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

RESPONDING FACTUM OF WILLIAM SEEGMILLER
(re: Parking Issue)

October 15, 2015

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PART I - OVERVIEW

1. William Seegmiller ("Mr. Seegmiller") negotiated for and entered into a binding agreement with 144 Park Ltd. ("144 Park") to purchase Unit 105, a 3-bedroom, 2,000 sq. ft townhouse with two permanent parking spaces in the 144 Park Street project. The Trustee now seeks the authority to terminate Mr. Seegmiller's agreement of purchase and sale if he refuses to capitulate to what are ultimately the demands of 144 Park's lenders that he forego his parking spot for a price far below its apparent market value.

2. Mr. Seegmiller opposes the relief sought on four grounds:

   (a) The Court's jurisdiction to authorize the Trustee's scheme is limited. The Trustee was appointed on the application of 144 Park, and with the ultimate consent of the secured creditors with a mandate to close on pending sales transactions. The Trustee is not a private receiver and cannot prefer the interests of secured creditors over those of unit purchasers;

   (b) The lack of parking for the Unsold Units should come as no surprise to 144 Park's lenders. They knew or should have known that parking had been "unbundled" from the units by the developer and so must have known that some units would be sold without parking;

   (c) The Unsold Units can be sold without parking. Contrary to the views of the Trustee's own broker, Mint Realty, which has a financial stake in the outcome of this motion, there is a market for condo units without parking in the downtown Kitchener-Waterloo area; and

(d) The Trustee's own analysis suggests that parking spots are far more valuable than the $33,900.00 now on offer to existing purchasers. Granting the relief sought would create an unfair windfall for the secured creditors at the expense and to the detriment of purchasers like Mr. Seegmiller.

3. The Trustee's motion should be dismissed.

PART II - FACTS

4. The background facts are largely set out in the Trustee's Fourth Report, the Trustee's factum, as well as the Factum of the clients of Duncan Linton LLP. Mr. Seegmiller has delivered two affidavits:

(a) An affidavit from himself describing his particular circumstances and concerns;[1] and

(b) An affidavit of Christopher Pidgeon, a planning expert with experience in development projects in and around Kitchener-Waterloo.[2]

5. This and certain other relevant evidence is summarized below.

Mr. Seegmiller's APS

6. Mr. Seegmiller purchased his unit in the development in May 2009. On May 28, 2009, he entered into an agreement of purchase and sale (the "APS") with 144 Park to purchase

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[1] Affidavit of William Seegmiller sworn October 14, 2015 ("Seegmiller Affidavit"), Responding Motion Record of William Seegmiller ("Seegmiller Record"), Tab 2

[2] Affidavit of Christopher Pidgeon sworn October 14, 2015 ("Pidgeon Affidavit"), Seegmiller Record, Tab 3

Townhouse Unit 105 (the "Townhouse") together with two parking units and two locker units for $616,000.[3] He paid a total deposit of $123,200, being 20% of the purchase price.

7. He purchased the Townhouse in order to provide a residence for his parents and did not intend to personally occupy the Townhouse. The inclusion of two parking units was critical to his decision to purchase the Townhouse. He would not have considered purchasing the Townhouse with fewer parking units under any circumstances.

8. Mr. Seegmiller was offered the option of purchasing one or two parking units with it. While he does not recall the exact price that was agreed on account of the parking, he negotiated with the purchasers over the price. The final APS only reflected a global price of $616,000 for the Townhouse and the two parking units.

9. Mr. Seegmiller borrowed his deposit and will incur interest costs totally nearly $55,000 to date.[4] This is in addition to legal and interior design fees that he has incurred totalling approximately $9,000.[5]

The Financing

10. 144 Park, an affiliate of the MADY Group, only acquired the 144 Park Street lands in September 2011, over two years after it entered into the APS with Mr. Seegmiller. To do so, it no doubt had to satisfy its secured lenders as to the plans and viability of the project. The lending

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[3] Agreement of Purchase and Sale and Addendum to Agreements of Purchase and Sale ("APS"), Exhibit "A" to the Seegmiller Affidavit, Seegmiller Record, Tab 2A

[4] Seegmiller Affidavit, *supra* note 1 at para. 30

[5] *Ibid.* at paras. 31-32

documentation underlying the Laurentian Bank and MarshallZehr Group loans was appended to 144 Park's initial Application Record.[6]

11. Those documents makes clear that Laurentian Bank was entitled to review and approve of all design criteria, plans, specifications and working drawings as well as any agreements of purchase and sale with individual unit holders.[7] MarshallZehr required arm's-length pre-sales of $47 million totalling nearly 90% pre-sales before it advanced funds.[8]

12. In short, this development could not have proceeded past pre-sales if the secured lenders were not satisfied with the terms of the Agreements of Purchase and Sale with the units, including that with Mr. Seegmiller, which specified that he would receive 2 parking spaces.

The Development of 144 Park Street

13. 144 Park Ltd. pre-sold 129 of the 149 residential units and granted many of the purchasers interim occupancy in 2014, prior to the appointment of the Trustee.[9] There is nothing to indicate that the Secured Lenders objected to any of these agreements of purchase and sale or interim occupancy.

14. 144 Park Ltd. received approximately $6,350,000 in deposits from the pre-sale units. 144 Park used $3,350,000 to finance the completion of the project. The remainder, approximately

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[6] MarshallZehr Commitment Letter dated October 24, 2011, Exhibit "B" to the Affidavit of Madison Robins sworn October 15, 2015 ("Robins Affidavit"), Supplemental Responding Motion Record of William Seegmiller ("Seegmiller Supplemental Record"), Tab 1B; Laurentian Bank Offer of Financing dated March 7, 2012 as amended on September 12, 2014, Exhibit "C" to the Robins Affidavit, Seegmiller Supplemental Record, Tab 1C.

[7] Laurentian Offer of Financing at 17.13

[8] MarshallZehr Commitment Letter at s. 1.3(f)

[9] Affidavit of Greg Puklicz sworn January 16, 2015 ("Puklicz Affidavit") at para 31, Exhibit "A" to the Robins Affidavit, Seegmiller Responding Record, Tab 1A

$3,000,000, is being held in trust by Harris Shaeffer LLP as escrow agent.[10] We understand from the Trustee that there is a performance bond from Aviva for the remainder of the deposits.

