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

(re motion for Advice and Directions)
(motion returnable October 16, 2015)

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INDEX

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INDEX

TAB 1

THE 2015 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

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case. Receivers must often consider whether they should commence proceedings to recover property for an estate, thereby improving the recovery for creditors of an estate. A receiver must determine if the potential recovery sufficiently outweighs the financial risks of bringing the litigation. Here, there was no element of public interest in this case; the dispute was a private one between a judgment creditor and a judgment debtor. Although a significant portion of the judgment concerned child and spousal support orders, the Ontario Legislature still requires that support order judgment creditors work within the general law of execution on judgments. Moreover, the impact of a cost immunity award on the defendants would be significant. Finally, Justice Brown held that in the absence of an affidavit describing the financial situation, the court was not prepared to conclude that without a cost immunity order in favour of the receiver, the claimant would not proceed with the recovery action on her own: *Haunert-Faga v. Faga*, 2013 CarswellOnt 2947, 100 C.B.R. (5th) 52, 2013 ONSC 1581 (Ont. S.C.J. [Commercial List]).

L§29 — Liability of Receiver for Expenses Incurred

A receiver appointed by the court is *prima facie* liable for all contracts entered into by it, but such liability is a liability of the estate under receivership: *Rogers v. Thorne Riddell Inc.* (1982), 1982 CarswellAlta 306, 41 C.B.R. (N.S.) 184 (Alta. Q.B.).

L§30 — Liability of Receiver on Contracts and Borrowing

A court-appointed receiver is not bound by existing contracts made by the debtor: *Bank of Montreal v. Scaffold Connection Corp.* (2002), 36 C.B.R. (4th) 13, 2002 CarswellAlta 932 (Alta. Q.B.).

A court-appointed receiver is personally liable in respect of contracts entered into by it unless the express terms of the contract exclude such liability. The receiver has the right to be indemnified out of the assets under its administration: *Bank of Montreal v. Steel City Sales Ltd.* (1983), 47 C.B.R. (N.S.) 15 (N.S. T.D.); *Re Ashk Development Corp.* (1988), 70 C.B.R. (N.S.) 72 (Alta. Q.B.); *Rogers v. Thorne Riddell Inc.* (1982), 41 C.B.R. (N.S.) 184 (Alta. QB). A court-appointed receiver is not personally liable for funds that it has been authorized by court order to borrow during the course of the receivership: *Re Ashk Development Corp.*, *supra*.

A receiver was not bound by a pre-receivership contract that obligated the debtor to pay a fee in respect of marketing efforts undertaken prior to the receivership, notwithstanding that the receiver made use of the marketing report to support its recommendation to sell the assets; nor was it bound to honour certain key employee retention requests, notwithstanding that the incentive payments were provided for in the cash flow forecasts, as it constituted a preference: *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 2007 CarswellOnt 6799, 36 C.B.R. (5th) 296 (Ont. S.C.J.).

L§31 — Liability of Receiver and Manager for Amounts Owing for Public Utilities Prior to its Appointment

In Manitoba, the court held there is no right, as in Ontario, to lock off gas to a delinquent customer, and consequently a receiver appointed under a debenture is not liable for arrears owing for gas supplied to the debtor prior to the appointment of a receiver-manager: *K-Tel Int. Ltd. (Receiver of) v. Greater Winnipeg Gas Co.*, 65 C.B.R. (N.S.) 34, [1987] 4 W.W.R. 447, 46 Man. R. (2d) 181, 37 D.L.R. (4th) 344 (C.A.).

A receiver under a trust deed in Québec was found not liable for arrears owing for the supply of public utilities: *Mercure, Beliveau & Associés v. Gaz Métropolitain Inc.* (1980), 35 C.B.R.

TAB 2

BENNETT on RECEIVERSHIPS

Second Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL
Thomson Professional Publishing

hat continuation of tenancy agreements is mandatory even where the term of the ease extends beyond the expiry of the redemption period.

