Court File No.

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

BRIEF OF AUTHORITIES OF THE APPLICANT

(appointment of a trustee)
(returnable February 11, 2015)

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2.	*Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ct. J. (Gen. Div.))
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4.	Endorsement of The Honourable Mr. Justice Penny, *Application of 144 Park Ltd. For the Appointment of a Trustee Under Section 68(1) of the Construction Lien Act*, January 22, 2015, CV-15-10843-00CL
5.	*Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.*, 1991 CarswellOnt 776 (Ct. J. (Gen. Div.))

TAB 1

1998 CarswellOnt 1865
Ontario Master

Ru-Ko Inc. v. Croatia (Republic)

1998 CarswellOnt 1865, [1998] O.J. No. 1881, 38
C.L.R. (2d) 269, 68 O.T.C. 313, 79 A.C.W.S. (3d) 452

Ru-Ko Inc. and The Republic of Croatia, Joseth Mamic (also known as Josip Mamic), Ivan Mikac and Angelo Zic (also known as Andjelo Zic), Defendants

Master Beaudoin

Judgment: May 3, 1998
Docket: 97-CV-3524

Counsel: *Peter Hargadon, Q.C.*, for the Plaintiff.
D. Lynne Watt, for the Defendant, The Republic of Croatia.

Subject: Contracts; Corporate and Commercial; Estates and Trusts; Property

Table of Authorities

Cases considered by *Master Beaudoin*:

Croatia (Republic) v. Ru-Ko Inc. (1998), 133 O.R. (3d) 133 (Ont. Gen. Div.) — referred to

Royaledge Industries Inc. v. Perma-Roof Ontario Ltd. (1991), 2 O.R. (3d) 488, 44 C.L.R. 160 (Ont. Gen. Div.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30
s. 44 — considered

s. 44(1) — considered

s. 68 — considered

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s. 68(1) — considered

s. 68(2) — considered

s. 70 — considered

Foreign Missions and International Organizations Act, S.C. 1991, c. 41
s. 3 — pursuant to

Treaties considered:

Vienna Convention on Diplomatic Relations, 1961, 500 U.N.T.S. 95; C.T.S. 1966, 29
Article 1 — pursuant to

Article 22 — pursuant to

MOTION by plaintiff for order under s. 68(1) of *Construction Lien Act* appointing trustee to act as receiver and manager to assist in closing sale of property and directing said trustee to hold proceeds of sale in trust for parties to this action pending further order of court.

Master Beaudoin:

1 The plaintiff herein seeks an order under Section 68(1) of the *Construction Lien Act*, R.S.O. 1990, C.30 appointing a trustee to act as receiver and manager to assist in the closing of the sale of property in the village of Rockcliffe Park in the Regional Municipality of Ottawa-Carleton and directing the said trustee to hold the proceeds of sale in trust for the parties to this action pending further order of this court. The property in question was owned by the Defendant Republic. In November of 1994, the Plaintiff entered into a contract with the Defendant Republic to supply labour, materials and equipment to perform a construction project at the property. Between November of 1994 and August of 1997 the Plaintiff was engaged in the performance of its contract which involved expanding the existing building and creating a new building of approximately twice its previous size. The Plaintiff submitted invoices to the Defendant for a total of $493,644.93. The sum of $265,362.77 has been paid, leaving a balance due and payable of $228,282.16 plus interest. By letter dated August 6th, 1997, the Defendant Republic advised the Plaintiff that it had decided to sell the property and terminated the contract. The Plaintiff was required to remove its tools, materials and machinery and following the receipt of such the Plaintiff ceased all work on the subject property. On September 5th the Plaintiff caused a Construction Lien to be registered against the title and subsequently issued its Statement of Claim on October 17th, 1997. On the

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same date, the Plaintiff caused the certificate of action to be issued and then registered against the title to the property's instrument and number LT1082275.

2 The Defendant Republic, by notice of application issued October 7th, 1997, sought an order vacating the claim for lien on the basis that the property was immune from execution and attachment pursuant to s.3 of the *Foreign Missions and International Organizations Act*, S.C. 1991, c.41 and Articles 1 and 22 of the *Vienna Convention on Diplomatic Relations*. In his decision, now report at (1998), 133 O.R. (3d) 133 (Ont. Gen. Div.) as *Croatia (Republic) v. Ru-Ko Inc.*, Mr. Justice Chilcott concluded that the subject property was never used as a "premises of the mission" and that the special protection and immunity provided by Article 22 did not apply to the lands. He dismissed the application.

3 Subsequently, the Defendant Republic entered into an agreement of purchase and sale to sell the property with a closing date of May 1st, 1998. Their solicitor, Mr. George C. House, was retained by the Defendant Republic to act in relation to the sale of the property. The Plaintiff was contacted as to whether or not it would consent to an order under Section 44 of the *Construction Lien Act* to vacate the lien upon payment of the monies claimed into court. The Plaintiff's solicitor responded to Mr. House in a letter dated March 23rd, 1998 that he would consent on the following terms:

> My client will consent to an order vacating the lien upon payment into court of the amounts described in the previous paragraph on condition that *The Republic of Croatia explicitly submits to the jurisdiction of the court by written agreement.* This means that no immunity or privilege will be claimed by your client generally in respect to the proceedings commenced against it or specifically in respect of the monies paid into court and that for all purposes in connection with the action or the enforcement of any judgment or order arising therefrom, your client will have specifically attorned to the jurisdiction of the court.

4 Thereafter followed a series of exchanges between Mr. Hargadon on behalf of the Plaintiff, Mr. House with respect to the sale and Ms. Watt, who now represents the Defendants in this proceeding. Ultimately, the Plaintiff was advised that the Defendant Republic would not give the written acknowledgment requested, nor would it not ultimately waive any arguments based on immunity with respect to any funds paid into court.

5 On April 15th, 1998, the Republic obtained an order without notice, pursuant to Section 44 of the *Construction Lien Act*, which order vacated the lien upon payment into court the full amount claimed as owing in the claim for lien, $227,119.74 plus $50,000.00 as security for costs. Accordingly, by order of Master Schreider dated April 16th, 1998, the claim for lien and certificate of action registered by the Plaintiff were vacated.

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6 Although the full amount of the Plaintiff's claim plus $50,000.00 for costs has been paid into court, the Plaintiff seeks the further protection of the appointment of a trustee pursuant to Section 68 of the *Construction Lien Act*. The Plaintiff continues to be concerned that the Defendant will continue to make claims of diplomatic immunity with respect to its lien claim. It must be noted that the decision of Justice Chilcott has not been appealed and that the time for perfecting any such appeal has since passed. It is submitted by the Plaintiff that if the sale proceeds of the property, are paid into the hands of the trustee, they will never come into the possession of the Defendants and any claims that they may have to these funds which might arise from their special diplomatic status will be defeated. The Defendant maintains that the Plaintiff is fully protected by virtue of the payment into court of the full amount of the Plaintiff's claim plus security for costs pursuant to Section 44(1) of the *Construction Lien Act* contemplates and that no further protection in the Plaintiff's claim is warranted or permitted under the act.

7 Section 68 provides:

> 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.
>
> 68 (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.

The Plaintiff submits that the statute is intended to be remedial and that the powers of the trustee as set out in Section 68(2) should be interpreted widely in the circumstances.

8 At the outset, the court has some difficulty finding that the Plaintiff comes within the requirements of Section 68(1) as "*any person having a lien, or any other person having an interest in the premises...*" It is clear that the lien and the certificate of action have been vacated as of April 16th when the money was paid into court. The Plaintiff no longer has a lien. The sole question is as to whether or not it still has an interest in the premises. The Plaintiff submits that, by virtue of supplying labour and improvements to the premises, the Plaintiff still has an equitable

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interest in the property that exists outside the provisions of the *Construction Lien Act*. In my view, the *Construction Lien Act* was a comprehensive piece of legislation which is designed to protect contractors who supply services and materials to an improvement and the statute is a complete codification of the rights and remedies of parties in these circumstances. Accordingly, I find that the words "any other person having an interest in the premises" would be anybody else having an interest in the property such as an owner, a mortgagee, or someone having an interest other than an interest as a lien claimant. Even if I should not be correct on this point, I do not consider that the provisions of Section 68(2) were designed to be applied in this type of situation. It must be remembered that the Plaintiff had the right to register a lien and that lien was further protected by the provisions of Section 44 which required that the full amount of the lien plus security for costs be paid into court if it were to be vacated prior to the trial of the action. Both counsel referred me to a decision of Mr. Justice Lane in *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 2 O.R. (3d) 488 (Ont. Gen. Div.). In that decision, at pages 495 through 497 Justice Lane reviews what was then Section 70 of the *Construction Lien Act* and comments on the lack of authorities touching on this point. He comments with approval on certain passages in the textbook by Kevin P. McGuinness, *Construction Lien Remedies in Ontario* (Toronto: Carswell, 1983) and at page 497 he states:

> He goes on to point out that the power is a discretionary one and that care must be taken "*to ensure that other persons having an interest in the premises will not be adversely affected, and that the appointment will serve some meaningful purpose*". By analysis of the powers given to the trustee, the learned author postulates three general areas in which it may be appropriate to appoint a trustee: "where the premises is an income earning property, and the lien claim may be satisfied out of the income" (p. 290); "where the owner has become insolvent but the project itself would be a viable one if it were refinanced and carried to completion" (p.291); and "where the appointment of a trustee may be of use...to obtain management of the premises, in order to prevent its deterioration" (p.291).
>
> While the analyses (sic) in the two textbooks just quoted may not be exhaustive, I think they illustrate the parameters within which s. 70 was intended to operate. *It is primarily intended to protect the interests of the lien claimants, care being taken to protect the interests of others in the process*. Although on a literal interpretation, s. 70(1) could be interpreted as applicable even in the absence of a lien, I do not so read it. It must be remembered that it is found in part of the *Construction Lien Act* which is headed "Extraordinary Remedies" and the wide powers given to the trustee indicate it is a remedy to be used with *caution*. (Emphasis mine.)