15. The MADY Group also purchased the adjacent lands at 155 Caroline Street in September 2013 through its subsidiary One 55 Mady Ltd. The intention was that 144 Park and 155 Caroline would share certain facilities, including parking.[11] However, due to the MADY Group's financial difficulties, construction at 155 Caroline has not yet commenced while the lands are being marketed to potential developers.[12]

The Parking Situation

16. 144 Park is a 19 storey residential condominium project with 148 total residential units, 149 permanent parking units, and 150 storage units.[13] Originally, there were to be 132 permanent parking units for residents and 17 visitor parking spaces. The 17 visitor spaces were later converted to permanent parking units.[14]

17. Prior to the transfer to 144 Park, Allen Street Holdings obtained an exemption under section 37 of the *Planning Act* to permit an increase in the density of the development beyond the requirements set out in the zoning by-law. This exemption was formalized in an agreement with the City of Waterloo and resulted in the passing of By-Law No. 09-071, both of which were registered on title and assigned to 144 Park Ltd.[15]

18. As Mr. Pidgeon, the expert planner, explains in his affidavit:

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[10] Publicz Affidavit, *supra* note 9 at para 34
[11] First Report of the Trustee at paras 27-30, Motion Record of the Trustee ("Trustee Record"), Tab 1I
[12] Fourth Report of the Trustee at para 51, Trustee Record, Tab 2
[13] Puklicz Affidavit, *supra* note 9 at paras 6 and 10
[14] First Report of the Trustee, *supra* note 11, at para 30,
[15] Parcel Registers for 144 Park Project, Exhibit "D" to the Robins Affidavit, Seegmiller Supplemental Record, Tab 1D

(a) 144 Park is located at the corner of Park and Allen streets in the "King Street Corridor", a high density area of uptown Waterloo, close to the border with downtown Kitchener. The location is within the City of Waterloo designated Primary Node for transit, is well served by bus routes, and within a short walking distance to three stations on the Kitchener-Waterloo RapidTransit LRT which will be in operation as of 2017.[16]

(b) Although the City's Zoning By-law 1108 sets out a minimum requirement of 1.0 parking space per unit but the Special Policy at section 12.3.1 of the Official Plan allows the City to grant exemptions under section 40 of the Planning Act to allow for higher maximum densities and reduced parking requirements than permitted under the existing zoning by-law.

(c) 144 Park Street specifically received "density bonusing…as a development incentive to promote transit oriented development."

19. There are currently 22 Unsold Units but effectively only 9 uncommitted permanent parking spaces to be sold with them. It appears that two of those units were from two units which had previously been sold without any parking but upon which the purchasers defaulted and are now available for sale.

20. It is clear that 144 Park's marketing plan appears to have always been, as the planner, Mr. Pidgeon, calls it, to "unbundle" parking – i.e. to give each unit purchaser a choice as to whether to purchase zero, one or two parking units. Indeed, a Transportation Impact Study on 144 Park –

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[16] Pidgeon Affidavit, *supra* note 2 at paras 4-6

Tower 2 from December 2011 encourages the use of unbundled parking.[17] In addition to automobile parking, there are 89 indoor bicycle parking spaces at 144 Park, or about one for 60% of the units in the building.[18]

The Market for the Unsold Units

21. The Trustee has obtained an opinion from Mint Realty to the effect that it will be nearly impossible to sell the Unsold Units without at least one parking spot.

22. This is inconsistent with the November 2014 appraisal from a third party obtained by 144 Park that indicated the (at the time) 20 remaining units had "substantial value".[19]

23. It is also inconsistent with the apparent views of developers and the local municipalities, who are moving forward on and approving projects with unbundled parking. As Mr. Pidgeon notes, 144 Park's unbundling is consistent with recent other developments in the high density King Street Corridor. He describes sales of units with no parking in those developments (representing approximately 7.5% of total sales).[20]

24. Mint itself, as the broker for the 155 Caroline development, now suggests that that adjacent development will likely proceed under new developers following a purchase transaction that is set to close by the end of next week. Mint's expectation is that there will be parking available in that development for purchasers in 144.

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[17] Pidgeon Affidavit, *supra* note 2at para 10
[18] Pdigeon Affidavit, *supra* note 2 at paras 11-12
[19] Puklicz Affidavit, *supra* note 9 at para 37
[20] Pidgeon Affidavit, *supra* note 2 at para 16

The Trustee's Mandate

25. The Trustee's mandate, as set out in the initial Appointment Order required the Trustee to manage the property, complete the sale process, register the condominium declaration, and operate the Condominium Corporation in accordance with the *Condominium Act*.[21]

26. The Affidavit of George Puklicz sworn in support of the Application makes clear that 144 Park sought the appointment a Trustee for the benefit of all parties, not just the secured debtholders. In particular, Mr. Puklicz requests that an Order be made to:

(b) allow the trustee to close the sale of the 129 sold units; and

(c) permit the purchasers of all units to obtain vesting orders from the Court, ensuring clear title to their units free from all mortgages, construction lien claims and other encumbrances[22]

27. The secured creditors consented, or at least did not oppose the appointment of a Trustee to fulfill this mandate.[23] MarshallZehr and Laurentian were involved with on-going discussions between 144 Park Ltd. and Collins Barrow prior to the latter's appointment as Trustee.[24] MarshallZehr agreed and was granted court approval to provide the Trustee with further loans in order to complete and close the pre-sale units and market the unsold units.[25]

28. On August 5, 2015, after closing 66 of the pre-sale agreements, the Trustee made an interim distribution of $14 million to its first mortgagee Laurentian Bank of Canada, leaving

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[21] Order of Justice Penny dated January 22, 2015, Trustee Record, Tab 2A
[22] Puklicz Affidavit, *supra* note 9 at para 55
[23] Puklicz Affidavit, *supra* note 9 at para 56
[24] Puklicz Affidavit, *supra* note 9 at para 51
[25] Puklicz Affidavit, *supra* note 9 at para 53; First Report of the Trustee, *supra* note 6 at para 3

approximately $25 million outstanding with 65% of the units still waiting for closing. The Trustee also retained $5.4 million for the construction lien claims process, representing 125% of the total outstanding claims.[26]

Opposition to this Motion

29. As of October 15, 2015, several purchasers of units with two parking spots (the "Respondents") have filed Notices of Appearance and posed written interrogatories in response to the Trustee's Motion.[27] There are a total of thirteen transactions at risk of termination, representing approximately 9% of the total units.[28]

30. The Trustee provided the Respondents with written responses to their interrogatories.[29] The Trustee has also provided the valuation tables provided by Mint Realty in support of their opinion that the units will be difficult to sell and, if sold, will command far higher prices if parking units are included.[30]