In the absence of a general power to let and renew leases, the court-appointed receiver should obtain leave of the court if the proposed lease or renewal lease is for a period of time extending beyond the redemption period, if any, or is for a period of time that may be excessive given the circumstances of the debtor's business. On the other hand, the private receiver takes the risk that the new lease or renewal is commercially reasonable, unless there is legislation permitting the receiver to apply for directions as to the terms of the proposed lease or renewal lease.

5. CONTRACTS

(a) Existing Contracts with Debtor

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 it should complete or adopt those contracts. In cases where the contract is almost complete, such as in the case where the debtor had sold goods, but had not delivered them, the court examines the contract and the conduct of the debtor. If the debtor intended that title to the goods pass to the purchaser and separated them from other inventory, the court will enforce the contract in favour of the purchaser[166] or, in the case real property, direct the receiver to perform the contract.[167]

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.[168] 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. On the other hand, if the receiver chooses to perform such contracts, the receiver becomes personally liable for their performance where it does not disclaim personal liability.

In *Re Newdigate Colliery Co.*,[169] the debtor carried on a business of mining and selling coal. When the court-appointed receiver took possession of the property, the receiver found that the debtor had entered into many contracts which if completed would not generate sufficient profits. The price of coal had risen

166 *NEC Corp. v. Steintron International Electronics Ltd.* (1985), 59 C.B.R (N.S.) 91 (B.C. S.C.).
167 *Freevale Ltd. v. Metrostore (Holdings) Ltd.*, [1984] Ch. 199, [1984] 1 All E.R. 495 (Ch. D.).
168 *Re Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159, 294 A.P.R. 198, 86 D.L.R. (4th) 127 (C.A.), dismissing an appeal from (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.).
169 [1912] 1 Ch. 468 (C.A.).

and the receiver sought authority to disclaim the contracts. However, the court concluded that the increased profits that could be generated by allowing the receiver to break the debtor's contracts were not a sufficient reason to give the receiver power to disclaim contracts generally. The court reviewed the differences between a court-appointed receiver and a court-appointed manager, and stated categorically that the court-appointed receiver and manager owes a duty to both the debenture holder and the debtor. In this case, the increased profits would ultimately become subject to the claims of persons who would be entitled to damages for breach of contract. If the court were to authorize the receiver and manager to breach the contracts, it would be benefitting the debenture holders at the expense of the unsecured creditors.

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.[170] 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.[171] 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.[172] If the receiver chooses to adopt the debtor's contract, the receiver becomes personally liable for that performance where it does not disclaim such liability.

Insofar as employment contracts are concerned, the receiver requires the existing employees initially on taking possession and during the continued operation of the business. To avoid severance problems, successor employer provisions, and personal liability for adopting the debtor's contracts with the employees, the receiver is best advised to continue with the employeees who have knowledge of the debtor's affairs if the receiver can enter such contracts without personal liability. If the receiver is unable to do so, it ought to dismiss the debtor's employees and re-hire on a selective basis after they have obtained independent legal advice.

In private receiverships, the appointment of a receiver does not automatically terminate existing contracts unless the contracts provide so. In private receiverships, the debtor stands charged with the obligations of the contract and therefore the privately appointed receiver, as agent of the debtor corporation, incurs no obligation to perform existing contracts after the receivership has commenced. There can be no novation of contract even if the receiver performs the terms of such contract, but the receiver may be exposing the debtor to a claim

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170 See *Parsons v. Sovereign Bank of Can.*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.). See also below "5.(c) Set-Off".

171 Above.

172 *Can. Commercial Bank v. Annandale Holdings Ltd. et al.*, above, note 161. See also above "4.(b) Landlord in Receivership, (ii) Leases".

TAB 3

2002 ABQB 706
Alberta Court of Queen's Bench

Bank of Montreal v. Scaffold Connection Corp.