If one considers the three general areas where it might be appropriate to appoint a trustee, clearly these are situations where the security of the lien claimants can be shown to be at risk. Justice Lane states that *it is a remedy to be used with caution*. This is not a situation where the Plaintiff's lien claim can be said to be at risk. The full amount of the lien claim plus an amount for security for costs has been paid into court. Monies cannot be paid out without approval of the court. There

is no evidence before the court to suggest that Section 68 and the appointment of a trustee will provide any greater protection to the Plaintiff against any claims of diplomatic immunity or any other similar claims that the Republic might be able to raise by virtue of its special status or under any other provisions of international law. The Defendants have clearly attorned to the jurisdiction of Ontario's courts for the adjudication of these matters by bringing their first application to vacate the lien and secondly, by bringing the motion to vacate pursuant to Section 44. That does not mean, however, that they may not be able to raise other legal arguments that they are immune from the enforcement of a civil judgment, whatever those arguments may be, whether the money is paid into court pursuant to Section 44 or whether a trustee holds the funds pursuant to Section 68. In either case, funds can only be paid out subject to further order of the court. The court will ultimately control that process.

9 What is more, the Plaintiff is not seeking that the entire proceeds of sale be paid over to the trustee; the Plaintiff simply seeks an amount equal to the amount of its claim for lien plus an amount for costs; namely, the same amount that has already been paid into court. If the Plaintiff's argument is that the Defendant's claims of diplomatic immunity or other such claims will be diminished if the sale proceeds do not pass into their hands; it follows that they should be able to assert those claims so long as any part of the sale proceeds are received by them. The power under section 68 is a discretionary one and, as pointed out by Mr. McGuinness in his text:

> care must be taken to ensure that other persons having an interest in the premises will not be adversely affected.

The Defendant Republic has already paid a significant amount into court. To require them to pay an identical amount over to a trustee would allow the Plaintiff to receive the benefit of double the amount that he would otherwise be entitled to for the vacating of a lien. The facts of this case do not reflect the situations contemplated by s. 68 and nor do they warrant the application of this extraordinary remedy. Accordingly, the Plaintiff's motion for the appointment of a trustee is dismissed. The Defendants have brought a cross-motion for security of costs. As this action is governed by the *Construction Lien Act*, leave is required before a court can entertain a motion under the Rules of Civil Procedure and the Plaintiff opposes the motion on that basis. Leave accordingly is granted to the Defendants to proceed with the motion for security on the basis that the Plaintiff is a corporation which is not ordinarily resident in Ontario. Costs of this motion are reserved to be dealt with on the return of the Defendant's cross-motion.

Motion dismissed.

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TAB 2

1992 CarswellOnt 608
Ontario Court of Justice (General Division)

Atlas-Gest Inc. v. Brownstones Building Corp.

1992 CarswellOnt 608, [1992] O.J. No. 1674, 26 R.P.R. (2d) 233, 2 C.L.R. (2d) 275, 35 A.C.W.S. (3d) 158

Re Contruction Lien Act, 1983

ATLAS-GEST INC. v. THE BROWNSTONES BUILDING CORPORATION, THE BREAKERS EAST INC., MONTREAL TRUST COMPANY, MONTREAL TRUST COMPANY OF CANADA and URSUS CAPITAL CORPORATION

MONTREAL TRUST COMPANY OF CANADA v. JOHN J. RYAN, KATHLEEN TIMMINS, 713905 ONTARIO LIMITED and THE BREAKERS EAST INC.

Stach J.

Heard: July 15-17, 1992
Oral reasons: July 17, 1992
Written reasons: August 11, 1992
Docket: Docs. 92-CQ-21862 and 38494/91

Counsel: *T. Kerzner, Q.C.*, for defendants Montreal Trust Company and Montreal Trust Company of Canada (Doc. 38494/91), and for plaintiff Montreal Trust Company of Canada (Doc. 92-CQ-21862).
John A.M. Judge and *Jim Doris*, for plaintiff Atlas-Gest Inc.
W.G. Dingwall, Q.C., and *Ian C. Marshall*, for defendants Brownstones Building Corporation, The Breakers East Inc. and Ursus Capital Corporation.
Max Shafir, Q.C., for lien claimant Forum Electrical.
Bruce Bos, for lien claimant Quality Rugs of Canada.

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

Table of Authorities

Cases considered:

Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp. (April 19, 1975), Grange J. (Ont. H.C.) [unreported] — *applied*

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Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd., [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.) — *applied*

Royaledge Industries Inc. v. Perma-Roof Ontario Ltd. (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.) — *applied*

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 68

Rules considered:

Ontario, Rules of Civil Procedure —

R. 41

Ontario, Rules of Practice.

Motion by mortgagee for appointment of trustee-receiver-manager over uncompleted condominium project.

Editor's Note

The developer applied for a stay of this order pending appeal. On August 13, 1992, Mr. Justice Montgomery (Doc. Whitby 38494/91, Ont. Gen. Div.) refused the application on the basis of balance of convenience. Montgomery J. determined that a stay would cause delay which would harm unit purchasers and lien claimants, and would certainly jeopardize the mortgagee's security interests.

Stach J.:

1 In this proceeding, the Montreal Trust Company of Canada and the Montreal Trust Company ("Montreal Trust") ask the court to appoint Coopers & Lybrand Limited as trustee of a parcel of land on which a 68-unit luxury building is situate, and as receiver-manager of The Breakers East Inc. ("Breakers"), the registered owner of the land in question.

2 The building is up, and although substantially complete, requires approximately $200,000 to render it into a state of completion that will permit the many remaining condominium units

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to be offered for sale. Several of the 68 condominium units have already been "sold," and have undergone the first phase of closing, known as "occupancy closing." The general contractor on this project has long since left the site as a result of a dispute with Breakers; that dispute is multi-faceted, and is now the subject of litigation.

3 The first mortgage on this development is held by the Montreal Trust Company of Canada, and although the mortgage matured on December 1, 1990, it remains unpaid. Approximately $13.6 million remains outstanding on the principal of that mortgage and, as at May 21, 1992, another $1.276 million has accrued in unpaid interest charges; and the interest continues to accrue.

4 The documentation necessary to effect registration of the project as a condominium is at hand, but has not been tendered for registration, owing in large measure to a dispute involving Breakers and a related corporation on the one hand and Montreal Trust on the other. The resulting stalemate has already endured for a considerable period. Numerous construction lien claims in excess of $2.7 million have been registered against the land.

5 Unit purchasers who have already occupancy closed are unable to secure title to their holdings, because title closing cannot take place until condominium registration is completed. The impasse between Breakers and Montreal Trust appears on the surface to stem from an obdurate position being taken by Breakers and a related corporation; the impasse shows no hint of ending or even abating. This continuing stand-off operates to the financial disadvantage of those persons who have completed occupancy closings but are unable and helpless to secure final closing. Debts for hydro and other services to the building are substantial, and are in considerable arrears.

6 The current real estate market is uncertain. If the impasse is allowed to carry on, interest charges will continue to accrue, and will continue to erode the pool of funds ultimately available to construction lien claimants. The security interest of Montreal Trust is likely to come increasingly in jeopardy.

7 Such is the background confronting the court in this proceeding.

8 Breakers takes the preliminary position that this motion is fatally flawed and that, in the result, it is a nullity. In short, counsel for Breakers advance the position that this proceeding ought to have been commenced by way of "application" rather than by "motion," and that the failure to do so is fatal to the position of Montreal Trust.

9 I hold a different view. Counsel have kindly provided me not only with the 1990 revision of the *Construction Lien Act*, R.S.O. 1990, c. C.30, but also the predecessors of that statute. I have carefully examined s. 68 of the current *Construction Lien Act* against the relevant statutory provisions in the predecessor legislation. Counsel have also provided me with the relevant *Rules of Practice* which obtained at the time the predecessor legislation was in effect, and also drew to my

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attention the current *Rules of Civil Procedure* which apply in respect of the current *Construction Lien Act.*

10 After hearing the submissions of counsel, I have come to the view that the "form" of the proceeding is not what governs, and that the proceedings as presently constituted in the form of a motion are in fact properly constituted. In coming to that view, I also place reliance on *Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd.*, [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.), in which Mr. Justice Lerner carefully analyzed a considerable body of case authority in coming to the conclusion that the request to appoint a trustee (under the predecessor legislation) was an interlocutory proceeding, i.e., and can be brought on a motion. The "old" *Rules of Practice* also contemplate such an interpretation. Although the 1990 revision of the *Construction Lien Act* and the "new" *Rules of Civil Procedure* have minor changes of wording, they do not dictate the result contended for by counsel for Breakers which, in my opinion, would be manifestly undesirable as a throwback to the old forms of action. Accordingly, any technical objection based upon the form of the proceeeding now before this court must, in my view, fail.

11 In the argument before me, it was vigorously urged by counsel for Montreal Trust that some of the documentation prepared by Breakers, by a closely related corporation and by Mr. Ryan, was either fraudulent or had a dishonest intent. I do not discern from the im pugned documentation, nor from the cross-examination of Mr. Reinards, any fraud, dishonesty or deceit. Rather, I regard the documentary steps taken by "the Breakers group" as an attempt to protect its additional investment vis-à-vis Montreal Trust, and as continuing evidence of the stalemate that exists between this group and Montreal Trust. The "Breakers group" may well have deliberately created this impasse to protect their interest vis-à-vis Montreal Trust on grounds that are not contemplated in the Montreal Trust security agreements. But there is no fraud.