31. The Trustee refused to provide an opinion regarding the valuation of the Respondent's units upon re-sale, and referred to the unsold unit appraisals as a reference point.[31] The Trustee confirmed that it would likely be seeking a motion to retain Mint Realty to market units after the termination of the APS.[32]

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[26] Order of Justice Newbould dated August 5, 2015
[27] Supplement to the Fourth Report of the Trustee ("Trustee Supplemental Record") at paras 4-10, Tab 1; Duncan Linton LLP Letter dated September 30, 2015, Trustee Supplemental Record, Tab A; Lenczner Slaght Letter dated October 2, 2015, Trustee Supplemental Record, Tab B; Oliver Romaniuk Letter dated October 6, 2015, Trustee Supplemental Record, Tab D; Duncan Linton LLP Letter dated October 9, 2015, Trustee Supplemental Record, Tab E
[28] Trustee's Chart re Answers at Question 26, Trustee Supplementary Record, Tab C
[29] Trustee's Chart re Answers, Trustee Supplemental Record, Tabs C and F
[30] Appendix "A" to Trustee's Chart re Answers, Trustee Supplemental Record, Tab C
[31] Trustee's Chart re Answers at Question 11, *supra* note 26
[32] Trustee's Chart re Answers at Question 12, *supra* note 26

PART III - ISSUES

32. Should the Court grant the Trustee the power to disclaim APS' like that of Mr. Seegmiller?

PART IV - LAW AND ARGUMENT

33. Mr. Seegmiller opposes the relief sought by the Trustee on the four broad grounds identified above.

The Narrow Scope for a Trustee to Disclaim Contracts

34. The Appointment Order grants the Trustee the powers of a receiver and manager, pursuant to the *Construction Lien Act*.[33] In general, a receiver-manger does have the authority to disclaim contracts, but only subject to court supervision.[34]

35. In determining whether to approve a request like that by the Trustee here, the Court must keep in mind the following principles, as reflected in the authorities relied on by the Trustee:

(a) A court-appointed receiver and manager owes a duty to both secured and unsecured creditors;[35]

(b) Both the Court and the Receiver must take into account equitable considerations of all stakeholders;[36]

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[33] CLA, s. 68(2); Appointment Order, para. 3(a).
[34] *Bennett on Receiverships*, p. 341, Trustee's Authorities, Tab 2.
[35] *Bennett on Receiverships*, p. 342, Trustee's Authorities, Tab 2, citing *Re Newdigate Colliery Co.*, [1912] 1 Ch. 468 (C.A.), Factum of William Seegmiller, Schedule C
[36] *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 at paras. 31-32, Trustee's Authorities, Tab 6; *Re Jade-Kennedy Development Corporation*, Endorsement, June 4, 2015 at para. 5 (Ont. Sup. Ct. J. Comm. List), Trustee's Authorities, Tab 7.

(c) A receiver and manager cannot arbitrarily terminate a contract and any decision to do so must be done in a fair and proper manner;[37] and

(d) Mere increased profits that could be generated by allowing a receiver to break a debtor's contracts are not a sufficient reason to grant the receiver that power.[38]

36. Court-appointed receiver-managers are thus different from a private receiver, such as one appointed by a mortgagee under the terms of a mortgage.[39] In a private receivership, the receiver has no personal obligation to perform a debtor's contracts, but in failing to do so may expose the debtor to legal liability.

37. The Trustee relies on section 16 of Mr. Seegmiller's APS, which provides that "The Purchaser covenants and agrees that his Agreement is subordinate and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time …"[40] It cites *Firm Capital* as a case in which the Court, relying on such a provision, granted a Receiver over a condominium the authority to disclaim contracts for sale of units and concluded that the position of the secured lender "takes legal priority over the interests of the purchasers".[41]

38. However, *Firm Capital* concerned a Receiver appointed by a secured creditor who used the receivership as a means to effectively enforce on its security. The Receiver in that case sought and was granted the specific power to disclaim APS' for condominium units that had not yet been registered in order to explore the possibility of selling the property as a whole.

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[37] *Bennett on Receiverships*, p. 341, Trustee's Authorities, Tab 2; *Re Jade-Kennedy* at para. 4, Trustee's Authorities, Tab 7.
[38] *Ibid.*
[39] Bennett on Receiverships, p. 342, Trustee's Authorities, Tab 2
[40] APS, *supra* note 3 at s 15
[41] *Firm Capital*, paras. 25, 27

39. In balancing the equities in the present case, the Court must consider that 144 Park's mortgagees have declined to exercise remedies available to them under their mortgages, preferring instead to support the debtor's request for the appointment of a receiver-manager with the express mandate to register the condominium and close on the sale of units.

40. Even if the secured creditors had appointed the Trustee themselves, they would not be entitled to demand the cancellation of existing APS. In *Armadale Properties Ltd v 700 King Stree*, Justice Lax refused to allow a Trustee appointed under the *Construction Lien Act* to terminate an existing APS with a commercial condominium purchaser and instead directed that the Trustee close the APD and convey clear title to the purchaser. Justice Law relied on s. 75 of the *Bankruptcy and Insolvency Act*, citing *Re Triangle Lumber & Supply Co.* for the proposition that:

> An agreement for sale in favour of a bona fide purchaser or mortgagee for valuable consideration is valid and effectual as if no receiving order had been made. It would therefore appear that the Trustee is bound by the agreement and may not disclaim it.[42]

41. The condominium has now been registered. Most unit transactions have closed. The secured lenders, already having supported the registration of the condominium units, should not now be permitted to reopen the mandate of the Trusteeship because they no longer like the economics of the Trustee's mandate.

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[42] *Armadale Properties Ltd. v 700 King Street (1997) Ltd.*, 2001 CarswellOnt 1567 (Sup Ct) at para 11, Schedule D to the Factum of William Seegmiller

144 Park's lenders must have known that parking would be "unbundled"

42. As detailed above, it was always intended that 144 Park would be developed with "unbundled" parking and should have been expected that this would result in some units not having at least one permanent parking space.

43. The secured lenders must have known of this strategy and any attendant risks. They had the power to review and approve design criteria, plans, specifications and required sufficient pre-sales before advancing funds.

44. Whatever the cost to the development from selling Unsold Units without any parking, there is no cogent reason why the Court must now protect secured lenders from a shortfall in recovery from which they could have protected themselves by, for instance, insisting on at least one parking unit being "bundled" with each unit.

45. The equities particularly favour Mr. Seegmiller, whose APS was executed in 2009 long before the secured lenders' mortgages registered in 2011 and 2012.

