No. H200268
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

HONG LIU and MENG RUI LI a.k.a. MENGRUI LI

PETITIONERS

AND:

EAGLE Q PARTNERS INC.,
JIAN JIN,
ZHIHONG CHU a.k.a. ZHI HONG CHU,
TIE FENG FU and
HANYUM DEVELOPMENT CORP.

RESPONDENTS

BOOK OF AUTHORITIES OF THE PETITIONERS

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.,* 2012 BCSC 437

Date: 20120315
Docket: H100986
Registry: Vancouver

Between:

Canadian Imperial Bank of Commerce

Petitioner

And:

Can-Pacific Farms Inc., Daljit Singh Kooner, Manjeet Samra and Raman Samra

Respondents

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment
In Chambers

Counsel for Petitioner	G. Thompson
Counsel for Respondents	K.E. Siddall
Place and Date of Hearing:	Vancouver, B.C. March 15, 2012
Place and Date of Judgment:	Vancouver, B.C. March 15, 2012

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[1] These are foreclosure proceedings. This is an application pursuant to s. 143(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*B.I.A.*"), and s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253. The application would see the appointment of KPMG as the Receiver of the property, which is a berry farm in the Lower Mainland ("Property"). The application requests that the Receiver have borrowing powers up to $75,000 and the ability to sell particular assets but with any sale transaction not to exceed $50,000 and the aggregate of all sales not to exceed $250,000. Can-Pacific Farms Inc. ("Can-Pacific") has also commenced proceedings pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*C.C.A.A.*")

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BACKGROUND

[2] There was a loan in April of 2010 for $10 million to Can-Pacific with a guarantee by its principal and sole shareholder, Mr. Kooner. In support of that loan, a general security agreement and mortgage charging all of the property, assets and undertaking of Can-Pacific was provided.

[3] In July 7, 2010, demand was made for repayment of the balance that was owing at that time, being roughly $7,500,000. As well, a notice of intention to enforce security was provided pursuant to both the *B.I.A.* and the *Farm Debt Mediation Act*, R.S.C. 1997, c. 21. No payments were made and Can-Pacific did not seek mediation under the *Farm Debt Mediation Act*. These foreclosure proceedings were then commenced on August 10, 2010.

[4] In September 2010, the parties came to an agreement which was subsequently encapsulated in a forbearance agreement. The Petitioner agreed that it would only take a three-month redemption period on any application for an order nisi of foreclosure. Can-Pacific agreed to make certain payments during the term of the forbearance agreement and keep the Petitioner informed regarding its effort to obtain refinancing. The Petitioner submits that it was not informed of the efforts to obtain refinancing and that Can-Pacific was in default under the forbearance agreement by September 22, 2010.

[5] The Petitioner also discovered that Can-Pacific had been using its funds to fund a proposal filed under the *B.I.A.* by a related company, Meadow Creek Cedar Ltd. Various other defaults occurred. Those defaults had not been cured by late November 2010.

[6] On December 2, 2010, the Petitioner discovered that Can-Pacific and Mr. Kooner were continuing to use Can-Pacific monies for the benefit of Meadow Creek. The Petitioner instructed its counsel to continue with the foreclosure proceedings and January 12, 2011 was set as the date when an application was to be made to apply for an order nisi of foreclosure. As a result of further negotiations, an agreement was reached that a redemption period of six months would be sought by the Petitioner and that any order would not be entered for a period of three months to accommodate the attempts of Can-Pacific to conclude refinancing arrangements.

[7] The Order Nisi of Foreclosure was granted on January 9, 2011. Judgment was granted against Can-Pacific and Mr. Kooner for $7,361,232.05 with the six-month redemption period to expire on July 19, 2011. To date, the Petitioner has not undertaken enforcement proceedings against Mr. Kooner or against other assets owned by Can-Pacific.

[8] The Petitioner learned that Can-Pacific had sold its 2011 berry crop and had deposited the proceeds with another financial institution despite the fact that the accounts receivable reflected by the sales constituted funds available to the Petitioner under its security.

[9] The application of the Petitioner on July 21, 2011 for an Order for Conduct of Sale was granted by the Court. The Property was listed for sale with Colliers International at a listing price of $13.5 million. The listing price was subsequently reduced to $12.5 million, then to $11.5 million, and then to $11 million.

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[10] The materials which are in evidence indicate that there was an appraisal done in April of 2011 indicating a value of the Property of $15 million if a freezer building that is partially constructed on the Property was completed.

[11] Despite the optimism in the appraisal and despite the optimism of the listing prices, only two offers were received by December 2011, being an offer of $8 million and an offer of $9 million. The subject clauses on those two offers were never removed.

[12] The balance owing to the Petitioner is approximately $7.5 million. Taking into account the real estate commission, the property taxes which are in arrears for approximately $25,000, the balance owing under the security of the Petitioner and of the second mortgage, and the claims of builders lien which have been filed against the Property, it would take a sale of in excess of $8.6 million to clear those debts. Any such sale would not provide payment for unsecured trade creditors of approximately $600,000 and the significant shareholders loan from Mr. Kooner of $5.5 million.

[13] The Petitioner obtained short leave to have this application for the appointment of a Receiver heard on February 15, 2012. On February 14, 2012, Can-Pacific filed for mediation under the *Farm Debt Mediation Act* which had the effect of staying the Petitioner's ability to proceed with the application. That stay was subsequently lifted by the Farm Debt Mediation Service. On February 27, 2012, an appeal of that decision was taken by Can-Pacific and, on March 6, 2012, the Farm Debt Mediation Service dismissed the appeal and filed a notice of termination of the stay of proceedings.

[14] The application before me is one which should, pursuant to the principles set out in *United Savings Credit Union v. F & R Brokers Inc.* (2003), 15 B.C.L.R. (4th) 347 (S.C.), result in the order requested being granted as a matter of course. Accordingly, I make the order requested. What has happened between the parties makes the appointment of a Receiver inevitable. In the case at bar, Can-Pacific has not met the onus of showing that there are compelling commercial or other reasons

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why such an order ought not be made. It would ordinarily be the case that the appointment of a receiver should be made as a matter of course: *Eaton Bay Trust Co. v. Motherlode Developments Ltd.* (1984), 50 B.C.L.R. 149 (S.C.); *Royal Trust Corp. of Canada v. Exeter Properties Ltd.*, [1985] B.C.J. No. 942 (S.C.); *Ross v. Ross Mining Ltd.* (2009), 57 C.B.R. (5th) 77 (Y.T.S.C.); and *United Savings Credit Union*, *supra*.

[15] In that regard, the Order Nisi has been granted so that there can be no doubt as to the legitimacy of the security of the Petitioner; an Order for Conduct of Sale has been granted; two offers of $9 million and $8 million have been received but without the subject clauses being removed; there is a possible shortfall to the creditors having secured or other claims against the Property if the Property can only be sold for less than $8.6 million; no interest payments have been made for about 19 months; efforts under the *Farm Debt Mediation Act* have failed; and monies otherwise available to the Petitioner have been diverted by Can-Pacific.

[16] Counsel has drawn to my attention the decisions in *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.* (2010), 67 C.B.R. (5th) 97 (B.C.S.C.) and *Maple Trade Finance Inc. v. C.Y. Oriental Holdings Ltd.* (2009), 60 C.B.R. (5th) 142 (B.C.S.C.), where the Court concluded that it was necessary to show that it was just and convenient to make an appointment before an appointment of a receiver would be made. In *Textron*, judgment had not been obtained. The same was the case in *Maple Trade*. From the Reasons, it is clear that the decision in *United Savings Credit Union* and the decisions relied upon in that decision were not drawn to the attention of the Court in *Maple Trade*. The decision in *United Savings Credit Union* was considered by the Court in *Textron*, but the Court relied on the decision in *Maple Trade* which had not considered the decision. While I am able to distinguish the decisions in *Textron* and *Maple Trade* on the basis that they dealt with applications for the appointment of a receiver prior to judgment being obtained, I find no need to do so as I am satisfied that neither decision correctly states the law in British Columbia.

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[17] On the assumption that I am incorrect in arriving at the conclusion that an order for a receiver should go as a matter of course, I also find that it would be just and convenient for this appointment to be made. In particular, I take into account the dissipation of assets which has occurred as a result of the activities of Can-Pacific in using the sale proceeds from the sale of berries other than in accordance with the security of the Petitioner, the apparent deterioration of the Property as evidenced by the state of cleanliness and repair that was present when the security was first put in place and what is evident now, and the fact that no interest has been paid to the Petitioner for approximately 19 months. Other than the fact that the order takes effect from today, I do not see any commercial or other reasons why any harm will come to Can-Pacific as a result of the appointment.

[18] I am satisfied that the order requested by the Petitioner should be granted. In view of the fact that there is a filing under the *C.C.A.A.*, I will stay all aspects of the appointment for a period of two weeks to April 2, 2012. That stay includes any statutory or common-law obligations of the Receiver in the interim. Accordingly, the Receiver will not be in a position to take possession. It will not be required to undertake those matters which are set out in the Order. It will not be necessary to take any of the statutory or common-law obligations ordinarily imposed on a Receiver.

[19] The stay will end at 4:00 p.m. on April 2, 2012. I adjourn the application under the *C.C.A.A.*. Counsel will set a date for a full-day hearing on the question of whether the orders sought under the *C.C.A.A.* should be made.