12 The power of the court to appoint a trustee and a receiver-manager has its origin in the law of equity. Although the notice of motion does not clearly allege fraud or dishonest intent, the thrust of many parts of Mr. Reinards's affidavit in support of the application makes such allegations, and they were expanded upon in the submissions before me by counsel for Montreal Trust. Having regard for my finding that Montreal Trust has failed to established these very serious allegations, that alone may have been sufficient for me to dismiss this motion. I do not do so, however.

13 There are other factors which the court considers of such sufficient significance that, in the final analysis, an order appointing a trustee and a receiver-manager must issue. In making such an order on the basis that it is just and convenient in all of the circumstances to do so, this court is nevertheless mindful of the proposition that the appointment of a trustee, receiver-manager, is an extraordinary remedy, and must therefore be a remedy that is granted rarely.

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14 One is similarly mindful of the series of cases (outlined in G.D. Watson and M. McGowan, *Ontario Civil Practice* (Toronto: Carswell, annual) under R. 41 of the *Rules of Civil Procedure*) which tend to indicate that the remedy is one that is not given without great care.

15 In applying what I consider to be the appropriate considerations, I found it most useful to review the decision of Mr. Justice Lane in *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.). In addition, I drew assistance from the full test of an earlier unreported decision of Mr. Justice Grange (as he then was) in *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.* (April 19, 1975), (Ont. H.C.) [unreported]. Although their precise make-up may vary greatly, the factors that seem to emerge in these kinds of cases appear to have considerable commonality. Yet it is the particular mix of factors present, their precise make-up and their relative importance in the particular circumstances that must in the end govern the discretion which the court exercises.

16 In *Royalege*, for example, Mr. Justice Lane refused to appoint a trustee for reasons he summarized, in part, as follows (at p. 497 [O.R.]):

> There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of the lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk.

17 In *Durcard*, the situation before the court invoved an apartment building that was up and, although not fully rented, was apparently being managed properly. On the contested allegations before him, Mr. Justice Grange could not determine whether the lien claimants were truly at risk.

18 In the case before me, the luxury condominium building is "up," but unfinished, and not in a state that permits the sale of several additional units to go ahead. Nor, in this artificial stalemate, can those units which are already "sold" proceed to final closings. If existing unit sales were allowed to complete and prospective sales permitted to go ahead, two separate streams of substantial income flow could be tapped.

19 I am satisfied that the impasse is even now operating to the financial detriment of lien claimants and to the financial detriment of unit purchasers who are otherwise innocent. The impasse, if allowed to continue, will result in a proportionately greater erosion of their respective positions. Accordingly, I am satisfied that the impasse has resulted in the neglect of essential management functions.

20 To be sure, Breakers also has a direct interest in the overall completion of the enterprise and, to the extent that the Breakers "group" has a legitimate dispute with Montreal Trust or other

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interested persons as to the priority that can or should attach to its "additional investment," my reasons should not be taken as an attempt to eliminate that perceived right.

21 Although it cannot be said, particularly with the mortgagee having gone into possession of the unfinished premises, that there is any *physical* deterioration of the asset here in question, yet it is plain that the value of the assets is deteriorating in an economic sense.

22 In coming to this result, I am reluctant to characterize Breakers as insolvent. It is not entirely clear from the evidence whether Breakers's failure to pay many of the outstanding accounts resulted from insolvency, or whether the failure was just symptomatic of the impasse that developed between Breakers and Montreal Trust. To be sure, the mortgage indebtedness of Breakers to Montreal Trust is very substantial, and has remained outstanding for a period in excess of 18 months. There are serious implications to a finding of insolvency, however, and I believe that aspect of the matter is better left to the appropriate forum to deal with on greater evidence than was before me on this issue. Suffice it to say that a very significant debt has remained outstanding for a considerable period, and it is my view that the security interest of Montreal Trust also stands to be imperilled further,and proportionately more, as the situation in its present state is allowed to continue.

23 In conclusion, I find that there are sufficient indicia to meet the test most recently set out in the *Royaledge* case by Mr. Justice Lane.

24 In the order that I make appointing a trustee and receiver-manager, I do not wish to be over-broad. To the contrary, I choose explicitly to narrow the authority of Coopers & Lybrand Limited by making it plain that the trustee-receiver-manager may not intrude on the ability of the directors or officers of Breakers to continue with any current litigation or to commence any additional litigation, if advised, provided that such litigation does not have the effect of imperilling the assets which are the subject of the charge to the trustee. I am hopeful that counsel can draft an order which incorporates that intent. If there is no agreement, I may be of some assistance in setting the terms of the order.

25 Accordingly, I make an order appointing Coopers & Lybrand Limited as trustee of the lands in question and as receiver and manager of The Breakers East Inc., subject to the limitations that I have already expressed. By way of direction to the trustee and receiver-manager, there will be an order directing Coopers & Lybrand, in addition to its other duties, to take such steps as are necessary to register the property as a condominium corporation, to complete and close the existing agreements of purchase and sale and to sell unsold units. In addition, there will be an order requiring The Breakers East Inc. and Ursus Capital Corporation, its officers, directors, agents (including solicitors), to turn over all documents, writings, records and things relating to the registration of the condominium corporation, and that each of them co-operate with the trustee and receiver and manager for these purposes.

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26 I adverted earlier in my reasons to the fact that I did not discern any dishonest or fraudulent purpose in the documentation of the Breakers group. Because of that finding, I make no order for costs.

Addendum

27 Appended as Schedule "A" to these reasons is the form of order settled with the assistance of counsel on July 30, 1992.

Motion granted.

Appendix — Order

This motion made by Montreal Trust Company of Canada for an order appointing Coopers & Lybrand Limited as receiver and manager of The Breakers East Inc. and as trustee of the lands and premises referred to in this order, without security, was heard the 15th, 16th and 17th days of July, 1992, at Toronto, Ontario.

On reading the evidence and proceedings herein and upon hearing counsel for the parties:

1. This court orders that Coopers & Lybrand Limited be and it is hereby appointed receiver and manager without security of all of the assets, property and undertaking of The Breakers East Inc., save the causes of action being or to be advanced by The Breakers East Inc. against the plaintiff and its bonding company, with authority to manage and operate the business and undertaking of The Breakers East Inc. in respect of which it has been herein appointed and to act at once until further order of this court.

2. This court orders that Coopers & Lybrand Limited be and it is hereby appointed trustee under the *Construction Lien Act* of the lands and premises set out below:

> Parcel J-2, Section M-977, part of Block J, according to Plan M-977, designated as parts 2, 9 and 10, Plan 40R-11755, Town of Ajax, Regional Municipality of Durham, Land Titles Division of Durham (No. 40)

3. This court orders that the said trustee, and receiver and manager (hereinafter "Coopers"), shall have the powers set out in this order.

4. This court orders that The Breakers East Inc., its officers, directors, agents, servants, solicitors and shareholders, do forthwith deliver to Coopers all of the assets, property and undertaking of every kind and nature of The Breakers East Inc., save those excluded from Coopers' appointment, and all books, documents, contracts, papers and records of every kind relating thereto, and to co-operate with Coopers in so doing and without restricting the generality of the foregoing, all documents, plans, writings, records or things, necessary for

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the due and prompt registration of the subject lands and premises as a condominium, and the closing of the existing agreements of purchase and sale with purchasers, including those who have taken interim occupancy under their agreements of purchase and sale, subject to any further order of the court in respect of documents required solely for The Breakers East Inc.'s prosecution or defence of claims left to its control herein by paras. 1 and 7 hereof.

5. This court orders that Coopers be and it is hereby empowered to complete any construction or repairs that it feels are necessary, in order to permit sales of units to close or to be entered into and to comply with or otherwise perform agreements of purchase and sale with purchasers existing or future.

6. This court orders that Coopers be and it is hereby authorized to take appropriate steps for the preservation of the subject lands and premises.

7. This court orders that Coopers be and it is hereby fully authorized and empowered to institute and prosecute all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings instituted against The Breakers East Inc. or Coopers and to appear in and conduct the prosecution or defence of any such action, proceeding or application now or hereafter instituted in any court by or against The Breakers East Inc., the prosecution or defence of which will in the judgment of Coopers be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed, and the authority hereby conferred shall extend to such appeals as Coopers shall deem proper and advisable in respect of any order or judgment pronounced in any such action, application or proceeding. For greater clarity, the authority hereby given to Coopers shall not include the prosecution of causes of action in respect of which Coopers has not been appointed nor the defence of this or any other *Construction Lien Act* claim (including breach of trust claims even if commenced by proceedings under the *Courts of Justice Act*) against The Breakers East Inc. or the defence of Action 92-CQ-21862.

8. This court orders that Coopers shall be at liberty to retain agents or such assistance including solicitors from time to time as it may consider necessary for the purposes of preserving the said assets, property and undertaking of The Breakers East Inc. and carrying on its business in respect of which Coopers has been appointed, and generally performing its duties and powers hereunder.

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9. This court orders that Coopers shall be at liberty to carry on the business of The Breakers East Inc. including:

(a) To carry on the business of The Breakers East Inc., including the power to sell those of its assets in respect to which it has been appointed in the ordinary course of business;

(b) To sell, lease or mortgage the assets, property, and undertaking of The Breakers East Inc. or any part or parts thereof in respect to which it has been appointed out of the ordinary course of business with the approval of this court, without waiting for the determination of any inquiries or accounts which may be directed herein or in the future, provided that the purchase money, rent or proceeds of any such realization shall be paid to Coopers;

(c) To manage, rent or lease and collect the rents, interim occupancy fees and other revenues from the lands and premises;

(d) To sell, lease, mortgage, or otherwise dispose of all or a part of the lands and premises in the ordinary course;

(e) To take such steps for the preservation and protection of the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed as Coopers deems necessary;

(f) To purchase or lease such machinery and equipment as may be necessary for the improvement or enhancement of the business assets or undertaking of The Breakers East Inc. in respect of which it has been appointed;

(g) To settle, extend or compromise any indebtedness or claim by or to The Breakers East Inc. in respect of which it has been appointed or for which it has authority to defend;

(h) To enter into any agreements or incur any obligations necessary or reasonably incidental to the exercise of the powers granted in this order to Coopers.