2002 CarswellAlta 932, 2002 ABQB 706, [2002] A.W.L.D. 420,
[2002] A.J. No. 959, 115 A.C.W.S. (3d) 620, 36 C.B.R. (4th) 13

BANK OF MONTREAL (Plaintiff) and SCAFFOLD CONNECTION CORPORATION, P.S.P. ERECTORS INC., SC ERECTORS INC., SCAFFOLD WORKS INC., INDUSTRIAL INNOVATIONS AND SERVICES LIMITED, AND SCAFFOLD CONNECTION (USA) INC. (Defendants)

Wachowich C.J.Q.B.

Heard: July 23, 2002
Judgment: July 26, 2002
Docket: Edmonton 0103-23333

Counsel: *J. Hocking, D. Polny, T. Reid*, for Receiver
R. Rutman, for Plaintiff
D. Shell, for Roynat Inc.
J. Topolniski, for Sit Down Export AB and Sit Down AB

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Table of Authorities

Cases considered by *Wachowich C.J.Q.B.*:

Bayhold Financial Corp. v. Clarkson Co., 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.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 82(1) — considered

s. 82(2) — considered

APPLICATIONS by receiver for approval of sale of assets of debtor companies and for declaration that assets would vest in purchaser free and clear of all charges or claims.

Wachowich C.J.Q.B.:

1 KPMG Inc., the Court-Appointed Receiver and Manager (the "Receiver") of the Defendants ("Scaffold"), seeks the Court's approval of a sale of certain assets ("Seating Equipment") of Scaffold. Some or all of the Seating Equipment was acquired by Scaffold from Sit Down Export AB, a secured creditor of Scaffold.

2 The Receiver further seeks a declaration that: the Seating Equipment shall vest in the Purchaser free and clear of all encumbrances, charges, interests or claims; and Sit Down Export AB, Swedish Export Funding AB and the Swedish Export Credits Guarantee Board, or any party claiming through or under them, have no claims whatsoever to the Seating Equipment or the proceeds of the Sale, or against the Receiver in respect of the Sale. The Receiver's applications were adjourned to allow Sit Down to present its objection to the proposed sale.

3 Under the Consent Receivership Order filed November 16, 2001, the Receiver is empowered to sell the property of Scaffold.

4 Sit Down disputes this Court's jurisdiction in this matter on the basis that the assessment of the propriety of the proposed sale requires an interpretation of the Distributor Agreement between Sit Down and Scaffold, which Agreement specifies that all disputes arising in connection with the Agreement shall be arbitrated in London, Great Britain and that the Agreement shall be construed according to the laws of Sweden.

5 The Distributor Agreement clearly provides that upon termination of the Agreement, Scaffold shall be allowed to sell any existing units within its possession at the time of termination.

6 In a letter dated November 23, 2001 to the Receiver, counsel for Sit Down advised that Sit Down considered the contract between it and Scaffold to be at an end pursuant to Article 1.18 of the Distributor Agreement. In a further letter dated November 28, 2001 to Scaffold, Sit Down's Swedish counsel terminated the agreements in effect between Scaffold and Sit Down.

7 Counsel for Sit Down submits that the Distributor Agreement contains restrictions on the use of Sit Down's intellectual property rights in and relating to the Seating Equipment, and requires the parties to exert reasonable efforts to "transit (which Sit Down defines as "convey") the relationship of the parties", which Sit Down understands to be the package of rights under the Distributor Agreement. Counsel for Sit Down did not articulate the manner in which the proposed sale would result in breach of any intellectual property rights.

8 The Receiver, the Bank of Montreal and Roynat Inc. (secured creditor) argue that the Receiver is not bound by the contracts entered into by Scaffold. The contemplated sale does not purport to assign any interest in intellectual property, nor does it purport to convey the distribution or manufacturing rights which arose under the agreements between Sit Down and Scaffold. The clear language of the Distributor Agreement permits sale of units in Scaffold's possession upon termination.

9 The Receiver provided evidence that there will not be sufficient assets to discharge the claims of Roynat and the Bank of Montreal and therefore no funds will be available for subordinate creditors.