"Burnyeat J."
The Honourable Mr. Justice Burnyeat

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cascade Divide Enterprises, Inc. v. Laliberte,* 2013 BCSC 263

Date: 20130201
Docket: S130606
Registry: Vancouver

Between:

Cascade Divide Enterprises, Inc. and Next Layer Inc.

Plaintiffs

And

Benoit Laliberte, Communication Teliphone Navigata-Westel Inc., Fiducie Residence Jaam, 0865944 B.C. Ltd., Navigata Communications Ltd. and Teliphone Corporation

Defendants

-And-

Docket: S130592
Registry: Vancouver

Between:

Teliphone Navigata-Westel Communication Inc.

Plaintiff

And

Cascade Divide Enterprises Inc.

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs in action S130606 and the Defendant in action S130592:	W.C. Kaplan, Q.C. R.W. Millen
Counsel for the Defendants in action S130606 and the Plaintiff in action S130592:	K.E. Siddall S. Boucher, A/S

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Place and Date of Trial/Hearing:	Vancouver, B.C. January 31 and February 1, 2013
Place and Date of Judgment:	Vancouver, B.C. February 1, 2013

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THE COURT:

Introduction

[1] These actions involve a number of disputes arising out of the conduct of the parties both prior to and after a significant transaction involving the sale of assets of a telecommunications business in late 2012 by Cascade Divide Enterprises, Inc. ("Cascade") to Communication Teliphone Navigata-Westel Inc. ("TNW").

[2] TNW is one of the defendants in the action commenced by Cascade to enforce the security. There are also various subsidiary companies, the defendants 0865944 B.C. Ltd. and Navigata Communications Ltd., which were originally subsidiaries of Cascade until the closing of the transaction.

[3] The defendant Mr. Benoit Laliberte is the president and principal of TNW. I understand that he is also now the president and principal of 0865944 B.C. Ltd. and Navigata Communications Ltd. Mr. Laliberte is an undischarged bankrupt. The final defendant is Fiducie Residence Jaam, which I understand is a family trust of which Mr. Laliberte is a beneficiary.

[4] There are written agreements between the parties relating to the sale; they provide for the granting of security by TNW for obligations arising under those agreements. Cascade alleges that TNW is in default of the agreements and that the security can be enforced as a result.

[5] There are two applications before me.

[6] In the action commenced by Cascade, it seeks an order appointing a receiver over TNW. In addition, Cascade seeks certain injunctive relief relating to what are said to be obligations arising out of the sale agreements. In the action commenced by TNW, it seeks an order staying enforcement of the security granted by TNW in favour of Cascade pursuant to the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the "*PPSA*"). TNW says that there are *bona fide* triable issues regarding the

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allegations of default and that accordingly, the appointment of a receiver is not appropriate in the circumstances.

[7] This application has been brought by both parties on an urgent basis, and on the basis of the evidence, I am satisfied that urgency has been made out. I am therefore giving these reasons orally so as not to delay matters. Despite the brevity of these reasons, I have considered all the evidence presented on the application, together with the extensive arguments and authorities advanced by both parties.

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Factual Background

(a) Prior to the Asset Purchase Agreement

[8] Cascade was formerly engaged in the provision of voice, data and broadband internet services. The plaintiff Next Layer Inc. ("Next Layer") is a wholly-owned subsidiary of Cascade and provides various co-location, network and data services, including cloud computing, for businesses across Canada. "Co-location" services are services provided to customers who co-locate their data servers in Next Layer's premises in a dedicated space provided by Next Layer, which is accessible either on a shared or exclusive basis to the customer.

[9] The evidence regarding the operations and business of Cascade and Next Layer prior to the sale is of some importance on this application. Cascade formerly carried on the business of providing telecommunication services, including voice, data and internet services, to service providers and end users (the parties describe this as the "Business"). In addition, Cascade provided various co-location, network and data services to its customers directly.

[10] In 2011, Cascade created a subsidiary, Next Layer, to separate the co-location services from the Business. In early 2012, Next Layer acquired the necessary assets from Cascade to provide the co-location services. Next Layer intended to expand its co-location business into a comprehensive data centre business that would complement the telecommunication service offerings of Cascade. Over time, it was intended that it would be capable of standalone

operations. At this time, Cascade continued to provide only telecommunication services to its customers through the Business.

[11] The co-location services were very integrated with the Business due to the fact that Next Layer customers typically subscribed to internet conductivity services and, in some cases, voice services, all of which were provided by Cascade to Next Layer.

[12] In January 2012, Cascade and Next Layer executed a Master Telecommunication Services Agreement whereby Cascade agreed to provide Next Layer with the necessary connectivity services on a wholesale bundled basis, which enabled Next Layer to provide the co-location services. The agreement provided that Next Layer would obtain services at the lowest price. The benefits under this agreement were mutual, in that Next Layer received wholesale telecommunication services for resale to its customers and Cascade received further sales by the marketing of those services by Next Layer along with its co-location services.

[13] Cascade and Next Layer were also highly physically integrated. Next Layer and Cascade shared office space in Burnaby. Some of Next Layer's servers and other equipment were located in Cascade premises, and all were serviced by Cascade employees. One of the critical aspects of this integration was that Next Layer's billing system and information database, including customer contracts and billing records, were commingled with Cascade's billing and accounting systems.

[14] In January 2012, Cascade and Next Layer also executed a Support Service Agreement. By this Agreement, Cascade agreed to provide various technical and general administrative support services to Next Layer for a three-year term for a flat fee of $10,000 per month. Cascade invoiced Next Layer for these services.

[15] Pursuant to the Support Service Agreement, Cascade was responsible for all billing and accounting matters in respect of Next Layer customers. Next Layer was provided with customer receipt reports from Cascade on an as-needed basis. These

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reports were provided as requested by Next Layer employees, sometimes on a daily or weekly basis.

[16] Customers were generally invoiced on the 1st or the 15th of the month, with payment due 30 days thereafter. The customers were sent a single monthly invoice by Cascade for both the co-location services and the telecommunication services. All amounts were remitted to Cascade. Cascade was also responsible for collecting all HST from Next Layer customers, holding it in a separate bank account and remitting amounts on a monthly basis to the Canada Revenue Agency ("CRA").

[17] As part of the physical integration, the computer systems containing customer information, usage information and other information of Next Layer's business were operated by Cascade's employees. After January 2012, Next Layer had access to this information through Cascade on an as-needed basis.

[18] In order to sort out how amounts collected by Cascade from customers would be allocable to Next Layer for its operations, the parties agreed to an allocation formula. This formula also addressed how to compensate Cascade for its costs associated with providing the telecommunication services to Next Layer customers.

[19] In the first instance, all customer receivables were deposited into Cascade's accounts. Thereafter, what the parties have called the "original" formula provided that if a customer used co-location services, all revenue from that customer, whether for co-location or telecommunication services, was allocated to Next Layer. To the extent that the customers used telecommunication services, Next Layer would pay Cascade for the cost of providing those services plus 50% of the profit relating to those services.

[20] Next Layer emphasized that its portion of the allocated revenue is its sole revenue source and that this allocated revenue was accounted for by Cascade on a monthly basis. The original allocation formula was primarily designed by Tim Sansom, Cascade's former Chief Financial Officer. Mr. Sansom, as CFO, also implemented the original allocation, and this revenue was reported in Next Layer's

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financial statements, the preparation of which was overseen by Mr. Sansom while he was at Cascade. Mr. Sansom is now an employee of TNW.

(b) The Asset Purchase Agreement

[21] The central issues in this litigation relate to the sale by Cascade of a portion of the Business to TNW on November 30, 2012, pursuant to an Asset Purchase Agreement (the "APA"). By reason of that sale, Cascade sold to TNW certain assets — which essentially involved Cascade's operating assets relating to the Business — for $6.44 million. There was also substantial related documentation arising from the sale. In particular, certain parties were to provide to Cascade guarantees or indemnities supported by security against assets for payment of the purchase price and compliance with obligations arising under the various agreements. Most importantly, for the purposes of this application, TNW provided security to Cascade in the form of a general security agreement ("GSA"). That GSA has, as far as I am aware, been properly registered in this jurisdiction and perhaps others.

[22] Pursuant to the APA:

a) TNW acquired the operating assets necessary to conduct the Business. Those assets were described in the preamble to the APA and included accounts receivable, leased premises, contracts, leased equipment, business records and pre-paid expenses;

b) Cascade retained the assets relating to the co-location services, which of course included Next Layer's business operations. Accordingly, Cascade retained all of its shares in Next Layer and the Business, assets of Next Layer, and Cascade's right and interest in certain leases and shares; and

c) TNW assumed all of the rights and obligations under certain contracts, including the Support Services Agreement. Various other agreements were also assigned by Cascade to TNW. One of the issues arising on this application related to a lease held by Cascade for the premises in Burnaby. These premises were used as Cascade's head office and were

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shared with Next Layer pursuant to the Support Services Agreement. Next Layer also located its facilities there.

[23] The payment schedule under the APA provided for the purchase price to be paid in a number of periodic payments:

a) $500,000 at closing;

b) $940,000 on December 14, 2012; and

c) commencing December 15, 2013, the remaining balance of $5 million was to be paid annually by five equal instalments, together with interest.

[24] The APA was originally scheduled to close on December 15, 2012. I understand that some urgency arose in respect of that closing, principally because Mr. Laliberte insisted that the financial health of Cascade was such that the closing had to occur as soon as possible so that efforts could be made to restructure the operations and return Cascade to better financial health.