There is a market for the Unsold Units

46. The Trustee suggests that Unsold Units will be impossible or at least difficult to sell. This is speculative and based solely on the analysis of Mint Realty, a party with a distinct interest in increasing the number of units available for sale (and for it to make a commission on as the Trustee's broker).

47. Mint's opinion can also be discounted because it fails to reflect the trend in development of new condominiums in the Kitchener-Waterloo area. As described above, many developments in the "King Street Corridor" where 144 King is located have similarly "unbundled" parking.

48. Other developments in the central Kitchener-Waterloo area have utilized the unbundled model successfully. In the face of this evidence, Mint Realty's bald assertions of an inability to sell the Unsold Units without parking is entirely unreliable.

The relief sought would grant an unfair windfall to 144 Park's lenders

49. Despite Mint Realty's opinion that the Unsold Units cannot be sold without parking, its report does make some effort to quantify the impact of the value of a single parking space on the market value of the Unsold Units. The Trustee relies on this analysis to suggest that, absent the relief sought, the Secured Creditors (and the Construction Lien Claimants) will increase their shortfall by some $3.7 million.

50. Putting aside the obvious lack of independence behind Mint's opinion, there are two fundamental inequities reflected in the Trustee's position.

51. First, Mint's analysis at least makes clear that a single parking spot has a significant value far in excess of the $33,900 currently being offered to unit purchasers.

52. Townhouse 106 is illustrative. It is an Unsold Unit adjacent to and very similar to that purchased by Mr. Seegmiller. Mint suggests that the addition of one parking space to Unit 106 increases its market value by $238,900 (or 60%). Although not express, Mint would surely ascribe a similar value to the one parking space that the Trustee proposes to take away from Mr. Seegmiller, and particularly based on Mint's apparent view that larger units like that of Mr. Seegmiller's require two parking units to be saleable. According to Mint, even a single parking spot in the smallest Unsold Unit (Unit 503 of only 690 sq. ft.) impacts the market value of that unit by $100,746.

53. If the Trustee obtains the relief sought and successfully uses the threat of termination to compel purchasers to give up one parking unit, the secured creditors will gain a significant asset at a relatively modest cost.

54. The second obvious inequity occurs if Mr. Seegmiller refuses to capitulate to the demands of the Trustee. Mint suggests that it will market Unit 106 with one parking spot at a price of $634,990. One can expect that the Trustee, through Mint, will re-market Mr. Seegmiller's unit (now with one parking spot) for a similar price as that of Unit 106. That is a price $18,990 more than what Mr. Seegmiller paid for his unit with two parking spots six years ago.

55. Further, Mr. Seegmiller advanced a significant deposit six years ago and, even if it is returned, he will incur significant carrying and other out of pocket expenses related to his purchase if his APS is cancelled. Mr. Seegmiller invested these monies and bore the risk of a drop in the value of his condominium. The creditors of 144 Park should not be entitled to, at this late stage, use the powers of the Trustee, an officer of the Court, to capture for themselves any appreciation that has occurred in respect of Mr. Seegmiller's unit.

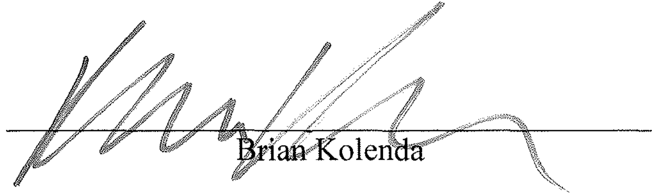
PART V - ORDER REQUESTED

56. Mr. Seegmiller respectfully requests an order:

(a) Dismissing the Trustee's motion; and,

(b) Granting Mr. Seegmiller his costs of this motion;

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of October, 2015.



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TAB A

SCHEDULE A

1. *Newdegate v The Company, [1912] 1 Ch 468*

2. *Armadale Properties Ltd v 700 King Street (1997) Ltd., 2001 CarswellOnt 1567*

TAB B

SCHEDULE B

Bankruptcy and Insolvency Act, RSC 1985, c B-3 at section 75:

> Despite anything in this Act, a deed, transfer, agreement for sale, mortgage, charge or hypothec made to or in favour of a bona fide purchaser, mortgagee or hypothecary creditor for adequate valuable consideration and covering any real property or immovable affected by a bankruptcy order or an assignment under this Act is valid and effectual according to the tenor of the deed, transfer, agreement for sale, mortgage, charge or hypothec and according to the laws of the province in which the property is situated as fully and effectually and to all intents and purposes as if no bankruptcy order or assignment had been made under this Act, unless the bankruptcy order or assignment, or notice of the order or assignment, or caution, has been registered against the property in the proper office prior to the registration of the deed, transfer, agreement for sale, mortgage, charge or hypothec in accordance with the laws of the province in which the property is situated.

Construction Lien Act, RSO 1990, c C.30 at section 68:

> (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate. R.S.O. 1990, c. C.30, s. 68 (1).
>
> (2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,
>
> > (a) act as a receiver and manager and, subject to the Planning Act and the approval of the court, mortgage, sell or lease the premises or any part thereof;
> >
> > (b) complete or partially complete the improvement;
> >
> > (c) take appropriate steps for the preservation of the premises; and
> >
> > (d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.
>
> (3) Subject to subsection 78 (7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2).
>
> (4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance that the court directs.
>
> (5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.

TAB C

C. A.
1912
Jan. 26.

In re NEWDIGATE COLLIERY, LIMITED.
NEWDEGATE v. THE COMPANY.

[1912 N. 22.]

Company—Practice—Debenture-holders' Action—Receiver and Manager—Duties—Repudiation of Company's Contracts.

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

Where therefore a receiver and manager of the undertaking and property of a colliery company had been appointed in a debenture-holders' action against the company, the Court declined to authorize him to repudiate the company's forward contracts for the supply of coal, notwithstanding that since those contracts were made the price of coal had risen, and if the contracts were disregarded a much larger sum would be obtained for the coal.

Decision of Eve J. affirmed.

Appeal from a decision of Eve J. refusing to direct the receiver and manager of the company to disregard certain forward contracts for the supply of coal which previously to the appointment of the receiver and manager had been entered into by the company.

