

CITATION: The Polish Alliance of Canada v. Polish Association of Toronto Limited, 2015
ONSC 6458

COURT FILE NO.: CV-08-361644

DATE: 20151019

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN:

THE POLISH ALLIANCE OF CANADA

Plaintiff

AND:

POLISH ASSOCIATION OF TORONTO LIMITED, MAREK MIASIK aka MAREK ADAM MIASIK, MARIA MIASIK, JAN ARGYRIS aka LOUIS JOHN ELIE ARGYRIS aka LOUIS aka JOHN ARGYRIS, WLADYSLAW JASLAN aka WLADYSLAW JULIAN JASLAN, HELENA JASLAN, EUGENIUSZ SKIBICKI, CZESLAWA ERICKSEN, STANISLAW ROGOZ aka STAN ROGOZ, ALBERT JOSEPH FLIS and RICHARD RUSEK

Defendants

AND:

POLISH ASSOCIATION OF TORONTO LIMITED, MAREK MIASIK aka MAREK ADAM MIASIK, MARIA MIASIK, JAN ARGYRIS aka LOUIS JOHN ELIE ARGYRIS aka LOUIS JOHN ARGYRIS aka JOHN ARGYRIS, WLADYSLAW JASLAN aka WLADYSLAW JULIAN JASLAN, HELENA JASLAN, EUGENIUSZ SKIBICKI, CZESLAWA ERICKSEN, STANISLAW ROGOZ aka STAN ROGOZ, and ALBERT JOSEPH FLIS

Plaintiffs by Counterclaim

AND:

THE POLISH ALLIANCE OF CANADA, ROBERT ZAWIERUCHA, TADEUSZ MAZIARZ, ELIZABETH BETOWSKI, DANUTA ZAWIERUCHA, TERESA SZRAMEK, ANDRZEJ SZUBA, ADAM SIKORA, ELZBIETA GAZDA, STANISLAW GIDZINSKI, STANISLAW IWANICKI and TADEUSZ SMIETANA

Defendants by Counterclaim

BEFORE: F.L. Myers J.

COUNSEL: E. Patrick Shea, for Collins Barrow Toronto Limited, Receiver and Manager
B.A. Kaminsky, for the Plaintiff
Bernie Romano, for the Defendants/Respondents, except for Richard Rusek

HEARD: October 19, 2015

F.L. Myers J.

ENDORSEMENT

[1] The Receiver seeks:

- 1) approval of its first and third reports and the activities recited therein (including supplemental reports);
- 2) approval of its fees and disbursements including those of its counsel;
- 3) an order for the sale of No. 32 Twenty-Fourth St., Toronto, to fund the payment of its fees; and
- 4) directions concerning the validity of the appointment of the members of the board of directors of PATL.

Issue (1)

[2] There are no specific issues raised concerning the Receiver's activities as outlined in its reports except as dealt with below. Subject to what follows herein, the court approves the Receiver's activities as outlined in its first and third reports (including supplemental reports).

Issue (2)

[3] All agree that the Receiver and counsel performed the work listed in its dockets and that the work itself was performed well and with diligence. I agree. The parties however, seek an unspecified reduction in the Receiver's fees because senior members of the Receiver's firm performed the bulk of the work and all lawyer time was performed by Mr. Shea.

[4] This was an unusual receivership. The Receiver was appointed to protect a very valuable real estate property, the control and ownership of which is hotly disputed. It was also specifically tasked with overseeing the reconstitution of Branch 1-7 of the PAC in circumstances in which the PAC fundamentally altered the position that it took at trial and the defendants purported to act unilaterally in a manner that did not recognize the upshot of the trial decision. That is, this receivership is not the normal case of overseeing going concern operations of a failing business or conducting a liquidation of assets. This Receiver was plunked between warring parties and was asked to do specific things to enable the proper legal order to resume operations of the Branch. I specifically asked the Receiver to do as little as possible to interfere with the Branch's ability to perform its community services.

[5] The Receiver performed its unusual role exceptionally well. Mr. Weisz is to be commended for maintaining the integrity of his role as an officer of the court in difficult circumstances. Although the PAC sought the appointment of the Receiver (to prevent the defendants from improperly reconstituting the Branch) the PAC became adverse to the Receiver when Mr. Weisz properly asserted his independence from both parties.

[6] Mr. Shea is senior counsel, but he billed this file at a very low rate for the downtown Toronto market.