[25] As far as I understand, in the weeks leading up to the closing, there was some due diligence done by TNW's employees, including Sandeep Panesar and Mr. Laliberte himself. I also understand that in the weeks leading up to the closing, TNW employees worked closely with Cascade employees. Many of these employees, including Mr. Sansom, the CFO of Cascade who later became the CFO of TNW, have provided affidavits on this application. Mr. Sansom was part of a group of high-level management employees of Cascade who moved over to TNW immediately after the closing and presumably are now fully employed by TNW.

[26] Given the shortened period of time in which the APA had to close, various documents that were intended to be exchanged between the parties were not prepared in time. Accordingly, there was also a further agreement between the parties called a Post-Closing Agreement, by which certain documents, including various security documents, were to be provided no later than December 18, 2012.

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Disputes Between the Parties

[27] There are many disputes between the parties. I will deal with them individually.

(a) The December 2012 Payment

[28] The first dispute relates to the second payment due under the APA on December 14, 2012. As I indicated earlier, the amount due and owing at that time in relation to the purchase price was $940,000. There was an e-mail sent from Mr. Laliberte to Cascade just immediately prior to that date which indicated that payment would be made; however, only $140,000 was eventually paid by TNW on or just after the due date.

[29] TNW later alleged that the short payment of $800,000 arose from a situation relating to one of Cascade's accounts receivable. As a result, there was substantial evidence on this application concerning the circumstances of the account receivable associated with TransPacific Telecom Group Inc. ("TransPacific").

[30] I do not intend to review all of that evidence in detail, but I will generally describe the issue. It appears that TransPacific began doing business with Cascade in early 2012. Services were provided by Cascade and payments were made by TransPacific. I understand that as of the end of October 2012, which would have included billings to September, TransPacific had fully paid up or, in fact, had slightly overpaid. In any event, it appears that there were substantial services provided to TransPacific prior to the sale, in both October and November 2012, such that eventually, a receivable of approximately $718,000 was owing to Cascade at the time of the closing of the APA.

[31] TNW points to certain clauses in the APA by which it says there was either an agreement or a representation by Cascade that all accounts receivable were "valid, enforceable and collectible accounts in full":

> Section 3.01(11)
> Financial Statements. The Financial Statements have been prepared in accordance with Canadian generally accepted accounting principles, are true,

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> correct and complete in all material respects and present fairly the consolidated financial condition of the Vendor as of the respective dates indicated therein. Without limiting the generality of the foregoing, the gross revenue as set forth on the Financial Statements is equal to $32,000,000.
>
> …
>
> Section 3.01(13)
> Accounts Receivable. The accounts receivable included in the Purchased Assets arose from bona fide transactions in the ordinary course of the Business have not been discounted (except for customary, early payment discounts consistent with past practice and are valid, enforceable and collectible accounts in full (subject to set-off and a reasonable allowance, consistent with past practice, for doubtful accounts as previously disclosed in writing to the Purchaser).
>
> [Emphasis added.]

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[32] Evidence presented by TNW on this application from former employees of Cascade (who are now employees of TNW) is said to support the contention that it was well known by Cascade that the receivable owing from TransPacific was a "bad debt".

[33] In light of that evidence, TNW now alleges that there was a breach of the representation in the APA concerning the TransPacific account being 'collectible account in full', or alternatively, that there was a fraudulent misrepresentation in respect of that debt. TNW now argues that the collectability — or rather, uncollectability — of this debt was not disclosed to TNW prior to closing. TNW also provided evidence that it had made unsuccessful efforts to collect the TransPacific debt in full.

[34] I questioned counsel for TNW in terms of the interpretation of the words "collectible accounts in full". As I understand it, TNW takes the position that this phrase essentially amounts to a guarantee by Cascade that all accounts receivable owing as at the end of November would be paid in full. Further, it contends that this "guarantee" relates to not only what might have been considered "bad" or problem debts prior to that date, but also to what might have been considered a good debt as of the closing but which later became a "bad" or problem debt for whatever reason.

[35] Cascade says that TNW knew of the accounts receivable levels prior to the closing. There is evidence that Mr. Panesar did in fact receive an accounts receivable listing prior to the closing which, on the first entry, clearly identifies TransPacific as having a large amount due and owing to Cascade. There is also evidence that Mr. Panesar was involved in an e-mail exchange just prior to the closing, at which time he questioned certain Cascade employees about whether $200,000 that was to be paid by TransPacific had in fact been received.

[36] I conclude from this evidence that it is abundantly clear that TNW was aware of the account receivable levels well before closing and that TNW was also aware of Cascade's efforts to collect the amounts outstanding from TransPacific. That evidence casts considerable doubt on TNW's ability to allege fraud on the part of Cascade by arguing that Cascade hid from TNW the true status of the TransPacific receivable. As counsel for TNW points out, I am not to make a determination in respect of those matters on this application, but I must at this time consider the merit, or perhaps lack of merit, of arguments that might be advanced at the end of the day.

[37] I also note that, in support of TNW's contention that the TransPacific debt was considered a "bad debt", various TNW employees (who were formerly employed by Cascade) have taken pains to outline in detail what they say was happening at Cascade in respect of the TransPacific matter. It is quite curious that those same employees did not comment at all on the level of discourse between them and TNW employees during the due diligence period in respect of that same receivable.

[38] Further, there is also little evidence from TNW in terms of its efforts to collect the TransPacific debt. There was evidence of a proposal by TransPacific to provide a promissory note, a proposal which was not satisfactory to TNW. But there was no further evidence from TNW on this application as to what happened after that point in time. There is, however, uncontradicted evidence from Cascade that a TNW employee has indicated fairly recently that TNW has had some success in collecting a substantial portion of the receivable owing by TransPacific.

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[39] The more significant argument on the part of Cascade relating to the TransPacific matter, the allegations of breach of contract or fraudulent misrepresentation, and the ability of TNW to set off any amounts owing as a result arise from the APA in Section 5.06. That clause provides:

> [TNW] shall not be entitled to set-off the amount of any Claim (whether submitted under Article 5 as damages or by way of indemnification or otherwise) against any other amounts payable by [TNW] to [Cascade] whether under this Agreement (including, without limitation, under Article 6) or otherwise.

[40] The definition of "Claim" in the APA is very broad, meaning "any claim, demand, action, lawsuit, proceeding, arbitration or investigation, in each case, whether asserted, threatened, pending or existing." As earlier stated, the argument advanced by TNW is that there was a breach of contract, which, as Mr. Kaplan points out, would quite likely be squarely met by what I consider to be the plain meaning of Section 5.06. TNW asserts, however, that there are issues with respect to the interpretation of Section 5.06. In the first instance, it says that the clause does not apply to these circumstances (and by that, I take it to mean the ability of TNW to set-off claims). It is acknowledged that there is no claim for legal set-off, since TNW's claim is not a liquidated debt. TNW contends, however, that it has a claim for equitable set-off, in accordance with the principles set out in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689 (B.C.C.A.). I acknowledge if a valid claim exists, then generally speaking, equitable set-off may be available to TNW in these circumstances.

[41] However, even if a claim for equitable set-off was available to TNW, again, I consider that the plain meaning of Section 5.06 would meet any such claim. TNW asserts that there is ambiguity in Section 5.06. But based on the plain meaning of the words in that Section, I quite frankly do not see it.

[42] TNW's alternate argument is that even if Section 5.06 precludes the exercise of any right of set-off, the court may not enforce such a clause where fraud is involved. In that regard, TNW relies on the decision of *British Columbia (Attorney General) v. Malik*, 2009 BCCA 202. At paras. 43-50, the court acknowledges that in

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certain circumstances, particularly in respect of an equitable claim such as fraud, courts may ignore the contractual arrangements between the parties.

[43] Cascade argues that within a normal commercial situation, the court will not usually depart from the clear wording of the contract and, in particular, the court will enforce clauses by which the parties have expressly agreed that no set-off will be exercised, citing in support *KKBL No. 348 Ventures Ltd. v. Vancouver Tech Park Corp. et al.*, 2003 BCSC 164 and *Royal Bank of Canada v. Parmar et al*, 2005 BCSC 1155.

[44] In this case, both parties are sophisticated parties. Further, this was clearly a situation where the parties had significant legal advice in the formulation of their agreement and, given the substantial documentation that accompanied the closing, also in the recording of their agreement. The allegations of fraud are advanced by TNW based on what I consider to be a fairly weak argument. In light of all the circumstances brought to light at this time, following *Parmar* and *KKBL*, I see no reason to depart from holding the parties to their bargain. There is no clear indication of fraud on which I might follow the *Malik* reasoning.

[45] Accordingly, with respect to the $800,000 amount owing, I find that Cascade has presented a strong case.

(b) Allocation of Next Layer Revenue

[46] I have already referred to the pre-existing arrangements between Cascade and Next Layer concerning the manner in which the revenue from the shared customers were to be recovered, paid and allocated between them.

[47] Critical to the allocation was that if there were any co-location services provided to a shared customer, all of the proceeds would be paid to Next Layer and there was to be a remittance back to Cascade of the cost of providing the telecommunication services plus 50% of the profits relating to those services. It is also the case that if there were any receivables owing from Next Layer to Cascade,

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by reason of services being provided to Next Layer, there would be a billing of those expenses to Next Layer and then a later remittance by Next Layer back to Cascade.

[48] This was the basis upon which Cascade and Next Layer operated prior to the closing of the transaction on November 30, 2012. Certain former employees of Cascade (now employees of TNW) gave evidence attempting to disparage the validity of that practice or method of allocation. I consider that whether this allocation was something that should have been done is rather beside the point; the fact is it was done.