10. This court orders that Coopers is authorized to join in and execute all necessary bills of sale, conveyances, deeds and documents of whatsoever nature in the name of and on behalf of The Breakers East Inc., in respect of the business, assets and undertaking in respect of which it has been appointed.

11. This court orders that any expenditure which shall be properly made or incurred by Coopers shall be allowed to it in passing its accounts and together with its remuneration shall form a charge on the assets, property and undertaking of The Breakers East Inc. in priority to all prior and subsequent encumbrances.

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12. This court orders that Coopers may from time to time move this court for advice and direction in the discharge of its powers and duties hereunder.

13. This court orders that liberty be reserved to any interested person to bring a motion to this court for such further order as such person may be advised.

14. This court orders that there be no order as to the costs of this motion.

15. This court orders that Coopers make a first report to this court as to its administration within 60 days of the date of this order.

16. This court orders that Coopers shall pass its accounts from time to time and shall pay the balance in its hands into court to the credit of this action or as the court may otherwise direct. Coopers shall be at liberty from time to time to apply reasonable amounts from the moneys in its hands against its fees and disbursements and such amounts shall constitute advances against its remuneration when assessed.

17. This court orders that Coopers be and it is hereby empowered to borrow moneys without personal liability from time to time as it may consider necessary, not exceeding the principal sum of $200,000 in the aggregate at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange for the purpose of taking possession of, receiving, protecting, preserving or realizing upon the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed and that as security for such borrowings and every part thereof, Coopers is authorized to pledge, assign or give security or securities on any such assets, property or undertaking but subject to the right of Coopers to be indemnified out of such assets, property and undertaking with respect to its liabilities, amounts and its own remuneration properly incurred and all of such amounts shall be a first charge on such assets, property and undertaking.

18. This court orders that the moneys authorized to be borrowed by this order shall be in the nature of a revolving credit and that Coopers may pay off or reborrow within the limits of the authority hereby conferred so long as the maximum principal amount owing in respect of such borrowings at any one time does not exceed the amount hereby authorized.

19. This court orders that for purposes of its borrowings, Coopers be authorized to give or issue receipts or receivers' certificates for any such moneys borrowed by it pursuant to this order, which receipts or certificates shall substantially be in the form of the Schedule "A" annexed hereto.

20. This court orders that any security granted by Coopers in connection with its borrowings shall not be enforced without leave of this court.

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21. This court orders that no action, application or other proceedings shall be taken or continued against The Breakers East Inc. or Coopers without leave of this court first being obtained, except that the following shall be allowed to proceed as to The Breakers East Inc.:

(a) Those which have been excluded from Cooper's authority to defend by para. 7 of this order and from prosecuting by para. 1 of this order;

(b) Such other proceedings as the court may by order hereafter determine.

22. This court orders that the tenants of any property of The Breakers East Inc. do attorn to and pay their rents in arrears and accruing rents to Coopers and that any persons who are liable to pay interim occupancy fees to The Breakers East Inc. shall hereby attorn to and pay such occupancy fees in arrears and accruing occupancy fees to Coopers.

23. And this court orders that without limiting the generality of any preceding paragraph of this order, all persons, firms, and corporations be and they are hereby enjoined from disturbing and interfering with utility services including but not limited to the furnishing of gas, heat, electricity, water, telephone or any other utilities of like kind furnished up to the present date to The Breakers East Inc., and they are hereby enjoined from cutting off or discontinuing or altering any such utilities or services to Coopers, except upon further order of this court.

24. And this court orders that the liability of Coopers which it may incur as a result of its appointment or as a result of the performance of its duties hereunder, save and except for negligence or wilful misconduct, shall be limited to the net proceeds realized upon the lands and premises. The net proceeds of the lands and premises shall be the cash proceeds realized by Coopers from the disposition of the lands and premises or any part thereof after deducting the remuneration and disbursements of Coopers and after any moneys borrowed by Coopers pursuant to this order are repaid.

25. And this court orders that the provisions of para. 4 hereof shall apply mutatis mutandis to Ursus Capital Corporation, its officers, directors, solicitors, servants or agents to turn over all documents, writings, records and things relating to The Breakers East Inc., the lands and premises which are the subject-matter of this order, including but not limited to those necessary or required by Coopers in order to effect prompt registration of the subject property as a condominium, including but not limited to all plans, surveys and approvals required for condominium registration, and to co-operate with Coopers in so doing.

26. And this court orders that for greater clarity in its duties and powers hereunder, without in any way restricting the generality of those, Coopers shall take such steps as are necessary to register the subject property as a condominium, complete and close existing agreements

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of purchase and sale, complete necessary construction or repairs where required in order to close or effect sales of units, and sell all unsold units in the subject property.

SCHEDULE "A"

Amount
$_____

Receiver's Certificate
No.

1. This is to certify that Coopers & Lybrand Limited, trustee and receiver and manager of the assets, property and undertaking of The Breakers East Inc. (the "company") acknowledges receipt of $_____ as trustee and receiver and manager, and that the trustee and receiver and manager is indebted to the holder of this certificate in the sum of $_____ in the aggregate.

2. The principal sum of $_____ represented by the certificate is payable on the _____ day of _____ 199_, [or, on demand] with interest thereon at the rate of _____ % per annum payable monthly on the _____ day of _____, 199_, and thereafter in each and every month.

3. The said principal sum of $_____ together with interest thereon is issued pursuant to the order and is secured by the assets, property and undertaking of the company, but subject to any higher ranking security in the nature of a mortgage, lien or encumbrance and to the right of the trustee and receiver and manager to be indemnified out of such property for its liabilities, its expenses and its own remuneration properly incurred.

4. All sums payable in respect of principal and interest under this certificateare payable at the office of _____ at _____ in the City of Toronto, in the Municipality of Metropolitan Toronto.

5. In case default shall be made in payment of interest on this certificate and such default shall continue for a period of _____ days, the principal of this certificate may be declared immediately due and payable by the holder hereof. This certificate and any security granted pursuant to it shall not be enforced without leave of this court.

6. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and for interest thereon shall at any time and from time to time be terminated on tender to the holder hereof of the whole or such part of such principal sum then outstanding with interest accrued thereon to the date of such tender.

7. The trustee and receiver and manager does not undertake and is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the said order.

Dated at _____ this _____ day of _____, 199_.

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The Breakers East Inc.

Per:_____

End of Document

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TAB 3

Court File No. CV-09-8201-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT* , R.S.O. 1990, C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

- and -

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

Reasons of the Honourable Madam Justice Pepall

Application heard: May 20 and 21, 2009
Reasons given orally: May 22, 2009

Counsel:

Pamela L.J. Huff and Michael McGraw for WestLB AG, Toronto Branch
Shayne Kukulowicz for Alvarez & Marsal Canada ULC and McIntosh & Morawetz Inc., Proposed Receiver and Trustee
Maria Konyukhova and Kathy Mah for The Rosseau Resort Developments Inc.
Fred Myers for Fortress Credit Corp.

The Applicant, West LB AG, Toronto Branch, seeks the appointment of an interim receiver and manager and a receiver, manager and trustee of Rosseau Resort Developments Inc. ("RRDI"). It relies on s. 47 of the BIA, s. 101 of the CJA and s. 68 of the Construction Lien Act.

RRDI is an Ontario corporation that owns property on the shore of Lake Rosseau in Muskoka. It has been developing and constructing a first class resort hotel and condominium complex on that property. RRDI is wholly-owned by Red Leaves Resort ("RLR"), a partnership of 5 corporate partners. The majority partner is Ken Fowler Enterprises Limited ("KFE"). RLR has assembled

a number of adjacent properties for the purposes of the development of a large planned resort and community known as Red Leaves. That development is projected to be completed in 2030. RRDI is one of a number of subsidiaries of RLR, each of which owns or operates a different aspect of the Red Leaves development.

RRDI's property consists of about 40 acres plus the land on which the hotel is situate. It leases adjacent property on which it operates a sewage treatment plant that provides services to the hotel.

The hotel's construction is incomplete. Upon completion it will consist of 221 fully furnished suites in 2 buildings plus various other facilities. The hotel has been constructed as a condominium/hotel whereby the residential units of the hotel would be marketed and sold to purchasers who would have defined access to use of the purchased unit. When not in use by the owner, the unit would be included in a rental pool and function as a hotel suite.

Of the 221 units, 72 units have been sold and closed; 65 units have been sold and are expected to close shortly or upon completion of construction and obtaining of occupancy permits; and 84 units remain to be sold.

The hotel has been open since December 2008 and is currently operating under the banner of "JW Marriott Resort and Spa" pursuant to a Management Agreement between Marriott Hotels of Canada Ltd. and RRDI. That agreement requires RRDI to fund any net operating losses of the hotel and any working capital requirements. Since its opening, the hotel has operated at a loss. Marriott may terminate its obligations as a result of unfunded net operating losses or if the hotel was not completed by May 1, 2009. In light of this, RRDI agreed with Marriott that Marriott would not declare an event of default prior to May 31, 2009 provided RRDI complied with terms of a funding letter wherein it agreed to fund about $1.95 million of net operating losses and working capital requirements through May 31, 2009. The applicant provided RRDI with these funds to make this payment. Marriott has requested that an additional $850,000 payment be made as of June 2, 2009 to fund operating losses.