The company was incorporated in 1904, with a capital of 150,000*l.*, to work mines leased to it by the plaintiff. The company had since issued three series of debentures secured upon its undertaking and property present and future, including its uncalled capital, namely, 100,000*l.* 5 per cent. first mortgage debentures, 11,500*l.* 7 per cent. second mortgage debentures, and 20,000*l.* 5 per cent. third mortgage debentures. In December, 1911, the interest on the debentures was twelve months in arrear, and the plaintiff, who was the holder of a large number of the first mortgage debentures and of the whole of the third mortgage debentures, on January 8, 1912, commenced an ordinary debenture-holders' action on behalf of himself and the other first debenture-holders to enforce their security against the company and the representatives of the second debenture-holders. On January 20, 1912, he obtained an interlocutory order for the

appointment of J. T. Browne as receiver and manager of the undertaking and property of the company. When he entered into possession of the colliery the receiver and manager found that in consequence of faults in the coal seams the output had dropped from 6000 to 4600 tons per week, the whole of which output would be required to satisfy the existing forward contracts, about eighty in number, which had been entered into by the company at a time when the price of coal was lower than it was at present. There was evidence that if the receiver and manager were to disregard these contracts he could sell the coal at an increased price of 1*s.* per ton more all round, and so realize an extra profit of 200*l.* a week. There was also evidence that having regard to the possibility of a strike in the near future it was necessary to reserve some of the output for keeping the colliery pumped free from water during any such strike.

On January 24, 1912, the plaintiff took out a summons asking that the receiver and manager might be at liberty to disregard the company's forward contracts for the sale of coal. The summons was heard in chambers by Eve J., who refused the application, but treated the matter as having been heard in Court and gave leave to appeal forthwith.

The plaintiff appealed.

Buckmaster, K.C., and *W. R. Sheldon*, for the appellant. The receiver and manager desires to obtain the direction of the Court with regard to the forward contracts which the company has entered into. In the interests of the debenture-holders he wishes to disregard them. They have been broken already by the appointment of the receiver, and the receiver is not bound by them unless he elects to adopt them. He desires to have the authority of the Court to disregard them.

[BUCKLEY L.J. The question is, ought the Court by its officer to refuse to carry out the company's contracts ?]

The position is really that of mortgagor and mortgagee of a business.

[BUCKLEY L.J. The Court has by its officer at the instance of the mortgagees taken charge of the mortgaged business. Ought not the Court to act as an honourable man would ?]

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1912
NEWDIGATE COLLIERY, LIMITED, *In re.* NEWDEGATE *v.* THE COMPANY.

These contracts can only be enforced as against the company. The receiver and manager seeks to know whether he can disregard them without incurring any liability. The effect of the appointment of a receiver and manager upon existing contracts was considered in *Reid* v. *Explosives Co.* (1)

[BUCKLEY L.J. The Court is asked to sanction the doing of something by its officer which will in effect benefit the mortgagees at the expense perhaps of the unsecured creditors.]

The appointment of the receiver relieves the mortgagee from the burden of the position of mortgagee in possession.

[COZENS-HARDY M.R. Is the receiver and manager of a licensed house at liberty to disregard an existing tie on the house?]

It is submitted that he is. The receiver and manager is not the agent of the company and need only have regard to the interests of the debenture-holders: *Burt, Boulton & Hayward* v. *Bull.* (2)

[BUCKLEY L.J. He is not the agent of the company, but he is appointed to carry on its business, and he is acting for all parties under the direction of the Court.

COZENS-HARDY M.R. "The receiver is not the particular agent of any party; he is the officer of the Court": Kerr on Receivers, 5th ed. p. 163.]

The receiver of property burdened with onerous leases constantly comes to the Court for permission to give up possession under the leases and leave the mortgagor liable to the obligations of the leases. Where a receiver and manager is appointed on behalf of the mortgagee of property consisting of licensed houses the Court would give the receiver and manager leave to give up a particular house which was not profitable.

[BUCKLEY L.J. The contention is that the mortgagee of an undertaking may seize the assets and refuse to discharge the debts. I had occasion to consider the rights of debenture-holders having a floating charge on the property and undertaking of the company in *In re London Pressed Hinge Co.* (3)]

In *Husey* v. *London Electric Supply Corporation* (4) the receiver appointed on behalf of debenture-holders of an hotel company

(1) (1887) 19 Q. B. D. 264, 267.
(2) [1895] 1 Q. B. 276.
(3) [1905] 1 Ch. 576.
(4) [1902] 1 Ch. 411.

was held to be at liberty to adopt or reject an agreement made by the company for the supply of electric light.

[BUCKLEY L.J. He was not a manager. That case does not apply here.]

See also *Forster* v. *Nixon's Navigation Co.* (1)

It is the duty of the receiver to safeguard the mortgaged property alone. The unsecured creditors will not get anything in any event. If the receiver and manager is allowed to break these contracts the security will be improved.

E. E. H. Brydges, for the company. There is no precedent for such an order as is sought for upon this application. The receiver was appointed to manage the whole of the business. He is not entitled to seize the assets and disregard the liabilities. The course proposed by him would be detrimental to the company by destroying its credit. There is a wide distinction between this case and that of an ordinary mortgagee of real estate. Here the debenture-holders have a floating charge on the whole undertaking, and the receiver is appointed to manage the whole business. The case of a mortgage of leaseholds is also very different, because there the lessor has the right of re-entry. The receiver in this case really seeks to marshal the assets in favour of the debenture-holders. Such a precedent as this might lead to collusion in other cases.

Buckmaster, K.C., in reply. Here the debentures cover the whole of the assets, so that there can be nothing for the unsecured creditors. If the security proves insufficient, then the creditors cannot be hurt. If there should be a surplus, then the creditors would reap the benefit. Supposing the company were liable on bills of exchange, in the absence of special circumstances the receiver would not be justified in meeting the bills out of the assets. That is very like this case. The receiver ought not to pay unsecured debts in order to maintain the credit of the company. The Court in administering the mortgaged property seeks to preserve it without regard to the consequences to the mortgagor or his unsecured creditors.

COZENS-HARDY M.R. This appeal raises a question of importance and novelty. Certainly I am not aware of any precedent for

(1) (1906) 23 Times L. R. 138.

C. A. 1912 NEWDIGATE COLLIERY, LIMITED, *In re.* NEWDEGATE *v.* THE COMPANY. Cozens-Hardy M.R.

such an order as the plaintiff is seeking to obtain. It is desirable that we should dispose of the case without delay, otherwise I should have liked to take a little time to express my judgment in more considered terms.