[49] Cascade submits that it was this very practice that was incorporated into the APA. Counsel for TNW submits, quite correctly, that there was no specific delineation of that allocation procedure in the APA. However, the APA did reference the financial statements and the assumptions on which those financial statements were created. The evidence is clear that those financial statements and the assumptions were on the basis of the original allocation formula that was in place prior to the closing of the transaction. Mr. Griffiths, the CFO of Next Layer, commented that it was on that basis that he expected that the allocation would continue simply as before.

[50] TNW takes the position on this application that there was no agreement between the parties concerning the allocation of revenue to Next Layer as at the date of the closing, in accordance with the APA. TNW also made certain submissions that, in any event, even if there was an "original" allocation, sometime in November prior to the closing, the parties agreed to what is called the "new" allocation.

[51] There are a number of difficulties with TNW's position. There is a suggestion in the evidence from Mr. Sansom to the effect that Mr. Laliberte alleges that he orally made this "new" agreement with the representatives of Cascade prior to the closing. That portion of the affidavit is very oddly worded; and while Mr. Samson says that Mr. Laliberte "advised" of such an agreement, there is no evidence as to *who* Mr. Laliberte is said to have advised of that agreement. I do, however, acknowledge that

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Mr. Panesar also says that this "new" agreement arose from a meeting between himself, Mr. Laliberte and two representatives of Cascade, including the Chairman.

[52] Cascade and Next Layer very much dispute that they entered into any "new" agreement with TNW prior to the closing.

[53] Another difficulty with this "new" agreement is that it is directly contrary to the financial statements that are expressly referenced in the APA and related documentation.

[54] A further difficulty is that the APA included an "entire agreement" clause in Section 7.08 which expressly precludes any reliance on prior agreements, including any oral agreements; and as in the usual fashion, it indicated that whatever agreements the parties intended to and did make in respect of this transaction were in writing, as found in the APA. This is not an unusual clause. And again, there was a specific reference to the Next Layer financial statements in Section 3.03 of the APA and that TNW expressly acknowledged that the gross revenue set forth in those financial statements are at a certain level. The assumptions within those financial statements lead back to the original allocation that was in place between Cascade and Next Layer prior to the closing.

[55] Perhaps the best response to TNW's current contention regarding this "new" agreement is the evidence from Mr. Laliberte himself. He sent an email to the Chairman of Cascade and Next Layer on the eve of the closing on November 29, 2012, stating:

> Don't worry about the intercompany we will follow the existing agreement. Revenue, asset and liability will be mutually agreed today in the agreement and nothing will change. Revenue of next layer and Oncall will be immediately forwarded to your account, but you will have to pay back to us the cost as per the agreement on a timely matter. Tim will deal with this for at least the next 6 months.
>
> John, AT THE END OF THE DAY IT IS A QUESTION OF TRUST AND GOOD FAITH!!

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[56] It is difficult to interpret the above statement by Mr. Laliberte, save and except that he understood that the allocation was to be exactly as was in place between Cascade and Next Layer just prior to the closing. That understanding would have not only included a calculation based on the original allocation; most importantly, it would have also included that there would be no set-off before that allocation was made and that there would be a billing addressed to Next Layer by TNW in the usual course of business, which would be paid by Next Layer.

[57] Once more, I acknowledge TNW's argument on this issue, and I do not intend to resolve that issue on this interlocutory application. For the purposes of considering the relief sought today, however, I consider that Cascade has a strong case in support of its position that the allocation between the parties was to be in accordance with the original allocation.

(c) HST / Lease Obligations

[58] There was some discussion during submissions regarding the amounts that are owed to the CRA for HST prior to the closing. I will not delve into that issue to any great degree because counsel for TNW indicated during argument that TNW now agrees that those amounts should have been, and will be, paid by TNW. I will, in any event, address this issue within the context of the court order to be granted.

[59] The lease was also a very contentious matter. The evidence indicates that the lease in Burnaby where both Cascade and Next Layer had their head offices was to be taken over by TNW. Obligations under the lease were addressed within the context of the Assignment and Assumption Agreements.

[60] Notwithstanding those agreements, almost immediately after the closing, Mr. Laliberte on behalf of TNW chose to take a different tack with the landlord. TNW moved from the premises shortly after the closing and indicated to the landlord that there would have to be negotiations on the outstanding obligations that remained under that lease.

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[61] I do not comment negatively on TNW's decision to move. There are often good reasons to move to less expensive accommodations towards lessening expenses. Counsel for TNW has explained that this decision was made to help rationalize or restructure Cascade's operations, in the hopes of improving the financial health of the Business.

[62] Mr. Laliberte's approach in relation to the lease is a somewhat curious one, particularly in light of his comments to certain Cascade employees on December 2, 2012 that things were going to get "rocky" in the days following his taking over the operations of Cascade, addressing certain operational matters, and effecting the "turn around" of the Business.

[63] The difficulty with his approach was that it brought about a default under the lease. A notice of default under the lease was issued by the landlord, noting defaults to the extent of $67,000. The consequences of those defaults have fallen upon the shoulders of Cascade, who of course remains the principal obligant under the lease at this time. Quite clearly, the substantial contractual obligations that were put in place between Cascade and TNW were intended to avoid this very result. TNW assumed liability for this contract so that Cascade would not be met with defaults under its contracts without having any resources to cover those obligations after having transferred the Business away to another party with only the promise of payment to come.

(d) Post-Closing Matters

[64] Various documentation, including security agreements, was not provided at the time of the closing. There was, however, good reason for that, namely, the closing happened very quickly. In any event, the parties agreed to a later deadline of December 18, 2012 for providing these further documents. This deadline was not met, and the further security documents were not provided.

[65] I did not take from TNW's submissions that there was any difficulty conceptually in providing those documents. Counsel for TNW referred to an ongoing

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dialogue between counsel towards having those documents put in a proper format, and once finalized, having those documents executed.

(e) Transition Issues

[66] This is a critical issue from the point of view of Cascade and Next Layer, and it is principally driven by the circumstances of Next Layer and its interdependence on Cascade (and now TNW) in terms of continuing with its ongoing operations.

[67] The interdependence that existed between Next Layer and Cascade was not an issue because they were run essentially by the same parties. The interjection of TNW in terms of Next Layer's operations has, however, introduced into the mix a level of vulnerability on the part of Next Layer that is being sorely tested.

[68] Consistent with documenting the terms upon which the sale was to occur, the process of the transition was addressed by the parties in a written document called the Transition Agreement. Conceptually, the idea was that the parties would move "as soon as practicable" to provide Next Layer with the means of obtaining its documentation and information that was in the possession of Cascade (and now TNW) for the purpose of enabling Next Layer to move forward towards establishing its own standalone operation.

[69] The overwhelming evidence from Cascade, which is supported to some extent by the evidence of TNW, is that the transition is happening neither as it should nor as quickly as it should.

[70] There is considerable evidence from all the parties concerning the past and continuing dialogue regarding the outstanding matters. What particularly emerges from that evidence, and which is undisputed, is that TNW has been expressly denying Next Layer certain of its information and has been expressly denying Next Layer access to its information and data which it otherwise would have been able to obtain through its arrangements with Cascade. It was this past practice of access to the Next Layer information and data which was intended to be continued through the transition period.

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[71] A further issue arising in this transition period relates to TNW's failure to remit monies to Next Layer in accordance with the original allocation formula, as discussed above. The Transition Services Agreement provided that funds collected by TNW were to be held in trust for Next Layer and were required to be remitted within 72 hours.

[72] Lastly, another troubling aspect of the transition is that there is evidence that TNW is interfering with Next Layer employees. Various Next Layer and Cascade employees recount a strange series of meetings in January 2013 which Mr. Laliberte, Mr. Panesar and Mr. Stearman (also a former employee of Next Layer) attended. There is some dispute about what happened at those meetings, but there is no dispute on certain events at those meetings. What I take from that evidence is a clear indication that Mr. Laliberte was, at least, making various disparaging comments about Next Layer and Cascade to their employees, by which he questioned the solvency of Next Layer and Cascade and their ability to survive as a business. In addition, during some of those meetings, Mr. Laliberte was actively recruiting Next Layer employees to join TNW. The recruitment of Next Layer employees is somewhat curious in the sense that it does not appear that TNW was at all in the co-location business prior to the closing in November 2012. However, the inference from the evidence is that perhaps TNW sees that that is a business that it wishes to get into and that acquiring the Next Layer employees would assist it greatly in that respect.

[73] Cascade advances the proposition that there is a strong inference from the evidence of the actions of TNW and its employees upon which to conclude that TNW, and particularly Mr. Laliberte, are engaged in a concerted campaign to weaken Next Layer and Cascade so as to allow TNW to pick off Next Layer's employees, and perhaps Next Layer's assets, for its own benefit. That is very much disputed by TNW. Taking all of the evidence on this application in its totality, however, I do consider that there is a strong inference from the evidence to suggest that this is, in fact, what is happening here. Again, I refer to the e-mail from Mr. Laliberte referring to the "rocky" road ahead that he anticipated by reason of his

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business strategies or tactics. The only thing that he perhaps forgot to mention is that, in addition to other parties, Cascade and Next Layer would also be asked to walk that same "rocky" road with him.

[74] With respect to the transition issues, again, while there is some dispute between the parties on many of those issues, I intend to approach them on the basis of respecting the bargain between the parties as evidenced by the extensive documentation executed by them.