The applicant is the agent for a syndicate of lenders that provided a first priority senior secured credit facility to RRDI pursuant to a February 1, 2007 credit agreement in the amount of $113.5 million. It was divided into 3 tranches:

1. $83.8 million senior secured construction facility to fund the construction of the hotel;
2. $12.8 million to develop 31 condominium units on other lands; and
3. $16.9 million to develop a further 51 residential units.

The first tranche has been fully advanced and the second and third have been cancelled.

RRDI is in default of its obligations to the senior lenders. On May 19, 2009, the applicant delivered a s.244 BIA notice and a demand for payment in the amount of $68,965,845.63. The senior lenders' financing is secured by mortgages, PPSA security and guarantees.

RRDI is also indebted to Fortress Credit Corp. in the amount of approximately $30 million. It is secured by a mortgage. All amounts under the Fortress Loan Agreement have been fully advanced and RRDI is in default.

Fortress and the senior lenders are parties to a subordination agreement dated June 6, 2007 in which they agreed that the security provided by RRDI to Fortress would be subordinated to the security provided by RRDI to the applicant subject to certain limits on certain other advances. Fortress takes the position that the relief requested by the applicant is an attempt to enhance its security rights in breach of the subordination agreement.

The applicant, Fortress, RRDI and KFE have engaged in discussions to consider solutions to the problems. In December 2008, the applicant agreed to temporarily waive certain defaults for 45 days and agreed to advance $13.1 million under the credit agreement. On January 26, 2009, the applicant agreed to continue to waive the defaults to February 17, 2009 and to advance an additional $1.4 million. On February 24, 2009, the applicant agreed to continue to waive defaults to March 3, 2009 and advanced $440,000.

By a forbearance agreement dated April 9, 2009, RRDI acknowledged certain existing and continuing events of default under the credit agreement and the applicant agreed to forbear from exercising any remedies under the credit agreement until May 15, 2009 and agreed to advance a further $2,493,637. Further amounts were advanced by the applicant on April 14, 2009 ($1,164,882), April 21, 2009 ($1,966,370.37) and May 12, 2009 ($24,739).

Neither the applicant nor Fortress is prepared to advance any further funds. Although efforts have been made, RRDI has failed to obtain financing from any other source. KFE has advised the applicant that it has no ability to invest any additional amounts to finance RRDI given the demands of its other facilities. Furthermore, KFE is not in a position to consent or acquiesce to the filing of an application under the BIA or CCAA as such conduct could trigger recourse under a guarantee provided by KFE to Fortress.

RRDI has no further access to funds and is in a cash crisis. It is unable to fund essential expenses and unable to fund its payroll after May 15, 2009. The hotel is operating at a loss and no funds are available to RRDI to support continued operations and finance construction costs. Net proceeds of condominium sales are required to pay down amounts owing to the applicant and are not available for operational expenses. Construction of the hotel is projected to be completed in June 2009 if work continues without interruption. Obligations due to construction trades amount to $4.3 million of which $3.4 million represents a holdback deficiency. Construction progress has slowed and certain construction trades have refused to perform services. Altus Group Limited, a cost consultant with expertise in construction projects, has recommended that an additional $5 million be added to the budget to complete the project and market the unsold units.

RRDI employs 10 people. On March 1, 2009, the Director of Finance and Administration of Red Leaves resigned and on April 17, 2009 and April 25, 2009, the CFO of Red Leaves and RRDI's controller resigned, respectively. As mentioned, 84 units remain unsold. According to the applicant, the sales and marketing of these units have discontinued although Mr. Fowler states that on April 10, 2009, RRDI retained Sothebys International Realty who is actively promoting the hotel. The hotel is operating at a loss and since opening, has operated at approximately 13% capacity. Construction cost overruns amount to $34.4 million or 25%.

McIntosh & Morawetz Inc., a company related to A&M, has consented to act as interim receiver under the BIA. Alvarez & Marsal Canada ULC ("A&M"), who has consented to act as receiver under the CJA and trustee under the CLA, prepared two reports dated May 19 and 20, 2009 at the request of the applicant. All counsel agreed that the facts contained therein were admissible with the exception of paragraphs 3.12 and 3.13 of the May 20, 2009 report. It was also agreed that I would give no weight to the recommendations made by A&M in the reports.

In those reports, A&M noted that:

- with respect to the non-RRDI Red Leaves entities, each is facing liquidity challenges. In this regard, the Rock golf course has not opened this season and Marriott, which manages the Rock, has issued a default notice to it and to KFE as guarantor;
- in the absence of immediate funding, it is expected that construction trade creditors will assert their lien rights and discontinue efforts to complete construction;
- in some cases, suppliers have refused to deliver goods or render services;
- Rock Ridge Contractors Inc. is the general contractor/construction manager of the hotel. Historically the applicant has advanced funds to RRDI and RRDI would then make disbursements to RRCI to allow RRCI to meet its obligations to the subcontractors. RRCI subcontract employees are owed amounts for fees and are expected to withdraw their services;
- the RRCI subcontract employees are critical to completing construction of the hotel;
- Fortress has been unwilling to provide consent to the release of its security over certain hotel units;
- there are no funds to meet payroll on May 29 and certain employees have not been reimbursed for out-of-pocket expenses amounting to $30,000;
- construction relating to outdoor bathroom facilities and guest change rooms has not proceeded due to lack of funding. This is required for the lower swimming pools to be operational and to permit the service of alcohol in the hotel's outdoor areas. This could take 6 weeks and 28 weddings are booked at the hotel for the summer season;

- Clevelands House is substantially fully booked for upcoming summer weekends and is forecast to operate on a cash flow neutral basis throughout 2009; and
- there is evidence of impairment of the applicant's security position.

The applicant brings this application on an urgent basis to stabilize the operations of RRDI, complete the construction project and maximize realizations. It is proposed that the senior lenders will provide the Receiver/Trustee with a $15 million senior secured loan facility which would rank in priority to all other obligations of RRDI except for obligations to the Receiver/Trustee secured by a Receiver's charge. The funds would be used for a variety of purposes including completing construction. It is also proposed that a claims administration process for construction trade creditors pursuant to the CLA be established.

As the summer approaches, RRDI is entering its peak unit sales season and maximum value should be achieved if the project is completed.

The applicant relies on s. 47 of the BIA, s. 101 of the CJA and s. 68 of the CLA.

RRDI objects to the relief requested as does Fortress. RRDI submits that 10 days' notice under s.244 of the BIA has not been given thereby precluding s.101 CJA and s.68 CLA relief and in any event, the requisite tests have not been met. As to s.47 of the BIA, that relief should be adjourned and in any event, the test is not satisfied.

Fortress submits that the relief requested is premature and RRDI is entitled to 10 days to respond. Furthermore, there is no urgency. The lien claimants are not at risk and it is inappropriate to prime Fortress, particularly in circumstances where the applicant and Fortress have agreed to funding priorities by contract. Fortress states that this application is an attempt by the applicant to enhance its security rights in breach of its agreements with Fortress. The relief requested is not in Fortress' interest nor to the benefit of RRDI. Fortress further submits that a receivership is destructive of the market and will negatively impact the other properties. Fortress has other complaints with respect to the applicant's conduct including the security it took from KFE and the assertion of priority with respect to approximately $5.6 million in alleged protective advances.

Pursuant to s. 244 of the BIA, a secured creditor who intends to enforce a security on all or substantially all of the inventory, the accounts receivable or the other property of an insolvent person that was used in relation to its business is to send notice of that intention. The secured creditor is not to enforce the security for 10 days absent consent. As is clear from the wording, s. 244 only applies to the enforcement of security on the property of insolvent persons. Insolvent person is defined in s. 2 of the BIA and would encompass RRDI.

S. 47 of the BIA provides that where the court is satisfied that a s. 244 notice has or is about to be sent, the court may appoint an interim receiver. An appointment may be made only if it is shown to the court to be necessary for the protection of the debtor's estate or the interests of the creditor who sent the s. 244 notice. (In the proposed amendments to the BIA, a receiver may be appointed before the expiry of 10 days if the court considers it appropriate.) Ground J. held in

BNS v. DG Jewelry Inc. (2002), 38 CBR (4th) 7 that the test is whether the appointment of a court-appointed receiver will enable that receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

S. 47.2 provides that the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper including giving the receiver security over the assets of the debtor ranking ahead of secured creditors.

Section 47.2(2) provides that disbursements do not include payments made in operating a business of the debtor.

Of course, a receiver or receiver manager may also be appointed pursuant to s. 101 of the CJA where it appears to a judge to be just or convenient to do so. As noted in the explanatory notes for the standard form template receivership order of the standard form template subcommittee of the Commercial List Users' Committee, the standard form adopts the format of a s. 47(1) BIA appointment together with a s. 101 CJA appointment. This was stated to have been recommended because a receiver and manager under the CJA may be provided with a priming charge in respect of its disbursements and thereby avoid issues concerning the limits on the authority of the court to grant a priming charge in respect of business losses suffered by an interim receiver.

In *Robert F. Kowal Investments Ltd. et al v. Doeder Electric Ltd.* (1975), 9 OR (2d) 84 the Court of Appeal examined the issues of receiver borrowings and the granting of security over the debtor's assets. A receiver must look to the assets under its control for payment of its charges and expenses. As a general rule, a receiver will have no power to subject the security of secured creditors to liability for disbursements made by the Receiver. Houlden J.A., writing for the court, noted that there are exceptions to the general rule. "If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him" (at para 16). Such an order will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. Another exception is if the receiver has expended money for the necessary preservation and improvement of the property, it may be given priority for such an expenditure over secured creditors.