The jurisdiction of the Court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency. Take the case of an individual mortgagee of a licensed public-house. If he is merely a mortgagee of the house he has no right to interfere with the goodwill of the business except so far as he may do so by taking possession of the house. He cannot get possession of the stock in trade, or outstanding book debts, or anything relating to the business which might be obtained by the appointment of a receiver and manager. Similarly if he elects simply to take the appointment of a receiver of the property he obtains possession of the house through the receiver, and being in possession can do exactly what he likes with it, but he has no interest in the goodwill and he has no right to the stock in trade or book debts. If, however, he elects to take an order for the appointment of a receiver and manager of the licensed house,—and it has been settled in comparatively recent years that he can do that—then, I think, he is in a different position. If he elects to obtain the appointment of a receiver and manager of the business including the stock in trade and book debts, it is just as much the duty and the business of the receiver and manager to protect the goodwill and to guard against the destruction of the business or injury to the goodwill, as it is the duty of the receiver of mortgaged property, not being manager also, to take care that the property is preserved so far as it reasonably may be for the benefit of all whom it may concern—the mortgagees and the mortgagor. There are really two separate properties comprised in a security of this kind—first, the property of which a receiver only is appointed, and secondly, the goodwill of the business of which a manager is appointed. Now it is said here that if an individual mortgagee

had taken possession of this colliery he would not have been bound by the company's contracts; he would have taken possession of the unworked coal at his own risk as mortgagee in possession, or if a receiver had been appointed on his behalf the receiver would have sold the coal as he liked. The mortgagee would have said, "I have nothing to do with the goodwill of this business, I have no charge upon it; I do not care whether it is damaged or not, and it does not concern me in the least"; but if he elects to have a manager appointed and takes upon himself through the manager the duty of carrying on the business, it is his duty to do nothing which will destroy, or prejudicially damage, the goodwill of the business at a time when it is not, and cannot be, apparent that the mortgagor may not have a real interest in the equity of redemption both of the colliery itself and of the business.

But we are asked to say, in circumstances which I think I can state in a sentence, that the receiver and manager has a wider right. This is a colliery in which there are forward contracts going to the end of this year, contracts entered into at a time when coal was at a lower price than it is now, which it is said will practically exhaust the full produce of the colliery. Coal has now risen considerably in price, and the colliery, apart from the business, would be no doubt more valuable if it could be worked without regard to these forward contracts, for a larger figure could be obtained for the coal. But if the mortgagee were allowed to abandon these forward contracts he would practically be discontinuing the company's business, because these contracts substantially take the whole of the output from the colliery. Is it fair, is it right, or is it reasonable that the mortgagee who has chosen not merely to act as mortgagee in possession of the colliery, but to take possession of the goodwill and book debts of the business also, should be entitled to say "I will discontinue the business of which I have thought fit to appoint a manager, and I do it because I think there will not be any surplus coming to the mortgagor and because it will be an advantage, not in respect of the goodwill of the business, but in respect of my position as mortgagee of the colliery"? In my opinion that is not the true view. There may be circumstances in which the Court might hold on

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the application of the receiver and manager that it was desirable, or essential, for the purpose both of the colliery and the business that a certain amount of money should be raised, and might make an order in the presence of all parties, even at this early stage of the action, directing that it should be raised in advance of everybody, and repaid out of money realized by a sale of the coal; but I am not prepared to say that it can be right to do what we are asked to do here, namely, to make a general order allowing the receiver and manager to break these contracts simply because it would be very beneficial to the mortgagee that that should be done. I do not quite like the phrase "break these contracts," because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

I am anxious to deal with this matter in the general way in which it has been raised, namely, as an application that the receiver and manager may be at liberty to disregard practically all the contracts of this business and start entirely afresh. That is what it really comes to. To accede to such an application without the clearest possible evidence that there is, and can be, no possibility of the mortgagor ever having any substantial interest in the assets of this company would be very wrong. That was the view taken by the learned judge in the Court below. He said it was an entirely novel application for which no precedent could be found, and that it seemed to him, as it does to me, to be an application for leave for the receiver and manager to do something inconsistent with his duties, seeing that he was at least as much under an obligation to preserve the goodwill of this business from injury or destruction as to prevent

the mine itself from being damaged by water or otherwise. What I have said will not in any way prevent the receiver and manager making a particular application under special circumstances dealing with a particular contract, but to ask for this general authority is altogether wrong. I think the view taken by Eve J. was quite right.

FLETCHER MOULTON L.J. I am of the same opinion. I also wish to answer the question before us in the general form in which it is asked. It may well be that in this case a special application of an analogous character might be made to which the Court might feel able to accede; but at present we are simply asked to allow the receiver and manager to proceed on the principle of declining to fulfil contracts which at the present moment are onerous. In my opinion the Court would be doing very wrong if it gave permission for anything of that kind. Here the mortgagees have as part of their security the assets of the company, and, supposing they contented themselves with enforcing their security over these assets, no question of this kind could arise; they would have a perfect right to take the coal and to sell it, as it is not specifically appropriated to any outside customers. But part of their security is also the undertaking of the company, and they have obtained the appointment of a receiver who is also to manage this undertaking. They have obtained this appointment by what is clearly an interlocutory proceeding, although perhaps on account of the peculiarities of the case it may continue until there is an actual sale of the property and business. That they have a right to do, because the undertaking of the company is part of their security. The goodwill of the company is therefore part of that which is charged to them, and the receiver and manager has, in my opinion, to do his best to preserve the whole of the property that is put in his care. It is not his duty to do what would ultimately sacrifice the value of the undertaking and to consider it a sufficient justification that by so doing he would obtain somewhat more money from the sale of the specific assets of the company. I certainly decline to be a party to authorizing in general any such conduct. In my opinion it might well ruin the whole reputation of this company and destroy

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the value of the undertaking from the point of view of the goodwill, and I cannot shut out from my mind that by breaking the contracts the receiver and manager would not only do damage to third parties, but would increase the amount of the company's unsecured liabilities. It seems to me that the receiver and manager ought to do his best to preserve the property as a whole and not to increase the value of one part of it at the cost of another; and this is especially the case where he has been appointed early in the proceedings. For these reasons I think that the learned judge was right in refusing to give the authority requested, and that this appeal must be dismissed.