Receivership

[75] As indicated earlier, the first action was commenced by Cascade and Next Layer seeking enforcement of the security given by TNW, which security is admittedly in place. The second action was commenced by TNW against Cascade on or about the same date as the first action. This latter action is more defensive in the sense of seeking a stay of enforcement of the acceleration of payment of the debt, which in fact was demanded by Cascade based on the alleged defaults. Alternatively, TNW seeks a stay of enforcement of the security held by Cascade. Based on submissions by Cascade's counsel, Cascade is not pressing that the security should be enforced based on an acceleration of the entire purchase price owing under the APA; rather Cascade seeks enforcement only in respect of the $800,000 that is owed from December 2012.

[76] The statutory basis upon which to appoint a receiver is well set out by the parties. The *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39, allows the appointment of a receiver where it is just and convenient. The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 243 (the "*BIA*"), similarly provides for the appointment of a receiver on that basis.

[77] Two decisions of this Court set out the factors that are to be considered in appointing a receiver: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 and *Textron Financial Canada Limited. v. Chetwynd Motels Ltd.*, 2010 BCSC 477. Although the factors referenced in *Maple Trade* and *Textron* may guide the court in terms of what is to be considered on such an application, the

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overarching is to consider all the circumstances in deciding whether it is just and convenient to appoint a receiver.

[78] TNW's application for a stay of enforcement proceedings is brought pursuant to s. 63(2)(d) of the *PPSA*, which provides that the court may grant an order staying the enforcement of rights under security instruments. Similar to the *Law and Equity Act* and *BIA* provisions, this section allows the court to exercise its discretion in appropriate circumstances.

[79] I will note at the outset that there are substantial triable issues. They have been advanced by both TNW and Cascade, and as counsel for TNW says, they have not been tested at trial. There have been no cross-examinations on the affidavits presented. However, I approach this application on the basis that certain circumstances have emerged, and I am satisfied that interim relief is necessary in those circumstances.

[80] The first factor set out in para. 25 of *Maple Trade* is whether irreparable harm might be caused if no receivership order were made. I should say at the outset that TNW has proposed what it considers a compromise in terms of the receivership sought by Cascade in respect of the $800,000 that was due on December 14, 2012. TNW has offered to pay that amount into court, which it says will provide security for that amount until the matter of its TransPacific set-off/fraud claim is determined. Accordingly, TNW says that no irreparable harm will be caused to Cascade for that reason and that it is fair to pay the amount into court.

[81] I do not intend to go through each of the *Maple Trade* factors in detail, although an important consideration is that a receivership is extraordinary relief which should be granted cautiously and sparingly. Accordingly, if the court can fashion a remedy that avoids receivership, then that is certainly something that should be considered. Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the

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receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.

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[82] Given the positions of the parties, in my view, the issue comes down to this: should the $800,000 stay in court or should it be paid to Cascade in accordance with the terms of the APA? I have decided in the circumstances that it should be paid to Cascade. I say that because, in my view, to do otherwise is not fair in the circumstances, where such payment was to be made in accordance with the APA and in light of the clear wording of Section 5.06 of the APA. In addition, if TNW should succeed in its arguments at the end of the day, there is no prejudice that will be suffered, because TNW will still owe $5 million to Cascade even after this amount is paid. The $5 million receivable can stand as substantial security in respect of the claim relating to the TransPacific receivable should TNW prevail at the end of the day.

[83] Accordingly, I am ordering that: (i) TNW pay the $800,000 to Cascade, and I will later address by what date; and (ii) failing payment, a receivership order is granted. TNW apparently has the money, and as I said, there is no prejudice in the event of payment. TNW and Mr. Laliberte can decide in fairly stark terms whether the payment is to be made, which will dictate what consequences flow from any default.

Injunctive Relief

[84] The request for injunctive relief principally arises from the transition issues that I have already discussed. The well-known authorities that govern the test to be applied on this aspect of the application are *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] S.C.J. No. 7. The three-part test includes considering: firstly, whether there is a serious question to be tried; secondly, whether the applicant will suffer irreparable harm if the application were

refused; and thirdly, whether the applicant will suffer greater harm from the refusal of the remedy than the respondent would suffer from the granting of the remedy. In *Wale*, the court chose to collapse the second and third aspects of the test into one, considering together the balance of convenience and the issue of irreparable harm.

[85] I have already stated my conclusions with respect to the two major issues, that is, the set-off issue and the allocation issue. In my view, Cascade has more than met the low burden of showing that there is a serious issue to be tried. I also find that Cascade has shown that there is a serious issue to be tried with respect to its cause of action relating to the interference with Next Layer employees.

[86] Turning to the irreparable harm and balance of convenience tests, the Court in *RJR-MacDonald* indicates that the factors will vary from case to case and that there is no set formula by which to decide the matter. TNW submits that this is just a matter of money and that money will solve the problems at the end of the day. That is in stark contrast to the position of Cascade and Next Layer, who submit that this is not about money. Rather, they say that Next Layer's very survival depends on a quick resolution of these transition issues, so that they can continue their efforts to separate the two operations and finish the transition so as to reduce and ultimately eliminate the current interdependence with TNW which places both Cascade and Next Layer in a vulnerable position.

[87] I do note that Next Layer employees have given evidence that had they known how the transition period would be dealt with by TNW, as they know now, they would have taken more serious steps to address the transfer of information and documentation prior to the closing date. I return to Mr. Laliberte's comment about the trust that was intended to be in place between the parties, which given the way things have turned out, was not worthy of consideration.

[88] The authorities are clear that the survival of a business is a factor that will be considered in the context of irreparable harm. This was particularly addressed in the *RJR-MacDonald* decision. This issue was also recently considered in *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 41, where the court refers to *RJR-MacDonald*,

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stating that "irreparable harm refers to the nature of harm suffered rather than its magnitude." However, Mr. Justice Chiasson goes on to say that:

> [41] ...if an applicant were able to show that its business potentially would be destroyed by the conduct of a defendant it might be open to argue that such "magnitude" of damage would be irreparable.

[89] It goes without saying that it is advantageous to have a weak opponent. I would reiterate the submissions of Cascade concerning its allegations of a campaign on the part of TNW to put Cascade and Next Layer in as vulnerable a position as possible. Again, I consider that there is a fair inference to be taken from the evidence that that is, in fact, what is happening here.

[90] There is substantial evidence to support that TNW is in breach of the various agreements: (i) the failure to pay the $800,000; (ii) the failure to pay the CRA; (iii) the failure to pay the landlord, and the issues with the landlord which have negatively affected Cascade; (iv) the admitted refusal by Mr. Panesar to provide to Next Layer certain information and documents and access to that information; and (v) the refusal to pay Next Layer in accordance with the original allocation.

[91] Furthermore, there are the negative representations to employees that were admittedly made by Mr. Laliberte. In addition, there were efforts by TNW to recruit Next Layer employees. TNW did not deny this, but suggested that the employees it was trying to entice across were not in fact that valuable. This begs the question, however, as to why it was trying to entice them across in the first place.

[92] All of these factors suggest that TNW made these efforts in an attempt to intentionally weaken Next Layer and Cascade, and it is evident that they had that effect to some degree.

[93] In particular, I would note affidavit #1 of Mr. Williams at para. 35, as to the harm that he says is being suffered by Cascade and Next Layer by reason of the actions or inactions taken by TNW. I agree with Cascade and Next Layer that the harm that has been brought to bear on the operations of Next Layer has more than

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adequately established that there is the risk of irreparable harm being visited upon Next Layer and hence, Cascade.

[94] I do not agree with TNW's submissions that damages would be an adequate remedy at the end of the day. It is evident that if Next Layer does not survive, then TNW would more than likely be dealing with the trustee in bankruptcy or perhaps a receiver. For TNW, from a negotiating point of view, this would clearly be better than dealing with Cascade and Next Layer directly.

[95] On the other hand, there is no prejudice to TNW by abiding by the bargain that it made in respect of the transition, which was clearly addressed by the parties in the documentation before me.

[96] I acknowledge that the allocation issue remains somewhat of an issue from TNW's point of view with respect to this so-called "new" agreement. But the evidence before me today strongly indicates that the parties agreed to the original allocation that was in place between Cascade and Next Layer. As I said, that was more than evident from Mr. Laliberte's own e-mail. I would emphasize again that if there is any issue in that respect at the end of the day, the $5 million still yet to be paid under the APA will stand as more than adequate security in respect of any recovery that TNW may be entitled to.

[97] I conclude that there is no prejudice if Next Layer is able to enforce the Transition Agreement. This transition can take place as soon as possible and in accordance with the bargain of the parties.

[98] There has been some discussion on this application concerning the *status quo*. TNW is not able to assert on this application that the *status quo* is that which arises from a departure from the agreements. That is simply an untenable position. The *status quo* that must be respected at this time, until such time as the parties establish something to the contrary, is the bargain. That bargain, as I said, is evident from the substantial written documentation and agreements that the parties have taken time, trouble and expense to put together to evidence their agreement.

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Accordingly, the *status quo* is in accordance with that documentation, not with any other agreements which TNW may allege are in place. I do not accept that breaches of the agreements — which appear to be the basis upon which Mr. Laliberte prefers to do business — are the basis upon which to establish the *status quo*.

[99] If this transition can be done as soon as possible, which is no doubt the intention of Next Layer at this point in time, the allocation issue will become less important as that matter is sorted out.