[7] In my view, a receiver is entitled to utilize senior counsel where a mandate calls for mature, nuanced judgment as this one did. Juniors are fine for mundane tasks. The onslaught directed at the Receiver was far from mundane or appropriate.

[8] The fees paid to Mrs. Miasik, and the security firm did save money and protect the operations of the Branch as I had ordered. The fees of the Receiver to May 31, 2015 of \$147,111.52 all-in are both fair and reasonable. The fees and disbursements of Gowlings a set out in the affidavit of Murray Haddon sworn June 4, 2015, to May 26, 2015, paras. 3 and 4, are also fair and reasonable. Both are approved. I note that no party suggested an alternative measure of either set of fees on any specific basis. No expert evidence was submitted. I see no basis for a general reduction of X% or Y% in this case.

Issue (3)

[9] In my endorsement dated September 3, 2014, 2014 ONSC 5095, at para. 21, I ruled that the Receiver would be paid from the properties under its control in accordance with its charge as established in its appointment order unless one of the parties steps up to pay. Neither has. The Receiver has been in place for about 16 months. It is completed all active aspects of its role. But it is not been paid one dollar. The Receiver is directed to sell No. 32 Twenty-Fourth St., Toronto to create a fund from which its fees can be paid. The Receiver will propose a sale process in writing to the parties within 30 days and seek approval of the process on consent, or, if opposed, on due notice.

[10] The property to be sold will be conveyed by vesting order so that no formal involvement of the trustees, in whose name the property is held for the Branch, is required.

[11] The Branch seeks indemnity from PAC for a share of the Receiver's costs. Allocation of a receiver's fees among interested parties on an equitable basis is appropriate. *DBDC Spadina Ltd et al. v. Norma Walton et al.* 2015 ONSC 2550.

[12] The Branch benefited greatly from the receivership as it was protected from predation by the PAC while it got its legal house in order. Its operations and community programs were maintained and its clubhouse remained available and open while the Branch was reconstituted.

[13] The PAC too benefited by keeping the defendants from proceeding as they planned in face of the trial judgment. The PAC has received over 50 applications for new members from the reconstituted Branch. It is also clear that the bulk of the fees of the Receiver and its counsel were incurred because of the unsuccessful and aggressive legal posturing against the Receiver by the PAC. There is some irony in the PAC complaining today that the Receiver should have used more junior counsel to protect itself from them or, even better, that they should have used more of the services of Mrs. Miasik to keep costs down, when they referred to her at the time as a "squatter" or a "trespasser".

[14] I will return to this issue after I address the last point.

Issue (4)

[15] The reconstituted Branch is the beneficial owner of the shares of PATL. It purported to elect a board of directors for the corporation. But it did not provide notice of the election