10 Further, under s. 82(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, where any property of a bankrupt vesting in a trustee consists of patented articles that were sold to the bankrupt subject to any restrictions or limitations, the trustee is not bound by the restrictions or limitations but may sell and dispose of the patented articles free and clear of the restrictions or limitations. The Receiver argues that by analogy, the Receiver likewise should not be bound. I note that ss. (2) provides that where the manufacturer or vendor of the patented articles objects to the disposition and gives notice, the manufacturer or vendor has the right to purchase the patented articles at the invoice prices thereof, subject to any reasonable deduction for depreciation or deterioration.

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: *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159 (N.S. C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341. The Receiver in this case is not breaking a contract which it has adopted, as the agreements between Sit Down and Scaffold were terminated by Sit Down shortly after the appointment of the Receiver. Thus, there is no basis to suggest that the Receiver is bound by any of the contractual terms entered into between Sit Down and Scaffold.

12 Although the Receiver is not bound by the Distributor Agreement, the Receiver does have a duty to act fairly and reasonably, and I conclude that this Court may consider that Agreement in determining whether the Receiver has fulfilled its duty in relation to the proposed sale.

13 The very clear language of the Distributor Agreement would have permitted Scaffold to sell the Seating Equipment on termination. There is nothing before the Court beyond speculation to suggest that the provisions in question would be interpreted any differently by a London arbitrator applying Swedish law. Further, there is nothing before the Court beyond vague speculation that the proposed sale will adversely affect any intellectual property rights of Sit Down, and counsel for Sit Down did not propose any concrete method of avoiding the result it fears.

14 The applications of the Receiver are granted.

Applications granted.

TAB 4

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

Table of Authorities

Cases considered by *Braidwood J.A.*:

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

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

Denison v. Smith (1878), 43 U.C.Q.B. 503, 1878 CarswellOnt 209 (U.C. Q.B.) — referred to

Erin Features No. 1 Ltd., Re (1991), 8 C.B.R. (3d) 205, 1991 CarswellBC 498 (B.C. S.C. [In Chambers]) — considered

Gibson v. Carruthers (1841), 8 M. & W. 321 (Eng. Ex. Ct. Pleas) — considered

Potato Distributors Inc. v. Eastern Trust Co. (1955), 35 C.B.R. 161, 1 D.L.R. (2d) 147, 1955 CarswellPEI 1 (P.E.I. C.A.) — considered

Repap British Columbia Inc., Re (June 11, 1997), Doc. Vancouver A970588 (B.C. S.C.) — referred to

Salok Hotel Co., Re (1967), 11 C.B.R. (N.S.) 95, 62 W.W.R. 268, 66 D.L.R. (2d) 5, 1967 CarswellMan 4 (Man. Q.B.) — referred to

Skeena Cellulose Inc., Re (2003), 43 C.B.R. (4th) 187, 184 B.C.A.C. 54, 302 W.A.C. 54, 2003 BCCA 344, 2003 CarswellBC 1399, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Sneezum, Re (1876), 3 Ch. D. 463 (Eng. C.A.) — considered

Stead Lumber Co. v. Lewis (No. 2) (1957), 37 C.B.R. 24, 40 M.P.R. 363, 13 D.L.R. (2d) 34, 1957 CarswellNfld 3 (Nfld. T.D.) — referred to

Thomson Knitting Co., Re (1925), 5 C.B.R. 489, 56 O.L.R. 625, [1925] 2 D.L.R. 1007, 1925 CarswellOnt 5 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
s. 365 — referred to

Bankruptcy Act, 1869 (32 & 33 Vict.), c. 71
Generally — referred to

s. 23 — referred to

Bankruptcy Act 1966, No. 33, 1966
s. 133 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — considered

s. 30(1)(k) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

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

Insolvency Act, 1986, c. 45
s. 315 — referred to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157
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:

> 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'

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.

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

> 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.

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.

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 Boric 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.*:**

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.

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.

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

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.