Disposition

[100] Accordingly, I am granting the orders sought by Cascade and Next Layer on this application. Cascade has produced draft forms of the orders which TNW's counsel has reviewed. Both parties have made submissions on changes to the drafts. I have considered submissions on these further changes to the draft orders and the changes are approved.

"Fitzpatrick J"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527

Date: 20090923
Docket: S095413
Registry: Vancouver

Between:

Maple Trade Finance Inc.

Plaintiff

And:

CY Oriental Holdings Ltd.

Defendant

Before: The Honourable Mr. Justice Masuhara

Oral Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	J.J.L. Hunter, Q.C. B.R.H. Johnston
Counsel for the Defendant:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. September 21, 2009
Place and Date of Judgment:	Vancouver, B.C. September 23, 2009

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[1] **THE COURT:** This is my ruling with respect to the application of Maple Trade Finance Ltd. made Monday.

[2] The plaintiff seeks an order pursuant to s. 39 of the *Law and Equity Act* and Rule 47 for the appointment of the Bowra Group as receiver and manager over all of the defendant's current and future assets undertaking in properties, including all proceeds. The application arises out of the default by the defendant of a loan owed to the plaintiff. The principal of said loan was some $3.5 million. The plaintiff says that as of July 15, 2009, the outstanding balance owed was $5.7 million.

[3] The defendant does not dispute that it is in default of the loan. Though it disputes the level of interest that has been accrued. It does not dispute that the amount owing is sizable. However, it is prepared to make payments in the order of some $4 million in six equal monthly installments and to have the interest dealt with as a sole issue. In this regard, the defendant has filed a statement of defence and counterclaim.

[4] In terms of background, the plaintiff firm provides accounts and receivable financing to various businesses, including the defendant. The defendant is a holding company whose principal asset is its wholly owned subsidiary, CY Oriental Garments Inc., a private BC company which in turn owns a BBI based company, which in turn owns a Hong Kong company called Huge Best International, which in turn owns two operating companies in China. The operating companies in China are in the garment manufacturing business.

[5] Until early July 2009, the plaintiff company was listed on the TSX Venture Exchange. In January 2006, the plaintiff and defendant entered into a financing agreement dated January 4, 2006. On June 27, 2006, the defendant executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The finance agreement and the GSA were registered in the BC Personal Property Registry.

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[6] The GSA provides, *inter alia*, that in the event of default, the following rights:

> 1) the plaintiff may, by instrument in writing, appoint any person as a receiver of all or any part of the collateral;
>
> 2) the plaintiff may from time to time remove or replace a receiver or make application to any court of competent jurisdiction for the appointment of a receiver.

[7] In July 2007, the January 2006 agreement was amended and restated by way of a credit letter which confirmed the earlier agreements and further increased the defendant's credit facility with the plaintiff from $5 million to $8 million.

[8] In furtherance of the financing agreements, the accounts receivable of Huge Best International were assigned to the defendant, who in turn assigned them to the plaintiff. As well a customer, Ideal Century's accounts receivable was also assigned to the plaintiff and to which Century acknowledged such assignment.

[9] The payments to the plaintiff from Ideal went into default. By letter dated March 3rd, 2009, the plaintiff demanded payment in full of the plaintiff's outstanding indebtedness and gave notice to the defendant pursuant to s. 244 of the *Bankruptcy and Insolvency Act*.

[10] In late March, the defendant made a payment of $100,000 to the plaintiff as a gesture of good faith in furtherance of negotiations related to forbearance. In early June 2009, the defendant made a further payment of $270,000 to the plaintiff as part of what it says was an agreement in principle on forbearance. The defendant has strongly denied any such agreement in principle. However, it accepted the monies.

[11] The current application was originally scheduled to be heard on August 27, 2009. On August 26, 2009, at the defendant's request, the plaintiff agreed to adjourn the application to September 11th in order to give the defendant more time to attempt to satisfy its indebtedness to the plaintiff.

[12] Further communications between the plaintiff and the defendant and their counsel carried on, and a letter dated September 10th, 2009, marked "with

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prejudice" was delivered. The plaintiff adjourned the within application from September 11th to September 17th in order to fully consider the contents of the “with-prejudice” letter. The plaintiff concluded that the contents of the letter did not set out an acceptable basis for resolving the indebtedness.

[13] The matter now is before the court. The applicable test is whether it is just and convenient to make the order sought for a receiver and manager. The authorities relied upon by the applicant state that the court ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default, which is as in the case of the instant application.

[14] A further case presented to the court, *Bank of Nova Scotia v. Freure* [1996], 40 C.B.R. (3d) 274, the plaintiff has indicated that the test of just inconvenience was said to be met where:

> ... it is more in the interests of all concerned to have the receiver appointed by the court.

[15] In this regard, the applicant submits that for the following reasons, it is more in the interests of all concerned that a receiver and manager be appointed by the court: that the parties have agreed the plaintiff may seek the appointment of a receiver in the event of a default; that the defendant owes a significant sum of money; there appears not to be a dispute with the fact of the size of the indebtedness; and, that the defendant is in default.

[16] The plaintiff noted that there were irregularities within the defendant, including the resignation of its board of directors and its recent delisting from the TSX exchange, which evidences a need to ensure that the defendant's assets are preserved for the plaintiff's benefit; that there are concerns with respect to the financial statements of the defendant; and that the defendant does not indicate what steps are being taken, to address the prospects for early repayment of the defendant's indebtedness.

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[17] Further, that the plaintiff is reasonably concerned that the prospect of the defendant performing its various obligation is in jeopardy; that the plaintiff has given the defendant reasonable opportunities to resolve the indebtedness, including the already mentioned adjournments; that the efforts to resolve or restructure or refinance the defendant's indebtedness to the plaintiff have to date proved unsuccessful; and that the defendant is essentially a holding company and presumably exercises oversight over the affairs of subsidiary companies, including the operating companies. As such, the defendant's value is likely to be optimized by a receiver manager ensuring the continued operation of the defendant's subsidiaries.

[18] The respondent in reply submits the following: that it has made a payment of $100,000, and as well as $270,000, which were after the March 2009 notice; that the negotiations had been initiated by the defendant with the plaintiff for terms of forbearance after the March 2009 notice; that the plaintiff has recourse to legal execution and thus the equitable remedy applied for is not warranted, but notes that the plaintiff has started a:

> ... baseless action in the United States against one of the defendant's customers.

[19] In this regard, a sanctions motion is currently before the US court regarding whether the plaintiff's actions there was an abuse of process.

[20] Further, it notes that notwithstanding the cease-trade orders and the delisting of the company from the TSX Venture Exchange and the issues regarding its audited financial statements; that the defendant has a fully functioning board of directors; that the ongoing operations of the defendant's subsidiary operating companies have not been impacted by these issues; and specifically that these operating companies are profitable.

[21] Further, that it has made a with-prejudice proposal to the plaintiff as mentioned on September the 10th, that the essence of which is that the principal majority shareholder of the defendant, who holds 44 percent of the outstanding

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shares, would be provided as security. I am assuming that is the 20,715,100 common shares referred to in the affidavit of Mr. Gee.

[22] That $4,084,767, which is the principal and non-default interest accrued, will be paid as follows: that the defendant will pay $1,016,019 plus non-default interest to the plaintiff, which it stated in the September 10th letter would be within ten days of that letter; that the balance of some $3 million would be paid in six equal installments every 30 days thereafter with a seven-day curative period, together with interest at the non-default interest rate.

[23] Further, during the course of the hearing, Ms. Carteri advised that the defendant would agree that it would consent to an order that would lead to the immediate appointment of a receiver upon default of any of the said payments.

[24] The position of the defendant is also that there is no evidence of jeopardy to the plaintiff's security.

[25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership, 2d ed.* (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

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h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

[26] The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.

[27] However, on the other hand, there is a proposal by the defendant to repay a significant amount which was further expanded during the hearing by defendant's counsel. This lends support to the defendant's position. I note as well, the more recent payments made by the defendant to the plaintiff are not insignificant, as well as Mr. Gee's statement that since the summer of 2006, the amounts advanced by the plaintiff are in the order of $7.6 million and that repayments through August 2009 have been in the order of $5,238,766. I recognize that interest has been accruing on the principal.

[28] The proposal as explored and discussed during the course of the hearing would align with the factor of controlling the costs to the parties at this point. It would also, align with the likelihood of maximizing return to the parties.

[29] If the company's condition as to its viability was accepted, this would deal in part with the plaintiff's concern regarding jeopardy. The difficulty is the confidence that one can have in the defendant's ability to make good on its payments.

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Mr. Hunter, stated the concern really is not as much to do with the promise, but more to do with performance. I would agree.

[30] However, balancing the factors, an order that would have the automatic imposition of a receiver, upon default in any payment required by the defendant, would address the concerns at this point. I think the balance of convenience can further be achieved through a further modification of the defendant's proposal to reflect the concerns over the lack of financial information to support the contention regarding the financial strength of the operating companies.

[31] To that extent, the payments will be made in this manner: the defendant is to pay the plaintiff on or before the 28th of September, 2009, the sum of $1,016,019 plus non-default interest.

[32] MR. REARDON: Sorry, My Lord, because I'm not familiar, would you mind repeating that number.

[33] THE COURT: Okay. $1,016,019.

[34] MR. REARDON: Yes, thank you.

[35] THE COURT: $1,016,019 plus non-default interest. The defendant is to pay the plaintiff, over four months, the remaining outstanding balance plus non-default interest in equal installments.

