

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

2615333 ONTARIO INC.

Applicant

- and -

**CENTRAL PARK AJAX DEVELOPMENTS PHASE 1 INC., 9654488 CANADA INC.,
9654461 CANADA INC., 9654372 CANADA INC., 9617680 CANADA INC. and 9654445
CANADA INC.**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY*
ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF*
JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

MOVING PARTIES' FACTUM

OVERVIEW

1. The issue on this motion is whether a court-appointed receiver can take steps to preserve and protect the debtor's property and address public safety issues on the property during the pendency of an appeal of the order appointing the receiver.
2. The answer must be that the receiver can, particularly in circumstances where the debtor plainly has no intention of preventing clear risk of deterioration to the property or address critical health and safety issues for members of the public as it relates to the property.

3. That is the case here. The Respondents have failed to manage the property that is the subject of this proceeding (the “**Property**”) in a commercially reasonable fashion, have failed to insure it, and have expressed no intention of remedying these issues. The Respondents appear more interested in nothing being done with respect to the Property at all.

FACTS

4. Pursuant to an order of this Court dated April 15, 2021 (the “**Appointment Order**”), RSM Canada Limited was appointed as receiver (in that capacity, the “**Receiver**”) over the Property. The Property includes certain lands and premises in Ajax, Ontario.¹
5. When the Appointment Order was made, the Receiver and the Applicant understood the Property to consist of a parking lot – vacant land. When the Receiver attended at the Property shortly after its appointment, however, it discovered that the Property also included at least seven commercial units (the “**Units**”).²
6. Three of the Units are vacant (the “**Vacant Units**”). They are dilapidated, damaged, and infested by mould. It is evident that people are accessing the Vacant Units to remove copper wiring, vandalize and seek shelter there. One of the tenants of the Units (“**Hughes**”) advised the Receiver that such persons are likely coming from a nearby homeless shelter.³

¹ First Report of the Receiver dated May 14, 2021 at para 1 (the “**First Report**”), Motion Record (“**MR**”), Tab B.

² First Report at paras 8, 10 and 14, MR, Tab B.

³ First Report at paras 11-12, MR, Tab B.

7. The Receiver also learned from Hughes that there is no formal property management in place and that regular operations and maintenance at the Property are not being maintained.⁴
8. After the Receiver's appointment, the Receiver and the Applicant also learned that there is no applicable property or liability insurance policy in respect of the Property.⁵
9. The Receiver is concerned regarding the state of the Property and the lack of any applicable policy of insurance, and believes that it is in the best interests of all stakeholders that it takes certain conservatory measures necessary in the Receiver's sole discretion to protect and preserve the Property (the "**Conservatory Measures**"), including but not limited to: **(a)** obtaining adequate insurance; **(b)** securing the Vacant Units; **(c)** addressing the health and safety risks that have arisen at the Property; **(d)** collecting rent from any commercial tenants of the Property; and **(e)** making satisfactory arrangements for funding to pay the costs of the foregoing and any other Conservatory Measure.
10. The Receiver expressed its concerns regarding the state of the Property and the attendant risks to the Property and to health and safety to the Respondents. The Respondents did not commit to resolving these issues and the Receiver took the position that it was not stayed from doing so itself. The Respondents urged the Receiver to take no steps and threatened

⁴ First Report at paras 12-13, MR, Tab B.

⁵ First Report at paras 15-16, MR, Tab B.

to seek costs against the Receiver and its counsel if the Receiver proceeded to Court on the issue.⁶

ISSUES & ARGUMENT

11. The questions to be decided on this motion are:
 - (a) whether the Receiver has the power and authority to take the necessary Conservatory Measures, notwithstanding any appeal of the order appointing the receiver;
 - (b) alternatively, whether the Appointment Order should be varied given the new facts discovered about the Property, such that the Receiver has the power and authority to take the Conservatory Measures, notwithstanding any appeal of the order appointing the receiver.
12. Both questions should be answered in the affirmative.
13. These questions do not require this Court to determine whether s.193(a) – (c) of the *Bankruptcy and Insolvency Act* (the “*BIA*”)⁷ applies to the issues raised in the Respondents’ appeal.
 - A. Conservation Measures May Be Taken Notwithstanding Any Appeal**
14. When appointed, the Receiver had a duty to take possession of the Property and to care for it in a commercially reasonable manner. That obligation is ongoing.⁸

⁶ Appendix 7 to the First Report (May 5, 2021, 10:39 am email from D. Ullman to A. Soutter), MR, Tab B7.

⁷ [RSC 1985, c B-3](#).

⁸ [BIA](#), s.247(b).

