Receiver is under no obligation to complete the purchase agreement.

17 The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.

The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.

18 This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc., Re*, 2005 BCCA 154 (B.C. C.A.). That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:

> Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.

In Braidwood J.A.'s opinion the foregoing clause determined the issue.

19 In that case the order appointing the Receiver contemplated a power to apply to the court for a vesting order to convey the assets to a purchaser free and clear of the interest of other parties.

20 Similar powers are contained in the order made by this court on May 10, 2008, which include a power to, "apply for any vesting order or other order as necessary to convey the property or any part or parts thereof to a purchaser or purchasers thereof free and clear of any liens or encumbrances affecting such property."

21 The issue the court has to consider is whether the Receiver is properly exercising its discretion. The affidavit of Michael Armstrong, sworn May 26, 2008 describes the interest that the Receiver has received with respect to the sawmill. There have been inquiries from some 14 entities. Ten entities have executed confidentiality agreements and the Receiver has received six expressions of interest and/or offers to purchase the Fort St. James sawmill and/or the forest licence as of May 26, 2008.

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22 The Receiver expresses the opinion that based upon the level of interest in the assets to date, the Receiver is of the view that it can realize more from the sale of the Fort St. James sawmill and the forest licence to another party rather than close the sale to Columbia.

23 Columbia submits that the reference contained in Bennett on *Receiverships* does not apply to contracts involving real property or does not apply where there is an existing contract that is capable of specific performance. In my view, prior to May 22nd, the contract was not capable of specific performance. It is clear that the parties were continuing to exchange drafts of documents and trying to reach agreement on the terms of critical documents. No consensus was reached between Pope & Talbot and Columbia prior to the appointment of the receiver on May 10. After that the Receiver made its position clear by letter of May 14 that it was expressly disclaiming or terminating the asset purchase agreement.

24 Columbia says that the court should not countenance what amounts to an expropriation of a beneficial interest. It says that as of February 5, when the asset purchase agreement was signed, a beneficial interest in the real property involved was transferred to the purchaser pending completion of the sale at which time the legal interest would also be transferred.

25 The specific argument is contained in paragraphs 57 and 58 of the purchaser's brief. It says:

> When a valid contract for the sale of land comes into existence, the vendor becomes in equity a constructive trustee for the purchaser and the beneficial ownership passes to the purchaser.

In support is cited Victor De Castri Q.C., *The Law of Vendor and Purchase*, (3d), Toronto, Thompson Canada Limited, 2007, at paragraph 17. Paragraph 58 goes on to submit:

> Consequently, Columbia is the beneficial owner of the Ft. St. James sawmill assets and the sellers became the trustee of those assets for Columbia.

The question is whether that is so.

26 It is clear that the extract from De Castri relied upon by the purchaser states, in the first paragraph, under paragraph 17 entitled "Trust," on page 1-12, that: "The beneficial ownership passes to the purchaser." However, the text goes on to say, at the bottom of that page that: "The purchaser's status as equitable owner is contingent upon the contract being specifically enforceable."

27 Over the page, on 1-13, the first paragraph states:

> It is clear, then, that the precise position which the parties stand with respect to each other is, *in fieri* until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que* trust relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser.

So it appears that before a purchaser can achieve "equitable owner" status, the parties must have reached "certainty."

28 Here no such certainty had been either by May 14 when the Receiver's counsel wrote to the purchaser's lawyer.

29 The closing date of April 30 passed without a closing. The parties, Pope & Talbot and Columbia, continued to negotiate the terms of necessary documents relating to the transaction, and shortly before the receivership order was made, Pope & Talbot, understandably, started to withdraw from these exchanges in light of the pending receivership. As of the receivership date on May 10 there was certainly no consensus *ad idem* on all the outstanding matters.

30 After May 10, the Receiver never affirmed the asset purchase agreement. On May 14, the Receiver disclaimed the agreement or, in the alternative, took the position that it had been terminated. Hence, it is my view that the contract was never

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specifically enforceable or capable of specific performance at any time prior to May 14. The certainty referred to by De Castri in his text was in fact never achieved.

31 The purchaser submits that the conduct of the parties supports an estoppel by conduct argument. It is true that Pope & Talbot continued to attempt to close the transaction after April 30. But by about May the 8th, Pope & Talbot withdrew from the field, so to speak, because of the impending receivership. There is no evidence of any conduct of the part of the Receiver that could give rise to an estoppel. The Receiver was entitled to a reasonable period of time, after May 10, to consider its position. It did this, between May 10 and May 14, and on the latter date it took its position.

32 So in my view, under the principles set out by the Court of Appeal in *New Skeena Forest Products Inc., Re*, the Receiver was not bound by this contract which had been entered into by Pope & Talbot on February the 5th. Here certainty had not been established by the time the receiving order was made. The Receiver never affirmed the contract either explicitly or by its conduct. Hence I would allow the Receiver's application, filed May 27, and dismiss the cross motion of Columbia.

33 Anything arising, counsel? You raised the deposit issue Mr. Hughes.

34 MR. HUGHES: Yes, there is one minor issue with respect to paragraphs 5 and 6 of the order, such that we need, essentially, to be at liberty to apply to this court for directions with respect to the treatment of the deposit.

35 THE COURT: Certainly.

36 MR. JACKSON: My Lord, I could add, very quickly, I'm sure, with my friends' assistance, a paragraph after 5 and 6 to say, notwithstanding anything herein, that the parties are at liberty to make further application to this court regarding the treatment of the deposit under the purchase agreement, something along those lines.

37 THE COURT: Sure, that will be fine.

38 MR. JACKSON: Thank you.

Application granted; cross-motion dismissed.

Footnotes

* A corrigendum issued by the court on September 29, 2008 has been incorporated herein.

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IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD. FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF THE TRUSTEE

(motion returnable April 23, 2015)

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