[36] The defendant will also provide financial statements related to its company and operations, including its wholly owned subsidiaries. Mr. Chen's shares will be delivered as security to the plaintiff.

[37] There will be a term that any default in payment, not cured within three days, as opposed to the seven days suggested by defence counsel, will lead to the automatic appointment of a receiver on the terms as sought in the application.

[38] There will also be a term that the defendant, will not permit the disposition of any of its property, including wholly owned subsidiaries, except in the ordinary

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course of business; and that Mr. Chen and Mr. Gee. are to make monthly representations confirming adherence to this term.

[39] Further, any material adverse change in circumstances in the condition of the defendant or its wholly owned subsidiaries are to be reported immediately to the plaintiff, at which time the plaintiff has leave to bring a further application for the immediate appointment of a receiver.

[40] That concludes my ruling.

"The Honourable Mr. Justice D. M. Masuhara"

2009 BCSC 1527 (CanLII)

Toronto-Dominion Bank v. First Canadian Land Corp., [1989] B.C.J. No. 2124

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

(In Chambers)

Lander J.

Heard: October 19, 1989

Judgment: November 23, 1989

Vancouver Registry No. C875175

[1989] B.C.J. No. 2124 | 77 C.B.R. (N.S.) 189 | 18 A.C.W.S. (3d) 421

Between The Toronto-Dominion Bank, Plaintiff, and First Canadian Land Corporation Ltd. Victor Michael Prescott, 292930 B.C. Ltd., V.M. Prescott Ltd., Lorraine Wilma Prescott Ltd., Lorraine Wilma Prescott, First Canadian Realty Ltd., Magnum Resources Ltd. and Enviro-Sonic Technologies Inc., Defendants,

Case Summary

Bankruptcy — Receivers — Appointments — Bank applying for declaration that its debenture constituted a charge against debtor's leasehold interest in property — Trial of issue directed — Bank applying for appointment of receiver to collect and hold rent pending trial — Application dismissed — Bank not establishing right over leasehold interest — No peril to property since lis pendens filed against property — Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36 — British Columbia Supreme Court Rules, 1976, R. 47.

This was an application by the plaintiff bank for the appointment of a receiver to collect and hold in trust rents accruing under various leases. The plaintiff had made an application for a declaration that its debenture constituted a charge against the leasehold interests in 92 apartment suites. The trial of an issue was directed and this application was made. The plaintiff contended that it established a prima facie case regarding its charge against the leasehold interests and that on this basis the Court ought to exercise its discretion and appoint a receiver. It claimed that if a receiver was not appointed it might not be able to recoup the rental income between then and the trial. The defendant took the position that it would be deprived of its operating income and suffer economic hardship if the rents were withheld from it.

HELD: The application was dismissed.

The plaintiff did not satisfy the onus of proving some peril to the property in issue. In fact, the leasehold interests had been secured by the filing of a lis pendens against them with the result that there was no threat to them. The plaintiff's contention that it might not be able to recover the interim revenue from the leasehold interests was not a sufficient basis to appoint a receiver and thereby create severe economic hardship for the defendant. Where a plaintiff alleged an interest that had yet to be determined and sought an intrusive order which could cause irreparable harm to the defendant, the Court had to consider all of the circumstances before granting such an order. The plaintiff did not establish that it would have been just and convenient to appoint a receiver.

Counsel for the Plaintiff: D.P. Tysoe. Counsel for the Defendants, Victor Michael Prescott, V.M. Prescott Ltd., First Canadian Realty Ltd., Magnum Resources Ltd. and Enviro-sonic Technologies Inc.: L.M. Candido. Counsel for the Defendants, 292930 B.C. Ltd. and Lorraine Wilma Prescott: P.J. Reardon.

LANDER J.

This is an application pursuant to R. 47 of the Supreme Court Rules and s. 36 of the Law and Equity Act, R.S.B.C. 1979, c. 224, for the appointment of a receiver to collect, and hold in trust, rents accruing due under a number of leases.

On November 3, 1987, Thorne, Ernst & Whinney Inc. were appointed receiver-manager of all property, assets and undertakings of the defendant First Canadian Land Corporation Ltd., by court order, in accordance with the terms of the plaintiff's debenture.

One of the assets of the defendant First Canadian Land Corporation Ltd. that gives rise to this application, is the property located at 1075 Comox Street. This asset is comprised of 170 suites. In the mid-1970's the defendant First Canadian Land Corp. Ltd. entered into a long-term lease with V.M. Prescott Limited, leasing 168 of the 170 suites. From 1974 to 1980, V.M. Prescott Ltd. assigned the leasehold interests in 78 of the suites to third party purchasers. In 1985, the defendant First Canadian Land Corp. Ltd. purportedly transferred its interest in 1075 Comox Street to the defendant Victor Michael Prescott, who purportedly transferred his interest in 1075 Comox Street to the defendant 292930 B.C. Ltd. Neither of these transfers were registered and the defendant V.M. Prescott Ltd. remains the registered lessee of the remaining suites that were not assigned to third party purchasers.

Subsequent investigation by the receiver-manager revealed that First Canadian Land Corporation Ltd. had retained beneficial interest in the remaining 92 suites at 1075 Comox Street. What is now in issue is whether the plaintiff's debenture constitutes a charge against the leasehold interests in the remaining 92 suites.

The plaintiff made an application pursuant to R. 43 seeking a declaration that the debenture in issue charges the leasehold interests at 1075 Comox Street. This matter came before Mr. Justice Davies on March 1, 1989. He concluded that the matter should be set down for trial for a final determination of the issue. This present application is for the appointment of a receiver to receive and hold in trust all rents accruing from the suites at 1075 Comox Street until determination of the plaintiff's claim can be made at trial.

The plaintiff is alleging that their debenture charges the leasehold and is seeking a means of securing the revenue from these leases until a final determination. It is the plaintiff's position that if a receiver is not appointed to hold the rents in trust, and the debenture is deemed to charge these leasehold interests, the plaintiff may not be able to recoup the revenue that accrues between now and trial.

The plaintiff asks the Court to exercise its jurisdiction and appoint a receiver pursuant to R. 47 and alternatively, s. 36 of the Law and Equity Act, where the Court may appoint a receiver if in the circumstances it deems it just or convenient to do so.

In Kerr on the Law and Practice as to Receivers, sixteenth edition (1983) C. 1, p. 5, the author states that the objective sought to be achieved where a receiver is appointed is to safeguard the property for the

benefit of those ultimately entitled to it:

> There are two main classes of cases in which the appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property pending realisation, where ordinary legal remedies are defective; and (2) to preserve property from some danger which threatens it.

The issue set down for trial by Davies J. is whether or not the plaintiff's debenture charges the leasehold interests. One might conclude that the plaintiff has not established a right and therefore this application falls within the second category. The above text goes on to state, at p. 6, with respect to this second category:

> In all cases within this second class it is necessary to allege and prove some peril to the property; the appointment then rests on the sound discretion of the court. In exercising its discretion the court proceeds with caution, and is governed by a view of all the circumstances.

I have concluded that the second category identified in Kerr on Receivers, is not applicable either. There is an onus on the plaintiff to prove some peril to the property in issue. This has not been established by the facts presented before me. In fact the contrary has been shown. The leasehold interests have been secured by the filing of a lis pendens against them, the result being, there is no threat to the interests in question.

The plaintiff relied upon the case of B.C. Power Corporation Limited v. A.G. of B.C. et al (1962), 38 W.W.R. 575 and in particular, the dissenting opinion of Norris, J.A. at p. 603 where he addresses the appointment of a receiver:

> It has never been the law that in all cases the applicant for the appointment of a receiver or for an injunction must show probable success. The requirements of proof depend on the nature of the case and the nature of the order sought -- on this appeal the nature of the order made. A distinction must be made, between applications for injunctions and applications for receivers and in the latter case there is particularly to be considered the powers which the receiver will exercise. In cases such as this, in which the questions are not questions of fact, and particularly where difficult questions of law are to be determined, the requirement that probable success be shown would, in effect, be to try the case on the interlocutory application. All that need be shown is that the applicant has a prima facie case."

The plaintiff contends that they have established a prima facie case with respect to their charge against the leasehold interests and on this basis the Court should exercise its discretion and appoint a receiver.

In B.C. Power Corporation, supra, the primary concern was the preservation of the assets. The plaintiff in that instance established that the property was in peril. This has not been done by the applicant in the instant case.

The plaintiff's position is that if a receiver is not appointed, the Bank may not be able to recoup the rental income between now and trial. The defendant's position is that it will be deprived of its operating income and suffer economic hardship if the rents are withheld from them.

So far as this Court has discretion to appoint a receiver, pursuant to s. 36 of the Law and Equity Act, where it would be just or convenient, Mr. Justice Taylor (as he then was) in Royal Bank v. Cal Glass Ltd., et al (1978), 8 B.C.L.R. 345 (B.C.S.C.) concluded that an application under this section should be granted for one purpose only: "to maintain the status quo pending determination of the rights of the parties at trial." He goes on to state:

> The applicant must discharge the onus of establishing that it is just and convenient that the court preserve the status quo for it, rather than for the respondent, until the issues between them have been resolved at trial."