BUCKLEY L.J. The defendant company is a company working a colliery in Warwickshire, and in connection with its business it has entered into contracts for the sale of coal extending over various periods. The longest of them will extend to December in this year. It has issued debentures in three series to the aggregate of 131,500*l.*, and they are debentures effecting equitable charges upon the whole undertaking of the company and its property, present and future, including uncalled capital. On January 8 a writ was issued in a representative action properly constituted to enforce the security of the debenture-holders, and on January 20 an order was made for the appointment of a receiver and manager. On January 24 the receiver and manager took out a summons asking that he might be at liberty to disregard the contracts made by the defendant company for the sale of coal; he wishes to be directed to proceed so as not to fulfil the contracts entered into by the company for forward delivery of coal. It appears that the weekly output of the colliery was about 6000 tons a week, but, owing to physical difficulties over which the company has no control, it dropped to 4600 tons a week, and the evidence is to the effect that in substance the forward contracts would exhaust 4600 tons a week. As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might

sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all. The receiver and manager is a person who under an order of the Court has been put in a position of duty and responsibility as regards the management and carrying on of this business, and has standing behind him—I do not know what word to use that will not create a misapprehension, but I will call them "constituents"—the persons to whom he is responsible in the matter, namely, the mortgagees and the mortgagor, being the persons entitled respectively to the mortgage and the equity of redemption. If we were to accede to the application which is made to us, and to allow the receiver and manager to sell the coal at an enhanced price, the result would be that the enhanced price would fall within the security of the mortgagees and they would have the benefit of it; but, on the other hand, there would be created in favour of the persons who had originally contracted to purchase the coal a right to damages against the mortgagor, the company, with the result that there would be large sums of damages owing. Thus, while the increased value of the coal would be thrown into the security for the benefit of the mortgagees, the surplus assets of the mortgagor, whatever they might be, would be affected in the sense that they would be the subject of claims not only by the present unsecured creditors, but also by the persons who had thus become entitled to damages for breach of contract. A receiver and manager owes a duty to two classes of persons. The order asked for would have the effect of allowing him to do an act which would benefit one class to the injury of the other. It has been truly said that in the case of a legal mortgage the legal mortgagee can take possession if he choose of the mortgaged property, and being in possession can say "I have nothing to do with the mortgagor's contracts. I shall deal with this property as seems to me most to my advantage." No doubt that would be so, but he would be a legal mortgagee in possession, with both the advantages and the disadvantages of that position. This appellant

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is not in that position. He is an equitable mortgagee who has obtained an order of the Court under which its officer takes possession of assets in which the mortgagee and mortgagor are both interested, with the duty and responsibility of dealing with them fairly in the interest of both parties. It seems to me that an order of the kind we are asked to make would be an order in the interest of one of these parties in disregard of the interest of the other.

Then it has been argued, and it is true, that primarily and principally the duty of the receiver is to have regard to what will benefit the mortgaged property and nothing besides the mortgaged property; this property goes to the mortgagee first, and to the owner of the equity of redemption afterwards; and it is said that so far as the mortgaged property is concerned the order asked for will increase its value because the coal now in the bowels of the earth will be sold at an enhanced price. That is no doubt true, but the security of the mortgagee is on the undertaking and all the property present and future, including the uncalled capital, of this company. So that the property for which the receiver and manager is responsible includes this business and undertaking, and it is his duty to do, and our business to see that he does, everything reasonable and right for the protection of the property as an undertaking for the benefit of all the persons interested in it. The order asked for is an order directing the receiver and manager to disregard the interests of one of his constituents, the mortgagor, in order to benefit another of his constituents, namely, the mortgagee. It seems to me that such an order is necessarily wrong. No precedent has been cited for such an order, I have never heard of such an application before, and it seems to me in principle to be wrong. It is the duty of the judge who has taken control of the assets to deal with those assets with due regard to the interests of everybody concerned, and not to advance the interests of one of the persons concerned at the expense of the other. For these reasons I think the order was rightly refused by Eve J.

Solicitors: *Lowe & Co.; Cooper & Co., for Davies, Sanders & Swanwick, Chesterfield.*

G. A. S.

TAB D

2001 CarswellOnt 1567
Ontario Superior Court of Justice [Commercial List]

Armadale Properties Ltd. v. 700 King Street (1997) Ltd.

2001 CarswellOnt 1567, [2001] O.J. No. 1727, [2001] O.T.C. 320, 105 A.C.W.S. (3d) 19, 25 C.B.R. (4th) 198

Re: Armadale Properties Limited and 700 King Street (1997) Ltd. and 140085 Ontario Limited

Lax J.

Heard: May 2, 2001
Judgment: May 7, 2001
Docket: 01-CL-4016

Counsel: *R. English*, for Trustee
R. Shour, for 1333203 Ontario Limited

Subject: Insolvency

Headnote

Bankruptcy --- Administration of estate — Trustee fulfilling contracts of bankrupt

RC was sole officer and director of condominium development corporation and president of project management firm, PH — Purchaser entered into agreement to purchase condominium unit, with PH and development corporation as vendors — RC directed purchaser to pay entire purchase price by way of deposit payable to PH — Purchaser did so and spent $80,000 on moving costs and improvements — Neither RC nor PH ever forwarded funds to development corporation — Trustee in bankruptcy was appointed trustee and receiver-manager of development corporation — Trustee brought motion for directions on whether to proceed to close sale to purchaser when transaction would be of no benefit to estate — Trustee was directed to complete transaction — RC had actual and apparent authority to enter into agreement of purchase and sale and to direct manner in which funds were to be paid — Fact that RC did not pay funds to development corporation could not affect corporation's obligations under contract — Section 75 of Bankruptcy and Insolvency Act prevents trustee from disclaiming contract entered into by bankrupt with bona fide purchaser for value prior to bankruptcy — Even if s. 75 did not apply, trustee had no right to terminate property rights which had passed under contract prior to bankruptcy — Although PH had no beneficial interest in unit sold, it was bankrupt that gave RC apparent authority to act as he did — Trustee, as officer of court, must act fairly to all parties with interest in estate, including purchaser — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Table of Authorities

Cases considered by *Lax J.*:

Bakermaster Foods Ltd., Re (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.) — distinguished

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

Triangle Lumber & Supply Co., Re (1978), 21 O.R. (2d) 221, 27 C.B.R. (N.S.) 317, 90 D.L.R. (3d) 152 (Ont. H.C.) — followed

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 75 — considered

MOTION by trustee for court's direction on whether or not to perform agreement where estate would receive no benefit from transaction.

Endorsement. ***Lax J.*:**

1 This motion is brought by Deloitte & Touche Inc. in its capacity as Construction Lien Trustee and in its capacity as Trustee in Bankruptcy. It raises the issue whether the Trustee should perform an agreement for the purchase and sale of land where the estate will receive no benefit from the transaction. The facts are unique.

2 700 King Street (1997) Ltd. was incorporated to convert 700 King Street West to mixed residential and commercial condominium use. Richard Crenian was its sole officer and director. He was also president and a 50% owner of Peregrine Hunter, a real estate developer and the project manager for 700 King. Armadale Properties Limited was a principal investor and 50% owner of the King Street project.

