Court File No. CV15-10882-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

BOOK OF AUTHORITIES OF THE TRUSTEE

(motion returnable June 4, 2015)

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INDEX

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INDEX

TAB 1

THE 2015 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

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

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

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

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

STATUTES OF CANADA ANNOTATED

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

L§29 — Liability of Receiver for Expenses Incurred

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

L§30 — Liability of Receiver on Contracts and Borrowing

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

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

A receiver was not bound by a pre-receivership contract that obligated the debtor to pay a fee in respect of marketing efforts undertaken prior to the receivership, notwithstanding that the receiver made use of the marketing report to support its recommendation to sell the assets; nor was it bound to honour certain key employee retention requests, notwithstanding that the incentive payments were provided for in the cash flow forecasts, as it constituted a preference: *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.).

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

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

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

TAB 2

BENNETT on RECEIVERSHIPS

Second Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL
Thomson Professional Publishing

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

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

5. CONTRACTS

(a) Existing Contracts with Debtor

At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not it should complete or adopt those contracts. In cases where the contract is almost complete, such as in the case where the debtor had sold goods, but had not delivered them, the court examines the contract and the conduct of the debtor. If the debtor intended that title to the goods pass to the purchaser and separated them from other inventory, the court will enforce the contract in favour of the purchaser[166] or, in the case real property, direct the receiver to perform the contract.[167]

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership.[168] However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach. On the other hand, if the receiver chooses to perform such contracts, the receiver becomes personally liable for their performance where it does not disclaim personal liability.

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

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

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

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor.[170] If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages.[171] If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages.[172] If the receiver chooses to adopt the debtor's contract, the receiver becomes personally liable for that performance where it does not disclaim such liability.

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

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

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

171 Above.

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

TAB 3

2002 ABQB 706
Alberta Court of Queen's Bench

Bank of Montreal v. Scaffold Connection Corp.

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

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

Wachowich C.J.Q.B.

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

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

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Table of Authorities

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

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

Statutes considered:

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

s. 82(2) — considered

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

***Wachowich C.J.Q.B.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

14 The applications of the Receiver are granted.

Applications granted.

TAB 4

2005 BCCA 154
British Columbia Court of Appeal

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

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

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

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

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

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

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

Southin, Braidwood, Oppal JJ.A.

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

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

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

Subject: Natural Resources; Insolvency

Table of Authorities

Cases considered by *Braidwood J.A.*:

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

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

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

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

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

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

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

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

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

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

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

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

Statutes considered:

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

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

s. 23 — referred to

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

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

s. 30(1)(k) — considered

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

Generally — referred to

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

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

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157
Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally

s. 12(4)

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

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

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

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

Facts

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

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

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

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

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

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

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

Trial Judgment

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disposition

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

Oppal J.A.:

I agree.

Southin J.A.:

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

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

Appeal dismissed.

TAB 5

2008 BCSC 1000
British Columbia Supreme Court [In Chambers]

Pope & Talbot Ltd., Re

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

IN BANKRUPTCY AND INSOLVENCY

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

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

Brenner J.

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

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

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Brenner J.*:

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

Statutes considered:

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

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

***Brenner J.*:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The question is whether that is so.

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

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

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

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

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

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

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

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

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

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

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

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

35 THE COURT: Certainly.

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

37 THE COURT: Sure, that will be fine.

38 MR. JACKSON: Thank you.

Application granted; cross-motion dismissed.

Footnotes

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

TAB 6

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

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

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

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

Morawetz J.

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

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

Subject: Property; Corporate and Commercial; Insolvency

Table of Authorities

Cases considered by *Morawetz J.*:

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

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

Statutes considered:

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

s. 78 — considered

s. 79 — considered

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

s. 93(3) — referred to

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

Morawetz J.:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Motion granted.

TAB 7

2008 BCSC 897
British Columbia Supreme Court [In Chambers]

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.

2008 CarswellBC 1421, 2008 BCSC 897, [2008] B.C.W.L.D. 5281, [2008] B.C.W.L.D. 5336, [2008] B.C.W.L.D. 5337, [2008] B.C.W.L.D. 5338, [2008] B.C.W.L.D. 5414, [2008] B.C.J. No. 1297, 169 A.C.W.S. (3d) 102, 44 C.B.R. (5th) 171, 72 R.P.R. (4th) 68, 86 B.C.L.R. (4th) 114

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

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

Burnyeat J.

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

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

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

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Buchanan v. Oliver Plumbing & Heating Ltd. (1959), [1959] O.R. 238, 18 D.L.R. (2d) 575, 1959 CarswellOnt 167 (Ont. C.A.) — referred to

CareVest Capital Inc. v. CB Development 2000 Ltd. (2007), 2007 BCSC 1146, 2007 CarswellBC 1771 (B.C. S.C. [In Chambers]) — considered

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R. 50 — referred to

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

***Burnyeat J.*:**

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

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

... no proceeding or enforcement process in any Court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

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

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

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

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

Background

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

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

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

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

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

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

3.3 Prepayment

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

(b) Provided that:

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

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

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

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

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

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

B. Real estate commissions;

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

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

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

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

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

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

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

8. Completion

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

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

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

10. Delay

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

16. Risk

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

25. Assignment by Purchaser

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

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

26. Liability of Purchaser

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

28. Contractual Rights Only

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

MPC Intelligence Inc. Report

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

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

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

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

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

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

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

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

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

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

Applications of the Receiver and Manager

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

(a) Contracts of Siu Chun Chao-Dietrich

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Contracts of Crestmark Holdings Corp.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Estimated Selling Discount	$83,170

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

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

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

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

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

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

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

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

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

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

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

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

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

Can the Receiver and Manager Disclaim Contracts?

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

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

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

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

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

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

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

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

(at paras. 19-21)

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

> ... The *Newdigate* case is authority for the following valid proposition (p. 468):
>
> > It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.
>
> In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

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

> There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:
>
> > The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they*

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

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

(at paras. 55-6)

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

> The power of a receiver to disclaim contracts is set out in Bennett on *Receiverships*, (2d) Toronto, Carswell 1999, at page 341, which was referred to by both sides in their submissions on this application. That extract states:
>
> > In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership.
>
> The paragraph goes on to outline the consequences of the steps that a receiver may choose to take.
>
> This extract was recently the subject of judicial consideration in the Court of Appeal decision, *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005, BCCA 154. That judgment reaffirms the foreseeability of disclaimed contracts, even where the party contracting with the debtor has an equitable interest in a contract. In that case, apart from noting the authorities supporting the principle, Braidwood J. noted that the order appointing the receiver included a term granting the receiver the following power:
>
> > Apply for any vesting order or orders which may be necessary or desirable in the opinion of the Receiver in order to convey the assets or any part or parts thereof by a purchaser or purchasers thereof free and clear of any security, liens or encumbrances affecting the assets.
>
> In Braidwood J.A.'s opinion the foregoing clause determined the issue. (at paras. 17-8)

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

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

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

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

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

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

Do the Contract Holders Have an Equitable Interest?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disclaiming Contracts Relating to the Vancouver Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disclaiming Contracts Relating to the Richmond Project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Application of Crestmark

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

Costs

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

Order accordingly.

Footnotes

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

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

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(COMMERCIAL LIST)

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BOOK OF AUTHORITIES OF THE TRUSTEE

(motion returnable June 4, 2015)

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