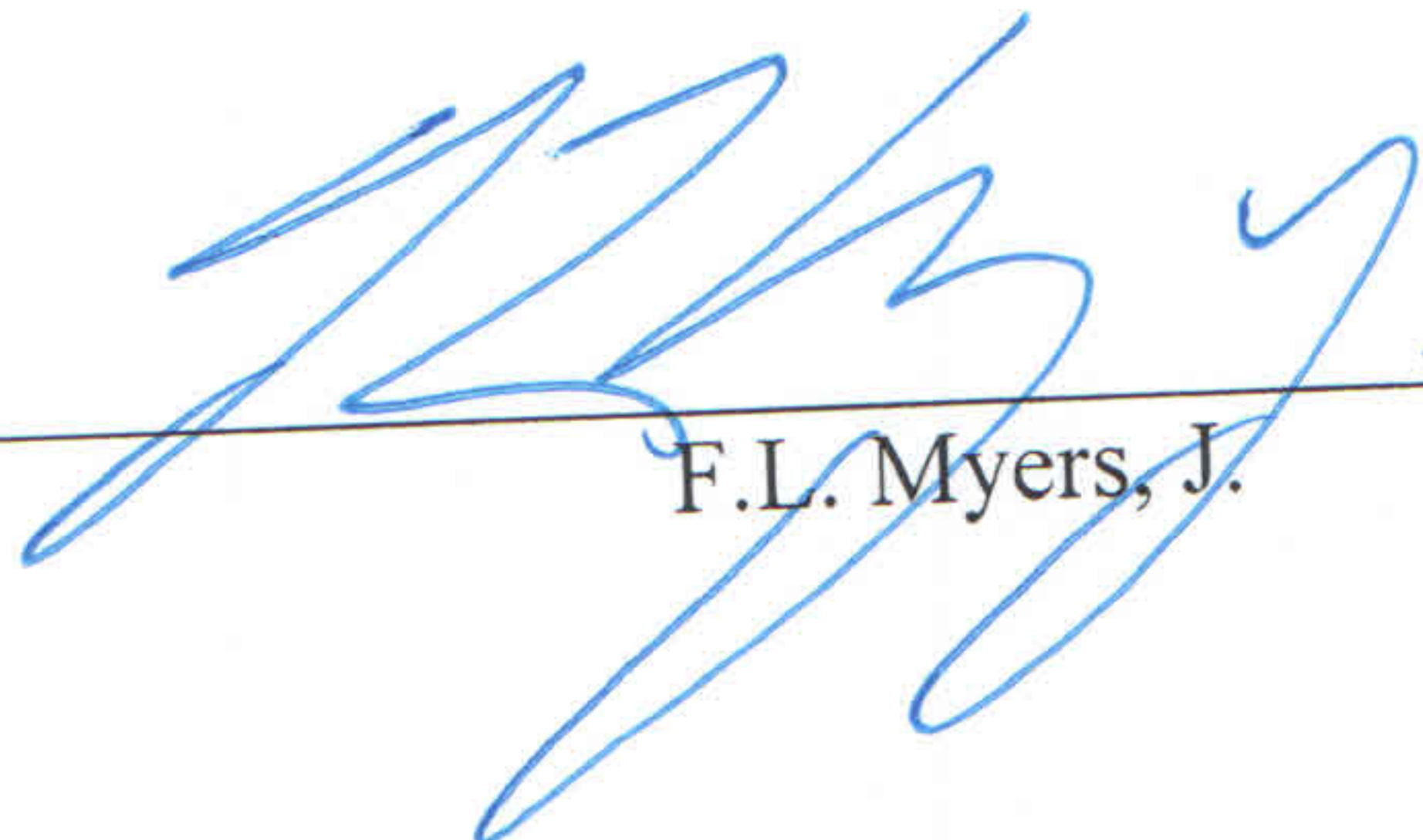
meeting to the PAC that holds legal title to the bulk of the shares of the company. PATL asks me to recognize its board. It was elected by the beneficial holders and, as a trustee, the PAC could only vote the shares as the beneficial owners required. The PAC agrees with a caveat. It will vote as required within its constitution. It says that the Branch as reconstituted is once again running amok ignoring the PAC Constitution.

[16] I cannot save the parties from themselves. Nor do I care to try. My trial judgment was very specific on the possibility of enforcement of the orders I made in that decision, with the help of a receiver if required. The Branch was reconstituted and once again made a viable operating body with the Receiver's help. What it does or did after that is beyond the contemplation of this proceeding. If the PAC wants to sue again and have its *bona fides* tested again is up to it. If the Branch gives the PAC grounds to enforce its constitution internally or in litigation, is up to them. The court is not operating the branch on some general trusteeship. The Receiver's mandate is done. It continues to exist solely to keep its name on title to preserve the clubhouse property pending the hearing of the appeal from the trial judgment. If someone sues for something new and seeks an interlocutory receiver in that case, then that is for another case. I decline to grant the directions sought by PATL and the Receiver. The approval of the Receiver's third report does not imply any determination at all concerning the propriety of the election of the board of PATL. That is beyond the scope of this proceeding.

[17] Finally, as is apparent from the foregoing, the war continues despite the court's efforts to bring the parties to cooperate in the best interests of members. Both sides are pulling out the stops to obtain tactical advantages and have been throughout. I cannot therefore assign greater benefit or blame to one party over the other. Every parry has been caused by a thrust and every thrust has been met by a parry. The PAC is therefore ordered to pay to the Branch 50% of all amounts that are paid to the Receiver and its counsel by the Branch or the proceeds of sale of its property. This order is effective and needs no further hearing for enforcement by the Branch as soon as monies are paid to the Receiver or its counsel from the Branch's property. This order (50/50, sharing), also covers all fees and disbursements of the Receiver and counsel from May 26, 2015 to today, if any, ordered after costs are argued.

[18] Cost submissions of no more than five pages may be filed by the Receiver and the defendants by December 1, 2015. The Receiver's submissions shall be supported by affidavits in the usual form. The defendants shall deliver a Costs Outline with their submissions. The PAC may respond by no more than 10 pages of submissions by year-end. The plaintiff shall deliver its own Costs Outline for comparison.

[19] All filings are to be by PDF attachment to an email to my assistant.


F.L. Myers, J.

Date: October 19, 2015