The Contruction Lien Act also provides for the appointment of a trustee who may act as a receiver and manager. Section 68 of that Act states that any person having a lien or any other person having an interest in the premises may apply to the court for the appointment and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate. The trustee may act as a receiver and manager, complete or partially complete the improvement, take appropriate steps for the preservation of the premises and, subject to the approval of the court, take such other steps as are appropriate in the circumstances.

A lien arises when a person supplies services or materials to an improvement for an owner, contractor or subcontractor (s.14 and s.15 of CLA) and where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement

have priority over that mortgage (s.78 of CLA). Advances to the trustee take priority over liens existing at the date of the trustee's appointment.

In *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 44 C.L.R. 160, Lane J. discusses 3 general areas in which it may be appropriate to appoint a trustee: where the premises is an income earning property, and the lien claim may be satisfied out of the income; where the owner has become insolvent but the project itself would be a viable one if it were refinanced and carried to completion; and where the appointment of a trustee may be of use to obtain management of the premises in order to prevent its deterioration. The statutory provision is described by Lane J. as being primarily intended to protect the interests of the lien claimants. The relief is extraordinary in nature and should not be sought for a collateral purpose. In *Atlas-Gest Inc. v. Brownstones Building Corp* (1992) 26 R.P.R. (2d) 233, a trustee and a receiver manager were appointed in circumstances where a 68 unit luxury condominium project was substantially complete but required an additional $200,000 to permit the remaining condo units to be sold.

In my view, the applicant has met the requisite tests and has established the need for relief on an urgent basis.

RRDI is insolvent, has no further access to funds and is in a cash crisis. The only source of funding available is the proposed receiver's borrowings. Funding is desperately needed to fund the costs to complete the hotel, maintain operations and generate value for stakeholders. Numerous construction trades have outstanding receivables and are in a position to assert lien rights. Construction progress has already slowed. Stoppage, slow-downs and liens if filed would impede scheduled closings. Unit purchasers would be impacted, the applicant's interests would deteriorate further and service providers would be prejudiced. Many innocent stakeholders are affected by a do-nothing approach. Although the parties have faced these financial problems for some time, no solutions are advanced except that proposed by the applicant. In this regard, I reject Fortress' argument that this is an attempt by the applicant to enhance its security rights. While there are benefits to the applicant that are associated with the proposed funding, it seems to me that neither the applicant nor Fortress should be precluded from providing a loan to the Interim Receiver. Fortress will continue to be at liberty to challenge both the security taken by the applicant from KFE and the $5.6 million in protective advances.

In my view, there is ample evidence to support the conclusion that the appointment of a s. 47 interim receiver is necessary for the protection of RRDI's estate and the interests of the applicant and I so order. Stability is required; there is a need for immediate conservation of the debtor's assets and protection of the interests of the applicant and other stakeholders.

Although not free from doubt, I do have some concerns about the s. 101 CJA and s. 68(2)(a) CLA powers. These are both adjourned to be addressed on June 1, 2009. I am satisfied that the requisite tests for a section 68(1) CLA appointment with subsection (2)(b), (c) and (d) powers are met. The owner is insolvent but the project would be a viable one if it were refinanced and moved towards completion. The applicant qualifies as a person having an interest. I am also satisfied that this order at this time assists in protecting the interests of the lienholders.

I am in the circumstances granting the applicant the s. 47 BIA relief and s. 68(1) and 2(b), (c) and (d) CLA relief. I am granting authorization to borrow as contemplated by paragraph 20 of the proposed order, however the amounts that can be borrowed are limited to $1,500,000 until June 1, 2009 or further order of this court. Any interested party may apply to this court to vary or amend this order on not less than 5 days' notice. Counsel are to confer with respect to finalizing the proposed terms of the order.

The confidential Appendix 1 contains commercially sensitive material and disclosure would impose a serious risk on an important commercial interest. Furthermore, there is no reasonable alternative. See *Sierra Club of Canada* (2002), SCC 41 in this regard.

Subsequent to the delivery of these reasons, I signed the proposed amended order.

S.E. Pepall, J.

Schedule "A"

The parties agree that the following disbursements by the Receiver shall not constitute payments made in operating a business of the Debtor for the purposes of s.47.2 of the BIA:

- wages for employees of the Debtor
- wages for employees of Rock Ridge Contractors Inc. who are providing dedicated services to the Debtor
- Payments to independent contractors of Rock Ridge Contractors Inc. for services provided to or for the benefit of the Debtor
- security costs
- payments for essential goods and services including hydro, propane and telephone

TAB 4

Court File No. CV-15-10843-00CL

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

ENDORSEMENT

January 22, 2015

This is an application for the appointment of a trustee of a condominium property which has run into financial trouble. The appointment is contemplated by s. 68(1) of the *Construction Lien Act* RSO 1990 c. C.30. Such appointments have been made previously in similar circumstances. See *Atlas-Gest Inc. v. Brownstones Building* 1992 CarswellOnt 608 and *WestLB v. Rosseau Resort* May 22, 2009, CV-09-8201-00CL.

After substantial negotiations, the parties, which involve the owner, several mortgagees, and many lien claimants, have agreed that the appointment is necessary to enable an orderly completion of the project, which will benefit all stakeholders.

Most of the terms and conditions of the appointment are agreeable to the parties. There are three discrete issues which I was asked to resolve.

In general, I am satisfied that the appointment of a trustee with, in fact, the authority of a receiver, is necessary and appropriate. Chaos must be avoided. There are many owners who need to close their deals etc. An orderly completion holds out the best hope for maximizing the value and therefore, return to creditors, of the project.

I therefore grant the application for the appointment of the trustee.

The remaining three issues deal with specific terms and conditions. Mr. Scotchmer, for J & L Gaweda Construction Limited, raises three objections:

1) to the scope of the immunity sought by the trustee;

2) to the owner and the trustee having the same counsel; and

3) to the priority for the applicant's legal fees.

J & L argues that the trustee should shoulder the liabilities of any trustee and not have the same immunity available to court appointed receivers, monitors and the like.

I cannot agree. The trustee is appointed as an officer of the court. Its actions will be the subject of court monitoring and approval. If there are issues, they can be addressed when court approval is sought. The trustee's appointment will benefit all parties. It would be hard to find reputable entitles to take on this role without standard protections in place.

I do not see any reason why the standard limitations available to court appointed receivers and monitors should not be available to the trustee, which will be performing as a de facto receiver function.

The conflict issue is, at this stage, a solution in search of a problem. There is no evidence of a current conflict. The order contemplates that if one arises, the trustee will retain other counsel.

The joint retainer is done in an effort to reduce fees. This will benefit everyone. Unless and until there is a problem, I see no reason to prevent the joint retainer.

The applicants have taken necessary steps to bring order to what might otherwise be a chaotic situation. Someone had to do it. I see no reason why there should not be priority for those fees which brought about the needed methodology for the benefit of all economic stakeholders. I approve the priority, limited as it is to this application.

I have also been asked to confirm that the order is without prejudice to any lien claimants later seeking relief from the requirements of s. 37 of the CLA, if so advised and I do so confirm.

I approve the order negotiated by counsel and the parties. A clean copy may be delivered to my attention for my fiat.

Penny J.

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

(2)

Court File No. Jan 22-15

January 22, 2015

This is an application for the appointment of a trustee of a condominium property which has run into financial trouble.

The appointment is contemplated by s. 68(1) of the Construction Lien Act RSO 1990 c. C-30.

Such appointments have been made previously by this Court in similar circumstances.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

APPLICATION RECORD
(appointment of a trustee)
(returnable January 22, 2015)

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Lawyers for the Applicant, 144 Park Ltd.

see Altas-Gest Inc. v Brownstone Building 1982 Carswell Ont 6 of and WestLB v Rosseau Resort May 22, 2009, CV-09-8201-00CL.

After substantial negotiations the parties, which include the owner, several mortgagee, and many lien claimants, have agreed that the appointment is necessary to enable an orderly completion of the project, which will benefit all stakeholders.

Most of the terms and conditions of the appointment are agreeable to the parties. There are three issues which I was asked to resolve.

~~For~~ On general, I am satisfied that the appointment of a trustee with, in fact, the authority of a receiver, is necessary and appropriate. Chaos must be avoided. There are many owners who need to close their buildings. An orderly completion holds out the best hope for maximizing the value and therefore, return to the creditors of the project.

I ~~am~~ therefore grant the application for the appointment of the trustee.

The remaining three issues deal with specific terms and conditions.

Mr. Scotchmer for J & L Gamada Contracting Limited raises three objections:

1) to the scope of the immunity sought by the trustee;

2) to the owner and the trustee having the same counsel; and

3) to the priority for the applicants' legal fees.

J & L argues the trustee should shoulder the liabilities of any trustee and not have the standard immunity available to court appointed receivers, monitors and the like.

I cannot agree. The trustee is appointed as an officer of the court. Its actions will be the subject of court monitoring and approval. If there are issues, they can be addressed when court approval is sought. The trustee's appointment will benefit

all parties. It would be hard to find reputable entities to take on this role without standard protections in place.

I do not see any reason why the standard limitations available to court appointed receivers and monitors should not be available to the trustee, which will be performing as a de facto receiver function.

The conflict issue is, at this stage, a shift in search of a problem. There is no evidence of a current conflict. The order contemplates that if one arises, the trustee will retain other counsel.

The joint retainer is done in an effort to reduce fees. This will benefit everyone.

Unless and until there is a problem, I see no reason to prevent the joint retainer.