15. The appeal of the order appointing a receiver does not serve to void the order, and a receiver can take conservatory measures in relation to property in its possession notwithstanding any appeal of the order appointing it. Indeed, it is the receiver's duty to do so, irrespective of whether the order appointing the Receiver may be stayed pending appeal.⁹

16. This power and obligation is analogous to that of a trustee in bankruptcy to preserve the bankrupt's assets (which vest in the trustee upon a successful bankruptcy application) notwithstanding the bankrupt's appeal:¹⁰

The execution of a receiving order contemplates the exercise by the trustee of the duties and powers vested in him under the Act. If the execution of the receiving order is stayed, it is logical that the exercise of those duties and powers is stayed. [...] If before the notice of appeal is served the trustee has exercised certain powers and duties, he need not undo what he has already done. He cannot, however, take any further steps in carrying out the duties he has commenced. Nor can he commence carrying out any other duties. **There is one exception: the trustee has the duty and power to take conservatory measures in relation to the property in his possession irrespective of the stay.** (emphasis added)¹¹

17. It must be noted that a 1922 decision of the Quebec Supreme Court, *Re Gilbert*,¹² stands as a lone decision to the contrary. In that case, the bankrupt appealed the receiving order made against him and the trustee sought directions regarding its rights and duties pending

⁹ [Royal Bank of Canada v Paulsen & Son Excavating Ltd](#), 2012 SKQB 267 at paras 14-16 [*Paulsen*], leave to appeal ref'd 2012 SKCA 101; [Royal Bank v Saskatoon Sound City Ltd](#) (1989), 77 CBR (NS) 127 at paras 14-15 (CA) [*Saskatoon Sound*].

¹⁰ [Saskatoon Sound](#) at paras 14-15, cited with approval by [Greenbaum v Barreau du Québec](#), 1994 CanLII 5823 at paras 15-16 (QCCA) [*Greenbaum*].

¹¹ [Saskatoon Sound](#) at para 15, cited with approval in *Greenbaum and Paulsen*.

¹² [Re Gilbert](#) (1922), 3 CBR 485, 1922 CarswellQue 52 (QCSC).

appeal. The Court held that though the trustee remained vested with the bankrupt's property, the effect of the appeal was the suspension of the receiving order, and

the trustees may not in any way proceed to put the said order into effect or execution [...] unless and until the Appellate Court shall have adjudicated the appeal; and the trustees may not perform acts of administration (even conservatory) unless for such acts of administration or others they be thereto authorized by the Court of King's Bench or by the Judges thereof in such cases as may be, as provided by law¹³

18. *Re Gilbert* is distinguishable as there does not appear to have been any conservatory action needed in that case. The decision has also been overtaken by the Quebec Court of Appeal's 1994 decision in *Greenbaum*, which adopted the conclusion in *Saskatoon Sound* that conservatory measures can be taken notwithstanding any appeal. Alternatively, *Re Gilbert* provides that a trustee can seek authority to take conservatory steps from a Superior Court of Justice. That is what the Receiver is doing on this motion.

19. The authority of a court-appointed receiver to take steps to conserve a debtor's property notwithstanding any appeal is consistent with its duty as a fiduciary to the debtor and its creditors, and with the purposes of the *BIA*, including that the *status quo* should be preserved pending appeal.

B. Alternatively, the Appointment Order Should Be Varied

20. Judges of the Superior Court have the inherent jurisdiction to order provisional execution of an order under the *BIA* notwithstanding any appeal therefrom.¹⁴

¹³ *Re Gilbert* at para 13.

¹⁴ *Computershare Trust Company of Canada v Beachfront Developments Inc and Beachfront Realty Inc*, 2010 ONSC 4833 at para 4 (Commercial List) [*Beachfront Developments*]; *Century Services Inc v Brooklin Concrete Products Inc* (2005), 10 CBR (5th) 169, 2005 CanLII 9668 at para 5 (ONSC).

21. A party may bring a motion to vary an order on the ground of facts arising or discovered after the order was made.¹⁵ In this case, the Receiver and the Applicant discovered that the Property was not vacant land as the application materials led this Court to find.¹⁶
22. To the contrary, upon attending at the Property, the Receiver discovered the presence of the Units, and that the Vacant Units were dilapidated, infested with mould, and appeared to have been accessed by unknown persons, possibly from a nearby homeless shelter.
23. Justice Newbould's decision in *Beachfront Developments* is on point. In that case the respondents appealed an order authorizing the receiver to take steps to sell property. Following service of a notice of appeal, the receiver brought a motion to have Newbould J's order provide that it is subject to provisional execution notwithstanding the appeal. In granting that relief, Newbould J held that given the need to protect the value of the asset under receivership, and given the potential for delay in having the appeal heard, it was just to permit the receiver to take certain steps (eg. marketing the property, but not selling it) to prevent the deterioration of the property's value.¹⁷
24. A similar risk of the deterioration in the Property's value exists in this case:
 - (a) the Vacant Units are being vandalized and accessed by unknown persons;
 - (b) the Vacant Units are also already damaged and infested with mould;

¹⁵ Rule 59.06(2)(a) of the [Rules of Civil Procedure](#), RRO 1990, Reg 194.