3 On February 9, 2001, Armadale obtained an order appointing Deloitte & Touche Inc. as Trustee and Receiver and Manager of 700 King and of 140085 Ontario Limited, a company which held title to the remaining real property assets of 700 King. On February 19, 2001, 700 King was assigned into bankruptcy and Deloitte & Touche Inc. was also appointed Trustee in Bankruptcy.

4 Yotam Goldschlager was directly or indirectly a purchaser of three residential units and one commercial unit at 700 King. The residential units were purchased for members of his family. The commercial unit, Unit 8, was purchased for his business. With respect to each of these purchases, Goldschlager dealt exclusively with Crenian, who had apparent and actual authority to enter into the agreements of purchase and sale on behalf of 700 King. This motion concerns the purchase of Unit 8.

5 On March 20, 1999, Goldschlager, through a numbered company as purchaser, entered into an Agreement of Purchase and Sale with Peregrine Homes Ltd. and 700 King as vendors. The purchase price provided in the Agreement of Purchase and Sale was $185,000 and by Amending Agreement dated January 5, 2000 was increased to $206,082. The uncontradicted evidence of Goldschlager is that initially, he was only prepared to pay $185,000 for Unit 8 and Crenian was only willing to sell it to him at that price if he paid a deposit of $100,000. Goldschlager agreed to this. Goldschlager's company provided cheques for $100,000 in May 1999, $22,557.74 in June 2000 (in accordance with the Amending Agreement) and $85,000 (the balance of the purchase price) in December 2000, with the result that the entire purchase price was paid by way of deposit. At the request of Crenian, the cheques were made payable to Peregrine Homes Ltd. In July 2000, Goldschlager moved his business from its former premises to Unit 8 and spent about $80,000 in improvements and moving costs.

6 The residential units closed on January 5, 2001. The transfer date for Unit 8 was scheduled for January 15, 2001 and postponed to February 7, 2001, but did not take place. The Receivership and Bankruptcy followed shortly after.

7 After its appointment, the Trustee proceeded to close sales of the residential and commercial units that had been sold. When it reviewed the files for Unit 8, it became apparent that all of the purchase monies for this unit had been paid by way of deposit to Peregrine Homes Limited, which was a personal company of Crenian, and had never been received by 700 King. There are no further funds to be delivered to the Construction Lien Trustee or to the Trustee in Bankruptcy upon the closing of the transaction. There is therefore no benefit to the creditors of the bankrupt in completing the transaction. The Trustee now applies for the advice and direction of the court.

8 The Trustee advances two arguments. First, it submits that the manner of payment is an essential term of a contract and that payment to one of two joint vendors in the absence of a written direction relieves the other contracting party from performing.

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Second, it submits that as the Trustee and the court must protect the assets of the estate for the benefit of the creditors, where the estate will receive no benefit, the court should direct the Trustee to disclaim the contract. In any event, as Trustee in Bankruptcy, it can only convey the bankrupt's interest, which is subject to mortgage and lien claims. Goldschlager would not accept this title. Although its powers as Construction Lien Trustee permit it to convey clear title, it questions whether it would be appropriate for the Trustee to use its lien powers in this way.

9 In my opinion, these arguments are both answered in the circumstances of this case and the Trustee should be directed to use its lien powers to convey clear title to Goldschlager in accordance with the Agreement of Purchase and Sale and consistent with the Statement of Adjustments that was prepared in anticipation of the scheduled closing.

10 As to the Trustee's first argument, I was provided with no case that stands for this proposition, but assuming this is sound law, it cannot apply in this case. The Trustee concedes that Crenian had actual authority to enter into the Agreement of Purchase and Sale and to direct the manner in which the funds were to be paid. This is precisely what occurred. Crenian determined that the funds should be paid to Peregrine Homes Ltd. and Goldschlager complied with this direction. It makes no difference that there is no written direction for payment. Crenian did not pay the funds to 700 King, but this cannot affect the performance obligations of 700 King under the contract.

11 As to the second argument, the circumstances under which a trustee can disclaim a contract entered into by a bankrupt prior to its bankruptcy have long been the subject of uncertainty: *Re Triangle Lumber & Supply Co.* (1978), 21 O.R. (2d) 221 (Ont. H.C.); *Re Erin Features No. 1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]). Assuming a trustee has this right, section 75 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B.3 prevents the Trustee from disclaiming this contract. As was noted by Saunders J. in *Re Triangle*, *supra*,:

> A reading of s.53 [now, s.75] would appear to dispose of the problem. An agreement for sale in favour of a bona fide purchaser or mortgagee for valuable consideration is valid and effectual as if no receiving order had been made. It would therefore appear that the Trustee is bound by the agreement and may not disclaim it.

12 In the event that I am wrong and section 75 does not apply, I would not allow the Trustee to disclaim this contract. It is clear that a trustee can only succeed to the rights of a bankrupt and has no higher or greater interest. A trustee cannot terminate property rights that have passed under the contract prior to the bankruptcy: *Re Triangle*, *supra*; *Re Erin Features No. 1*, *supra*. The equitable interest under this contract passed prior to the bankruptcy and Goldschlager could have enforced the transfer of title by way of specific performance. In my opinion, the property was validly conveyed and all that remained was the delivery of a deed.

13 I was referred to the decision in *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.) as contrary authority. In that case, if the Trustee had closed the transaction, there would have been a substantial deficit, which could only be made up from the funds in the estate to the prejudice of the unsecured creditors. The Trustee was directed not to close the transaction. In my view, these were exceptional circumstances, which have no application here.

14 The Trustee submitted that Goldschlager was the author of his own misfortune in providing the entire purchase monies as deposit and it is therefore he and not the creditors of 700 King who should bear this loss. In my view, if there is culpability, it does not rest with Goldschlager. He had no relationship with Crenian except as a purchaser of real estate. He has offered an explanation for providing the deposit he did. Although Peregrine Homes Ltd. had no beneficial interest in Unit 8, it was the bankrupt that gave Crenian apparent authority to act as he did. Prior to the bankruptcy, 700 King could not assert as against Goldschlager that Crenian lacked the authority to direct payment of the funds to Peregrine Homes Ltd. As the Trustee stands in the shoes of the bankrupt, it cannot now complain of the very loss to the estate that the bankrupt brought about.

15 Finally, the Trustee is an officer of the court and must act fairly to all parties with an interest in the estate. It would be dishonourable for the Trustee to disclaim this contract. I therefore find that the Trustee is bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract. The Trustee is directed to complete the transaction in its capacity as Construction Lien Trustee. It may discharge the caution

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registered on title by 1333203 Ontario Limited. The Trustee and the numbered company should have their costs out of the estate. I fix the costs of the numbered company at $2500.

Order accordingly.

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

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

Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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