TAB 6

2012 ONSC 4816
Ontario Superior Court of Justice [Commercial List]

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.

2012 CarswellOnt 10743, 2012 ONSC 4816, 222 A.C.W.S. (3d) 938, 99 C.B.R. (5th) 120

Firm Capital Mortgage Fund Inc. Applicant and 2012241 Ontario Limited Respondent

Morawetz J.

Heard: July 23, 26, 2012
Judgment: August 30, 2012
Docket: CV-11-9456-00CL

Counsel: J.D. Marshall for Deloitte & Touche Inc., Receiver
J. Finnigan, A. McEwan for Firm Capital Mortgage Fund Inc.
R. D. Howell, D. Schatzkev for G. Gill et al.
S. Dewart for LawPro

Subject: Property; Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Morawetz J.*:

Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1997), 1997 CarswellOnt 1163, 33 O.R. (3d) 285, 29 O.T.C. 193 (Ont. Gen. Div.) — referred to

1565397 Ontario Inc., Re (2009), 2009 CarswellOnt 3614, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214 (Ont. S.C.J.) — followed

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19
Generally — referred to

s. 78 — considered

s. 79 — considered

Land Titles Act, R.S.O. 1990, c. L.5
s. 44(1) ¶ 4 — considered

s. 93(3) — referred to

MOTION by receiver for orders approving sale of debtor's commercial property and authorizing vesting out of purchase agreements and leases for units on property.

Morawetz J.:

1 The Receiver brings this motion for an order (i) approving the Receiver's proposed marketing and sales process in respect of the Respondent's commercial property in Brampton, Ontario (the "Property"); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

2 The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver's opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be "vested out" upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

3 Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

4 On the other hand, a group of purchasers (the "Unitholders") have entered into agreements with 2012241 Ontario Limited ("the Debtor") and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

5 At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc ("Firm Capital").

6 Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of "pre-sale" agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

7 The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

8 The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

9 None of the agreements and leases are registered against the title to the Property.

10 All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers' interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

> **26. Subordination of Agreement**
>
> The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

11 Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

12 It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

13 However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than $1.2 million.

14 The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

15 In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

16 From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

17 Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

18 Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

19 Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act, 1998*

(the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

20 The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

21 In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a "declarant" or "owner" of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

22 With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

23 In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

24 Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease "for a period yet to run that does not exceeds three years" is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

25 In addition, the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express subordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* (1997), 33 O.R. (3d) 285 (Ont. Gen. Div.).)

26 Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:

> **19. Agreement not to be Registered**
>
> The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property...

27 I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

28 Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.).) I accept this submission.

29 In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

30 Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

31 With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

32 The remaining question is whether there are any "equities" in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights.

33 Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

i. Those who paid deposits that are still held in trust;

ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;

iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;

iv. Those who claim to have incurred expenses in renovating or improving their units.

34 With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

35 The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

36 The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

37 The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

38 In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

39 The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

Motion granted.

End of Document

TAB 7

Court File No. CV15-10882-00CL

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 JADE-KENNEDY DEVELOPMENT CORPORATION FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

ENDORSEMENT

June 4, 2015

Harvey Chaiton and Sam Rappos for Trustee
David Shiller for Purchasers

[1] This is a motion by Collins Barrow Toronto Limited in its capacity as court appointed *Construction Lien Act* ("CLA") trustee (the "Trustee") for an order authorizing it to terminate or disclaim two residential agreements of purchase and sale (the "Agreements") dated February 9, 2015 between Jade-Kennedy Residential Corporation as vendor and Roger James Dol on the one hand and Anna Gayle Andrew on the other (the "Purchasers"). In each case the Agreements related to the purchase of a residential condominium unit in Phase II of a development by Jade-Kennedy Development Corporation known as South Unionville Square for a purchase price for each unit of $200,000 and a deposit of $5,000.

[2] The Purchasers submit that the court should order the Trustee to complete the Agreements. They submit the court has no basis for determining if the sale of the units was improvident because the Trustee has not provided any evidence of the true market value of the units. They further submit the Trustee has provided no evidence of bad faith or improper conduct on the part of the Purchasers.