¹⁶ *2615333 Ontario Inc v Central Park Ajax Developments Phase 1 Inc. et al* (April 15, 2021), Toronto CV-20-006512299-00CL at para 4 (ONSC Commercial List).

¹⁷ [Beachfront Developments](#) at paras 4, 13 and 18-19.

- (c) the tenants of the Units have been paying, and may continue to pay, rent to Hughes, another tenant who allegedly has unsecured claims against the Respondents; and
- (d) there is no adequate insurance in place in respect of the Property.

C. No Stay of the Appointment Order Pending Appeal

25. The relief sought on this motion does not require consideration of whether the Appointment Order has been stayed by the Respondents' appeal because:

- (a) even if there was a stay, the receiver is still empowered to take conservatory measures; or alternatively,
- (b) this Court has the inherent jurisdiction to vary the Appointment Order to provide for provisional execution notwithstanding any appeal.

26. In any event, however, the Appointment Order is not stayed pending appeal. The Ontario Court of Appeal has confirmed that "there is no automatic right to appeal from an order appointing a receiver".¹⁸ It must be determined that the appeal falls within one of s.193(a) – (d) of the *BIA* before there is any appeal, failing which the Court of Appeal must grant leave pursuant to s.193(e) of the *BIA*.

27. Section 193 of the *BIA* provides,

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;

¹⁸ [Business Development Bank of Canada v Pine Tree Resorts Inc.](#), 2013 ONCA 282 at para 12 [*Pine Tree*].

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

28. Because of the broad nature of the stay imposed by s.195 of the *BIA*, the rights of appeal without leave under s.193 “must be clearly applicable”,¹⁹ and narrowly construed.²⁰
29. Section 193(a) of the *BIA* does not apply to the appeal. “Future rights” are future legal rights, not procedural or commercial (dis)advantages that may accrue from the order challenged on appeal.²¹ They are rights which come into existence in the future (as opposed to presently existing rights which may be exercised in the future).²²
30. The Respondents’ appeal does not involve future legal rights. Insofar as it relates to rights conferred upon Ajax in the Appointment Order, the appeal invokes only procedural or commercial issues, not “future rights” as that term is used in s.193(a) of the *BIA*.
31. Section 193(b) of the *BIA* does not apply to the appeal. An order is likely to “affect other cases of a similar nature” in the proceeding where the decision will likely affect another

¹⁹ [Re Robson](#), 2002 CarswellOnt 1052 at para 5 (CA).

²⁰ [B&M Handelman Investments Limited v Drotos](#), 2018 ONCA 581 at paras 27-28.

²¹ [Pine Tree](#) at para 15.

²² [Shaver-Kudell Manufacturing Inc v Knight Manufacturing Inc](#), 2021 ONCA 202 at para 26.

case raising the same or similar issues in the same proceeding.²³ The potential to affect other cases of a similar nature has been acknowledged, for example, where an order was made permitting the disclaimer of certain pre-sale contracts in a condominium development, when other pre-sale contracts existed and might yet be disclaimed.²⁴

32. There will be no other orders “of a similar nature” in this proceeding, as there will only be one order appointing a receiver in this proceeding.
33. Section 193(c) of the *BIA* does not apply to the appeal. Orders appointing receivers do not bring into question the value of the property, they simply appoint a court officer to preserve and monetize that property subject to court approval.²⁵
34. Section 193(d) of the *BIA* has no application here.
35. The Respondents have not obtained leave to appeal. Without a determination of whether s.193(a) – (d) applies, or leave to appeal being granted by the Court of Appeal, there is no stay of the Appointment Order as a result of the Respondents’ appeal.²⁶

CONCLUSION & ORDER SOUGHT

36. The Receiver has the authority to take the Conservatory Measures, notwithstanding any appeal – that principle is consistent with the duty imposed on trustees in bankruptcy in similar situations. Alternatively, the Receiver should be expressly given such authority

²³ [Buduchnist Credit Union Limited v 2321197 Ontario Inc](#), 2019 ONCA 588 at para 13.

²⁴ [Forjay Management Ltd v Peeverconn Properties Inc](#), 2018 BCCA 188 at para 40.

²⁵ [Pine Tree](#) at para 17.

²⁶ [Re Robson](#).

given the risk to health and safety and to deterioration of the Property, issues which the Respondents seem intent on ignoring.

37. The Receiver and the Applicant respectfully request that this Court make an order substantially in the form of the draft order enclosed in their Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of May, 2021.

A handwritten signature in black ink, appearing to be 'A. G.', written above a horizontal line.

Thornton Grout Finnigan LLP, lawyers for the Receiver, **and Garfinkle Biderman LLP**, lawyers for the Applicant

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

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Respondents

Court File No.: CV-20-00651299-00CL

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced at Toronto, Ontario

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