The applicants have taken necessary steps to bring order to what might otherwise be a chaotic situation. ~~The~~ Someone had to do it. I see no reason why there should not be priority for those fees which ~~I~~ brought about the needed methodology for the benefit of all economic stakeholders. I approve the priority, limited as it is to this application.

I have also been asked to confirm that the order is without prejudice to any bid claimants later seeking relief from the requirements of s. 37 of the CLA, if so advised and I do so confirm.

I approve the order negotiated by counsel and the parties. A clean copy may be delivered to my attention for my fiat.

Perry J.

TAB 5

1991 CarswellOnt 776
Ontario Court of Justice (General Division)

Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.

1991 CarswellOnt 776, [1991] O.J. No. 242, 25
A.C.W.S. (3d) 792, 2 O.R. (3d) 488, 44 C.L.R. 160

RE AN APPLICATION UNDER THE CONSTRUCTION LIEN ACT, 1983, S.O. 1983, c. 6; ROYALEDGE INDUSTRIES INC. v. PERMA-ROOF ONTARIO LTD. et al.

D. Lane J.

Heard: February 15, 1991
Judgment: February 21, 1991
Docket: Doc. RE 2673/90

Counsel: *W.G. Dingwall, Q.C.*, for applicant.
William D. Dunlop, for respondent Perma-Roof Ontario Ltd.
Fred A. Platt, for respondent Boothe Computer, Ltd.
F. D'Alessandro, for respondent Canadian Imperial Bank of Commerce.
Hugh DesBrisay, for respondent George Wimpey Canada Ltd.

Subject: Contracts; Corporate and Commercial

Table of Authorities

Cases considered:

Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp. (19 April 1975), Grange J. (Ont. H.C.) [unreported] — *applied*

Statutes considered:

Construction Lien Act, 1983, S.O. 1983, c. 6 —

s. 70

Mechanics' Lien Act, R.S.O. 1970, c. 267 —

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s. 34

APPLICATION for appointment of trustee pursuant to s. 70 of *Construction Lien Act.*

D. Lane J.:

1 This application raises the question of the circumstances under which the Court will appoint a trustee of land under s. 70 of the *Construction Lien Act, 1983*, S.O. 1983, c. 6. The application is brought by Royaledge Industries Inc. ("Royaledge") as developer and first mortgagee of certain lands. The respondents are Perma-Roof Ontario Limited ("Perma-Roof"), the registered owner of the land; Boothe Computer, Ltd. ("Boothe"), the second mortgagee thereof; Canadian Imperial Bank of Commerce ("CIBC"), the banker of Royaledge and assignee (by way of security) of the first mortgage; and George Wimpey Canada Ltd. ("Wimpey"), a lien claimant. There is an additional lien claimant, Ontario Power Contracting Limited, which was not represented but which by fax to Mr. Dingwall announced its support of his application. Perma-Roof and Boothe opposed the application; CIBC and Wimpey supported it.

2 Section 70 of the *Construction Lien Act* is found in Part IX and reads as follows:

Extraordinary Remedies

70. (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.

(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 80(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).

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(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.

3 Royaledge applies to appoint a trustee on the basis that there is a lien registered under the Act by Wimpey, which is installing the services in the subdivision; that there is an impasse between the applicant, the owner and the second mortgagee in that the latter two will not sign a subdivision agreement which Royaledge has negotiated with the Municipality; that by reason of this impasse the project is no longer being managed appropriately; and that the services already installed, which include the underground utilities and the base roads, are likely to deteriorate.

Background Facts

4 Prior to 1989, Royaledge was the owner of certain lands in the Town of Flamborough, for which it had draft approval of a subdivision plan. On May 24, 1989, it agreed to sell those lands to Perma-Roof for $12,240,000 on terms that required Royaledge to install and pay for all of the servicing and all local and regional levies, park dedications and roadways for a subdivision of 137 lots on the lands. Perma-Roof was allowed 20 days to review all documentation relating to the subdivision, including engineering and soils reports, the subdivision agreement and other agreements. If those documents were not satisfactory, Perma-Roof had the right to terminate the agreement.

5 The sale to Perma-Roof closed on June 30, 1989. Perma-Roof gave a first mortgage of $9,180,000 to the vendor and a second mortgage of $3,300,000 to Boothe. The total of the two mortgages is said to exceed the actual value of the land. On July 25, 1989, Royaledge assigned the first mortgage to CIBC as collateral for a loan of approximately $5 million. The first mortgage provides that interest does not run on it until the day that building permits become available for the subdivision. It further provides that the due date is extended 1 day for each day beyond April 15, 1990, upon which building permits are not available. It is common ground between the parties that the building permits will not become available until a subdivision agreement is executed and registered on title.

6 Royaledge negotiated the current draft subdivision agreement with the town without consultation with Perma-Roof. One of the provisions of that draft is that Boothe postpone its second mortgage of the lands to the town's interests under the subdivision agreement or, alternatively, that Boothe execute the subdivision agreement. Another provision requires that Perma-Roof execute the subdivision agreement. It is alleged by the applicant that building permits would have been available on or about September 15, 1990, had these agreements been signed.

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7 Although the agreement of purchase and sale contemplated that Perma-Roof would have an opportunity to approve the subdivision agreement before closing on June 30, 1989, the final draft subdivision agreement was not presented to Perma-Roof until the summer of 1990, at which time Perma-Roof refused to sign it on the grounds that it was not in accordance with the contractual obligations which Royaledge had undertaken to Perma-Roof. Specifically, Perma-Roof was concerned that the agreement as settled between Royaledge and the town rendered Perma-Roof liable for contingencies and costs that Royaledge had agreed to assume on its own. Perma-Roof's solicitors amended the draft agreement to exclude Perma-Roof from the definition of developer. Whenever the developer's responsibilities were defined, the draft was amended to exclude Perma-Roof. A clause was added to provide specifically that nothing in the agreement imposed any of the developer's obligations on the owner unless the agreement clearly stated so. As well, certain schedules were amended to reflect Perma-Roof's view that the original agreement with Royaledge obliged the latter to pay the costs of all services and all levies. Royaledge rejected these proposed changes. Perma-Roof has refused to execute the draft subdivision agreement without the amendments, and Royaledge has refused to submit Perma-Roof's amendments to the town.

8 There is, in addition, a draft subdivision agreement with the Regional Municipality of Hamilton-Wentworth which has not yet been presented to Perma-Roof for execution. There are also agreements with Bell Canada and with Ontario Hydro which must be finalized before building permits can be obtained.

9 Boothe has no agreement with Royaledge. The second mortgage does require Boothe to consent to any subdivision agreement, but it is refusing to do so because the second mortgage is in arrears.

10 The applicant submits that because Perma-Roof refuses to sign the subdivision agreement and Boothe refuses to postpone its second mortgage to the town's interest, the entire project is at a standstill. Royaledge engaged Wimpey to do the actual installation of the services and presently owes Wimpey some $800,000. It is not suggested that there is any significant problem with the work Wimpey has done; it is both complete and satisfactory. But Wimpey has not been paid because Mr. Charles, the president of Royaledge, does not think it prudent to do so. He made this statement on his cross-examination, in the course of which he also suggested that the CIBC did not think it was prudent for him to pay these sums in view of the disputes with Perma-Roof and Boothe. On this evidence there is no defence to the lien action. It is argued that Royaledge simply decided not to pay Wimpey so that a lien would be registered in order to create the circumstances in which this application could be brought. That may well be so, but there is no evidence of collusion between Royaledge and Wimpey, and I propose to deal with the application on the assumption that the lien is real.

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Previous Litigation

11 This application is not the first effort on the part of Royaledge to require Perma-Roof and Boothe to accede to its view of their contractual obligations. In the fall of 1990, Royaledge brought an application against Perma-Roof and Boothe which was heard by Gibson J. In his reasons dated December 21, 1990, GibsonJ. reviewed the issues between the parties. So far as I can see, the underlying issues presented to him and those presented to me are substantially the same. Mr. Dingwall, on behalf of his client, urged Gibson J. to require Perma-Roof and Boothe to execute the draft subdivision agreement and to make other declarations regarding the contractual rights of the parties. Gibson J. declined to do so, saying there were many factual issues involved between these parties as well as issues revolving around the meaning of the various agreements en tered into by them. These included whether Perma-Roof still had the right to withdraw if the subdivision agreement as finally settled is not satisfactory to it, and whether Perma-Roof had in fact already exercised that right. Such matters required a trial. He dismissed the application.

The Present Dispute

12 This application is for different relief, and it has not been suggested by anyone that I am in any way bound by what Gibson J. did, but what is instructive about Gibson J.'s reasons is that the issues between the parties are no different today than they were 6 months ago when the matter was argued before him. There is still no evidence that the amended draft is not acceptable to the town, or that it has even been submitted to the town. The real dispute here has nothing to do with Wimpey's lien or with problems with the town; it has everything to do with the contractual relations between Royaledge and Perma-Roof. The applicant's counsel complained several times in the course of his submissions that the changes made to the draft subdivision agreement by Perma-Roof would cost his client substantial sums of money, possibly as much as a half a million dollars. He did not, however, analyze the changes to show that Perma-Roof is wrong, or is relying on an overly technical view of the arrangement. By way of example, it appears that some of these costs arise out of the fact that the town is apparently content with partial funding by way of letters of credit from Royaledge, whereas Perma-Roof's view is that Royaledge is obliged by its agreement with Perma-Roof to secure these expenses fully. I can see nothing unreasonable in Perma-Roof raising such a point. It is in Perma-Roof's interest to ensure all Royaledge's obligations are secured. If its agreement with Royaledge requires such security, the fact that the town will settle for less does not make Perma-Roof's stand unreasonable.