[3] The Trustee does not rely on the fact that sales of the units are improvident or that there was bad faith or improper conduct on the part of the Purchasers. Rather, it relies on the principal that a court appointed receiver is not bound by existing contracts made by the debtor: *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 36 C.B.R. (4th) 13 (Alberta C.A.); *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, [2005] B.C.J. No. 546, 9 C.B.R. (5th) 267 (B.C.C.A.).

[4] In this case, the Trustee was appointed pursuant to s. 68 of the CLA which provides in subparagraph (2) that "subject to the supervision and direction of the court, a trustee appointed under subsection (1) may, (a) act as receiver and manager..." Further, paragraph 3 of the Trustee's appointment order dated February 11, 2015 authorizes and empowers the Trustee to act as receiver and manager of the property and take any steps reasonably incidental to the exercise of the powers. Based on the above, therefore, I am satisfied that the Trustee is not bound by the Agreements entered into prior to its appointment. That, however, does not end the matter. Although the Trustee is not bound by prior agreements, it is clear that it cannot arbitrarily terminate them: see *Bennett on Receiverships*, 2nd ed. Carswell p. 341. Any decision to terminate must be done in a fair and proper manner.

[5] In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J.), Morawetz J. (as he then was) dealt with the issue of a receiver terminating certain purchase agreements for units in an unregistered condominium in connection with the approval of a proposed marketing and sales process of the respondent's commercial property. In considering the receiver's right to terminate the purchase agreements, Morawetz J. held it was necessary for the receiver to take into account the equitable considerations of all stakeholders. In my view, the Trustee's decision to terminate the Agreements is appropriate having regard to the interests of all stakeholders. In that regard, the Trustee has presented evidence in the form of a recent listing for sale of a similar unit; previous sales in 2014 (2) and 2013 (1) of similar size units; and an offer in March 2015 for Unit 117, one of the two units in dispute. That evidence is sufficient, in my view to establish that the purchase price in each of the Agreements is materially below fair market value for the unit. Accordingly, to permit the Agreements to close would be prejudicial to the mortgagees, lien claimants and other creditors of Jade-Kennedy.

[6] The Agreements (which are, except for the purchaser and unit number, identical) contain clauses subordinating the Purchasers' rights to any mortgagees (para. 15) and acknowledging that the Purchaser, by executing the Agreement, has not acquired any equitable or legal interest in the unit or property (para. 16). The Purchasers each paid a deposit of $5,000 at the time the Agreements were executed but the Trustee has agreed to return the deposit. In my view, when the equitable considerations of all the stakeholders, including the Purchasers, are taken into consideration, termination of the Agreements is appropriate. Given the evidence, I am of the view that the Trustee has a reasonable basis for terminating the Agreements. Order authorizing same, as requested, to issue.

[7] The Confidential Supplement to the Third Report of the Trustee contains confidential information as to the net sale price the agent indicated it could sell Unit 117 for. In the circumstances and at the request of the Trustee that Supplemental Report shall be sealed until further order of the Court.

[8] As the Trustee does not request costs, no order as to costs.

Pattillo J.

Court File Number: CV-15-10882-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Re: dade-Kennedy Development Corporation
Plaintiff(s)

AND

Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
Harvey Chaiton Sam Rappos for Trustee		
David Shiller - for purchasers		

☑ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

This is a motion by ~~Collins~~ Bauow Toronto Limited in its capacity as court appointed Construction Lien Act ("CLA") Trustee (the "Trustee") for an order authorizing it to terminate or disclaim two residential agreements of purchase and sale (the "Agreements") each dated Feb 9, 2015 between dade-Kennedy Residential Corporation as vendor and Roger James Dol on the one hand and Anna Gayle Andrew on the other (the "Purchasers"). In each case the Agreements related to the purchase of a residential condominium unit in Phase II of a development by

June 4, 2015
Date

Judge's Signature

☑ Additional Pages 4

Court File Number: CV-15-10882-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

Jane - Kennedy Development Corporation known as South Unionville Square for a purchase price for each unit of $200,000 and a deposit of $5,000.

The Purchasers submit that the court should order the Trustee to complete the Agreements. They submit the court has no basis for determining if the sale of the units was improvident because the Trustee has not provided any evidence of the true market value of the units. They further submit the Trustee has provided no evidence of bad faith or improper conduct on the part of the Purchasers.

The Trustee does not rely on the fact that sales of the units are improvident or that there was bad faith or improper conduct on the part of the Purchasers. Rather, it relies on the principal that a court appointed Receiver is not bound by existing contracts made by the debtor: Bank of Montreal v. Scaffold Connection Corp., [2002] A.J. No. 959, 36 C.B.R. (4th) 13 (Alberta C.A.); New Skeena Forest Products Inc. v. Kitwanga Lumber Co., [2005] B.C.J. No. 546, 9 C.B.R. (5th) 267 (B.C.C.A.)

In this case, the Trustee was appointed pursuant

Court File Number: CV15-10882-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

to s. 68 of the CJA which provides in subparagraph (2) that "subject to the supervision and direction of the court, a trustee appointed under subsection (1) may, (a) act as receiver and manager ..." Further, paragraph 3 of the Trustee's appointment order dated February 11, 2015 authorizes and empowers the Trustee to act as receiver and manager of the property and take any steps reasonably incidental to the exercise of the powers. Based on the above, therefore, I am satisfied that the Trustee is not bound by the Agreements entered into prior to its appointment. That, however, does not end the matter. Although the Trustee is not bound by prior agreements, it is clear that it cannot arbitrarily terminate them: see Bennett on Receiverships, 2nd ed. (Carswell, p. 341. Any decision to terminate must be done in a fair and proper manner.

In Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J.), Morawetz J. (as he then was) dealt with the issue of a receiver terminating certain purchase agreements for units in an unregistered condominium in connection with the approval of a proposed marketing

Judges Initials DAP.

Court File Number: CV15-10882-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

and sales process of the respondent's commercial property. In considering the receiver's right to terminate the purchase agreements, Morawetz J. held it was necessary for the receiver to take into account the equitable considerations of all stakeholders. In my view, the Trustee's decision to terminate the Agreements is appropriate having regard to the interests of all stakeholders. In that regard, the Trustee has presented evidence in the form of a recent listing for sale of a similar unit; previous sales in 2014 (2) and 2013 (1) of similar size units; and an offer in March 2015 for Unit 117, one of the two units in dispute. That evidence is sufficient, in my view to establish that the purchase price in each of the Agreements is materially below fair market value for the unit. Accordingly, to permit the Agreements to close would be prejudicial to the mortgagees, their claimants and other creditors of Jack-Kennedy.

The Agreements (which are, except for the purchase and unit number, identical) contain clauses subordinating the Purchasers' rights to any mortgages (para. 15) and

Judges Initials

Court File Number: CV15 - 10882 - 00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued

acknowledging that the Purchaser, by executing the Agreement, has not acquired any equitable or legal interest in the unit or property (para. 16).

The Purchasers each paid a deposit of $5,000 at the time the Agreements were executed but the Trustee has agreed to return the deposit.

In my view, when the equitable considerations of all the stakeholders, including the Purchasers, are taken into consideration, termination of the Agreements is appropriate. Given the evidence, I am of the view that the Trustee has a reasonable basis for terminating the Agreements. Order authorizing same, as requested, to issue.

The Confidential Supplement to the Third Report of the Trustee contains confidential information as to the net sale price the agent indicated it could sell unit 117 for. In the circumstances and at the request of the Trustee that Supplemental Report shall be sealed until further order of the court.

As the Trustee does not request costs, No order as to costs.

Judges Initials RAP.

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

(re motion for Advice and Directions)
(motion returnable October 16, 2015)

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