13 It is argued by Mr. Dingwall that the project is at an artificial impasse because Perma-Roof, aided and abetted by Boothe, does not wish it to proceed for reasons related to the depressed real estate market and its own financial health. He points to a recent request by Perma-Roof for a $2 million reduction in the first mortgage in support of this position. It may well be that it is in the economic interest of Perma-Roof to insist on the letter of its agreement with Royaledge,

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and perhaps thereby delay the time when building permits become available and interest starts to accrue upon the first mortgage. But the objections made by Perma-Roof to the draft subdivision agreement seem reasonable and have not been challenged before me on their merits, just on their cost. It appears that there is a genuine contractual dispute among these parties. There is also some evidence that if the impasse is artificial, it is the applicant that has created it. The applicant received some $3 million on closing, and it is admitted that the total expenses of development to date, including the Wimpey claim, are but $2.2 million. There should be ample funds available to pay Wimpey. But if Wimpey is paid, its lien disappears, and with it the basis for this application. Royaledge has refused even to submit the amended draft agreement to the town. It is said by Perma-Roof that the reason for this is that the town is likely to accept the amendments, and that the real objectives of Royaledge are to involve Perma-Roof in Royaledge's obligations and to avoid the cost of compliance with the terms of the agreement of purchase and sale.

14 On all the evidence, it is at least as likely that Royaledge is deliberately creating the impasse to avoid its obligations as it is that Perma-Roof or Boothe are doing so to avoid theirs.

Is There a Need to Preserve the Property?

15 In my view, the preservation of the property does not require the intervention of a trustee at this time. The unchallenged evidence of the engineer, Mr. Krpan, who reviewed engineering reports and personally observed the site, is that there is no danger whatsoever of the project and services installed deteriorating other than in the usual and ordinary course by usage and time.

The Function of the Proposed Trustee

16 The function of the trustee, as seen by the applicant, would be to take charge of the project and forge ahead with it. Necessarily this would involve settling the final form of the subdivision agreement. When I questioned the applicant's counsel on how the differences of opinion between the parties would be resolved, the answer was that the trustee would have to report those differences to the Court and the Court would decide. The trustee would not, the applicant said, have regard to the contract between Royaledge and Perma-Roof but, directed by the Court, would decide what is in the best interests of the project. The trustee would raise funds by mortgage to complete the project. The funds raised by the sale of the subdivision, when completed, would go into court, and the battles would then be fought out over the funds in court.

17 This is an extraordinary and illusory submission. It is illusory because "the best interests of the project" is an illusion; there is no such thing. There are only parties which are legal entities with competing interests whose disputes must be resolved on the legal principles involved after trial. If this dispute is to be resolved (as it should be) upon commercial and entrepreneurial grounds "in the best inter ests of everyone" rather than on legal grounds, it falls to be done by the parties, and not by the Court, which acts to protect legal rights. The submission is extraordinary because Perma-Roof is the registered owner of the lands in which it may or may not have some equity. Without any prior

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determination of the actual extent of its rights and obligations under its contract with Royaledge, its land is to be taken from it and placed in the hands of a trustee who may sell or mortgage it, or who may enter into agreements with which Perma-Roof may be in utter disagreement; all for the alleged greater good of everybody involved in this proposed subdivision. This is to be done, not on motion from the lien claimant, but on the application of the primary debtor, whose default in payment gave rise to the lien. As submitted by the applicant, the trustee would raise funds by mortgage to complete the project; but Royaledge is already committed to provide the funds for this purpose. Whose interest is served here?

18 Such an extraordinary remedy would be called for only if the irresponsible acts of Perma-Roof were imperilling the security of the lien claimants. This is not such a case. Perma-Roof is not acting irresponsibly. The security of the lien claimants has not been shown to be at risk. The completion of the project may be at risk, but that is not the same thing. In my view, s. 70 is designed to enable the Court to protect the interests of the lien claimants. It is not intended to enable one party to a contractual dispute to get a trustee appointed of the lands belonging to the other party in the hope that it will thereby be able to force the other party to agree to changes in, or a particular interpretation of, their contract.

Law

19 Counsel were able to find only one decided case to give guidance in the interpretation of s. 70. This is the decision of Grange J. (as he then was) in *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.* (19 April 1975), (Ont. H.C.) [unreported]. There, an application was brought under s. 34 of the *Mechanics' Lien Act*, R.S.O. 1970, c. 267, which gave the Court powers similar to those to be found in s. 70. Durcard, the plaintiff, was a lien claimant, and the defendant was the owner of a large apartment building. The plaintiff had obtained a judgment referring the trial of the lien action to the Master, but giving judgment for a balance admittedly owing in excess of $40,000. It now applied for the appointment of a trustee upon the ground that the property was only partially rented, and the defendant had ceased to pay the subtrades, including the plaintiff. It was further alleged that a second mortgage was about to come due and would require refinancing, and therefore it was imperative that some independent body manage the operation for the protection of the lien claimants. The defendant's evidence disputed these allegations. Grange J. dismissed the application, notwithstanding that he could not decide which of the two versions of the situation was correct. He said:

> I have been unable to uncover any helpful precedents, but in my view the remedies provided under s. 34 of the *Mechanics' Liens Act* are intended to be resorted to only when the present management is clearly unable to carry on with the business, either by reason of incompetence or dishonesty or neglect of the undertaking. I cannot find clear evidence of such deficiencies on the part of the defendant in this instance.

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Later on he said:

> I do not feel, however, that the Court should appoint a receiver or a trustee upon the application of one unsatisfied lien claimant where there is no evidence of abandonment of the premises or mismanagement of the project, particularly when a large part of the claim is disputed and where a ready remedy is available for that portion of the claim which is not disputed.

20 Section 70 is discussed in Harvey J. Kirsh, *Kirsh: A Guide to Construction Liens in Ontario* (Toronto: Butterworths, 1984), in Chapter 8, under the heading "Extraordinary Remedies". The author refers at p. 113 to the fact that it is in the best interest of lien holders to ensure the protection of the premises in the event the owner abandons them. He points out that the typical problem arises when an owner abandons a project prior to completion, to the potential prejudice of lenders and the trades. He describes the problem of physical deterioration of the project, particularly in winter through the actions of frost, and other weather conditions and vandalism. He concludes:

> Part IX of the Act is meant to deal with those types of potential problems referred to above by providing the machinery for the appointment of a trustee to secure, protect and perhaps even sell the premises.

21 Another textbook, Kevin P. McGuinness, *Construction Lien Remedies in Ontario* (Toronto: Carswell, 1983), discusses the remedy of the appointment of a trustee in Chapter 9, beginning at p. 288, where he says:

> The remedy provides for the appointment of a court officer to supervise the making of the improvement, to protect the premises on which it is being made, to assume management of that premises, and if necessary, to refinance the improvement and assume the responsibilities of the owner under the contract.

At p. 289 he says:

> The appointment of a trustee is described in the Act as an 'extraordinary remedy'. This description in itself suggests the nature of the protection afforded by section 70; it is not one which will be of use in most cases, but rather is one which may be of use only in a limited range of circumstances.

22 He goes on to point out that the power is a discretionary one, and that care must be taken "to ensure that other persons having an interest in the premises will not be adversely affected, and that the appointment will serve some meaningful purpose." By analysis of the powers given to the trustee, the learned author postulates three general areas in which it may be appropriate to appoint a trustee: "where the premises is an income earning property, and the lien claim may

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be satisfied out of the income" (p. 290); "where the owner has become insolvent, but the project itself would be a viable one if it were refinanced and carried to completion" (p. 291); and "where the appointment of a trustee may be of use ... to obtain management of the premises, in order to prevent its deterioration" (p. 291).

23 While the analyses in the two textbooks just quoted may not be exhaustive, I think they illustrate the parameters within which s. 70 was intended to operate. It is primarily intended to protect the interests of the lien claimants, care being taken to protect the interests of others in the process. Although on a literal interpretation, s. 70(1) could be interpreted as applicable even in the absence of a lien, I do not so read it. It must be remembered that it is found in a part of the *Construction Lien Act* which is headed "Extraordinary Remedies", and the wide powers given to the trustee indicate it is a remedy to be used with caution. I agree, respectfully, with the approach taken by Grange J. in *Durcard*, supra, in the passages I have quoted.

Summary

24 In my view, s. 70 has no application in the circumstances of the case at Bar. There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of the lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk. The problem underlying this litigation is a dispute between Perma-Roof and Royaledge as to the meaning of the agreements between them and as to whether the draft contract settled by Royaledge with the town is in harmony with those contractual arrangements. The appointment of a trustee does nothing to resolve these issues. Inevitably, the trustee will be faced with the same positions as are now being taken by the parties. The present proceeding, being summary in nature and based upon affidavit evidence, is ill-equipped to provide a forum for the resolution of contractual disputes. Under our system, these disputes are resolved at trial following viva voce evidence.

25 In my view, it is not appropriate in the present case to remove control of the property from those who own it simply because a contractual dispute is holding up the development of the property. The parties may well come to some economic grief if they cannot resolve their disputes. There is, however, no evidence before me to indicate that the lien claimants are at any risk. In all these circumstances, it is not appropriate for me to exercise my discretion and appoint a trustee. The application is accordingly dismissed.

26 There has been no argument as to costs. My preliminary views are that those respondents who opposed the applicant, namely, Perma-Roof and Boothe, should each have their costs against Royaledge, and that those respondents who supported the applicant, namely, Canadian Imperial Bank of Commerce and George Wimpey Canada Ltd., should bear their own costs. Counsel may

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make submissions on the matter of costs and the quantum thereof in writing, or at an appointment to be arranged through my secretary.

Application dismissed.

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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 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

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BRIEF OF AUTHORITIES OF THE APPLICANT

(appointment of a trustee)
(returnable February 11, 2015)

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