In First Western Capital Ltd. v. Wardle et al (1984), 54 B.C.L.R. (B.C.S.C.), Boyle, L.J.S.C. also considered this element of s. 36 and adopted the criteria enunciated in Goldschmidt v. Oberrheinische Metallwerke, [1906] 1 K.B. 373 (C.A.), applied in Sign-o-Lite Plastic v. MacDonald Drugs (Cranbrook) Ltd. (1980), 24 B.C.L.R. 173 (B.C.S.C.):

> The cases direct that, in weighing justice and convenience, the court must consider whether or not "the circumstances are such as to render it practically very difficult, if not impossible, to obtain any fruit of Judgment, unless what has been called equitable execution be granted ....

The plaintiff contends that it may not be able to recover the interim revenue from the leasehold interests. This is not a sufficient basis to appoint a receiver and thereby visit a severe economic hardship upon the defendant. Where the plaintiff alleges an interest, that has yet to be determined, and seeks an intrusive order that may cause irreparable harm to the defendant, the court must consider all of the circumstances before granting such an order.

If it is found that the plaintiff does have a charge against the leasehold interests, then they can start collecting the rents at that point. They have secured the interest by filing a lis pendens. For the court to intervene at this point would have serious economic ramifications on the defendant. The only ramification of waiting for a final determination as to the plaintiff's charge would be to postpone the plaintiff's entitlement to the revenue. The leases will continue to produce revenue in the future. In all the circumstances the balance of convenience lies with the defendants.

In summary, the interest to be determined is not in peril, nor has the plaintiff discharged its onus in establishing that it would be just and convenient to appoint a receiver. The application is dismissed.

Costs of this application to the defendants.

LANDER J.

End of Document

United Savings Credit Union v. F & R Brokers Inc., [2003] B.C.J. No. 1057

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

Burnyeat J. (In Chambers)

Heard: December 9, 2002.

Judgment: May 6, 2003.

Vancouver Registry No. H021226

[2003] B.C.J. No. 1057 | 2003 BCSC 640 | 15 B.C.L.R. (4th) 347 | 9 R.P.R. (4th) 279 | 122 A.C.W.S. (3d) 162

Between United Savings Credit Union, (formerly United Civic Savings Credit Union), petitioner, and F & R Brokers Inc., Everparks Ventures Incorporated, Moo Park, Sang Won Park, J.T.S. Mortgage Investments Corporation, LDS Tradehouse Inc., Fred Carline, Workers' Compensation Board, Her Majesty the Queen in Right of the Province of British Columbia, City of Vancouver, respondents

(34 paras.)

Case Summary

Receivers — Grounds for grant of receivership — On application of a mortgagee — Appointment — Jurisdiction to appoint — Powers — Disposition of property.

Application by United Savings Credit Union for the appointment of a receiver manager of a hotel. United also wanted the receiver to sell the hotel. United had a mortgage against the land and building of the hotel but not against its chattels. The application was opposed by the respondent second mortgagee, JTS Mortgage Investments. JTS claimed that the court could not appoint the receiver at the request of a land mortgagee, and that the appointment was unnecessary because JTS collected most of the hotel income.

HELD: Application allowed.

The receiver manager was appointed and was granted conduct of the sale. United was entitled to the appointment, as its mortgage was in default. JTS showed no good reason why the appointment should not be made. A receiver manager could be appointed at the instigation of a mortgagee in foreclosure, even though that mortgagee had no charge against the chattels or goodwill of the mortgagor. The appointment could also be made even though United did not have a general security agreement. The receiver was allowed to conduct the sale because it had the best access to the income and expense figures that a prospective purchaser would rely upon.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 47, 47(1). Judicature Act, 1879, c. 12, s. 3(8). Law and Equity Act, R.S.B.C. 1996, c. 253, s. 39, 39(1).

Counsel

J.I. McLean, for the petitioner. E.P. Morris, for J.T.S. Mortgage Investments.

BURNYEAT J.

1 This is an application by the first mortgagee, United Savings Credit Union ("United") for the appointment of a Receiver Manager of this hotel. The request is made despite the fact that United only has a mortgage charge against the land and building of the hotel. United also seeks an order that the Receiver Manager have the conduct of the sale of the hotel. These applications are made pursuant to the inherent jurisdiction of the Court, Rule 47 of the Rules of Court, and s. 39 of the Law and Equity Act, R.S.B.C. 1996, c. 253.

2 The application is opposed by the second mortgagee, J.T.S. Mortgage Investments Corporation ("J.T.S.") on the basis that the Court is not in a position to appoint a Receiver Manager at the instigation of a land mortgagee. As to whether a Receiver should be appointed, J.T.S. submits that such an appointment is unnecessary as most of the income for the hotel is already being collected under an informal arrangement between J.T.S. and the owners of the hotel. J.T.S. also opposes the Receiver Manager having the conduct of the sale of the hotel as J.T.S. has already been granted the ability to offer the hotel for sale.

3 J.T.S. obtained an order nisi in its own foreclosure proceedings. The redemption period in those proceedings will expire on January 17, 2003. On November 26, 2002, J.T.S. obtained an order for conduct of sale. J.T.S. contemplates listing the property at a listing price of 7% on the first $100,000 and 2-1/2% on the balance of the sale price over $100,000.

BACKGROUND

4 This hotel operates in the Gastown area of Vancouver. It has a limited number of rooms which are mostly rented on a monthly basis. There is also a restaurant and pub within the building. These operations are leased to third parties. The information which is before me allows me to conclude that there are unpaid taxes of approximately $150,000, that only some of the room rents are being collected by J.T.S. who has exercised its right under its assignment of rents, and that the balance of the rents are either not being paid or are being paid to the current owners. There is no evidence that any funds being paid to the owners are being expended for the benefit of the property or for the benefit of those parties having claims against the equity of the owners in the property.

5 As well, there is a very real danger that the property will be subject to a cease and desist order from the City by virtue of problems associated with the property. There are a number of judgments which have been registered against the property so that it is unlikely that the owners have any equity which they will want to protect.

STATUTORY PROVISIONS

6 Section 39 of the Law and Equity Act provides:

> 39(1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

7 Rule 47 of the Rules of Court states:

> 47(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

THE "USUAL" FORM OF ORDER

8 The Annotated Supreme Court Chambers Orders dealing with the appointment of a Receiver provides the following form of order where a Receiver is appointed under Rule 47:

> 1. [name of receiver] is appointed as receiver [and, where applicable add: without bond or security] of the rents and revenues of the property at address] (the "Property") with power and liberty to do any or all of the following things:
>
> (a) to recover and enter forthwith into possession of the Property;
>
> (b) to collect, get in, and receive any and all rents, revenues, security deposits, and prepaid rents of, from, and collected with respect to the Property, including rents in arrears, and to enforce payment to the receiver of any such rents, revenues, security deposits, or prepaid rents or any part thereof at such time or times as the receiver may think fit and may take such proceedings as the receiver considers necessary or advisable;
>
> (c) to rent, re-rent, or enter into a lease or leases of the Property or any part thereof from time to time at such rentals and otherwise upon such terms as the receiver may consider necessary or advisable under the circumstances;
>
> (d) to take whatever steps the receiver may consider advisable for repairing and preserving the Property or any other part thereof, including any buildings and improvements thereon, but the receiver shall not be liable for waste;
>
> (e) to retain and employ some person or persons to assist in doing any of the things contemplated by this order and to assist generally in the receivership;
>
> (f) to apply at any time or times to this court for directions as to the discharge of any of its duties as receiver or for the determination of any matter arising out of the receivership;
>
> (g) to apply any money received by the receiver as rent or revenue of or from the Property in payment of the following items in the following order:
>
> (i) to the receiver in respect of the services as receiver a reasonable amount, either monthly or at such longer intervals as the receiver deems appropriate, which amount shall constitute an advance against the remuneration of the receiver when fixed;

(ii) any costs, charges, and expenses incurred in respect of carrying on any of the foregoing activities, and all operating expenses relating to the Property;

(iii) any charges for utilities or insurance premiums which relate to the Property;

and the balance, if any, in accordance with the further order of this court;

2. any person or person in occupation of the Property or any part thereof attorn and become tenants of the receiver and pay to the receiver rents, arrears of rents, and accruing rents so long as the receiver shall continue in office;

3. the respondent, [name of party in possession], forthwith deliver over to the Receiver all keys necessary to gain access to the Property or any part thereof and all books, documents, papers, and records of every kind and nature relating thereto;

4. it shall not be necessary for the receiver to pay any money received by the receiver as rent or revenue arising from the Property into court and that the said receiver shall be liable to account only for money that actually comes into the receiver's hands or into the hands of any person or persons retained or employed by the receiver in the preservation or management of the Property;

5. all monies properly expended and all costs and charges properly incurred by the receiver in respect of all the receivership shall be paid primarily out of the rents and profits of the Property, and in the event of the said rents and profits being insufficient for such purposes, such monies so expended and such costs and charges so incurred shall be and form a first charge on the Property in favour of the receiver;

6. all questions relating to the passing of the accounts of the receiver and the discharge of the receiver and the remuneration of the receiver shall be reserved until further order of this court.

DISCUSSION AND CASE AUTHORITIES: APPOINTMENT AS OF RIGHT?

9 Prior to the Judicature Act of 1873, an English Court of Equity would only appoint a Receiver at the instigation of an equitable mortgagee who, unlike a legal mortgagee, had no right to possession. Subsequent to the passage of that Act, the Court could appoint a Receiver at the instigation of a legal mortgagee in order to prevent the mortgagee from becoming a mortgagee in possession.

10 The decisions in England are consistent in stating that such an Order will be made as a matter of course once default under a mortgage can be shown. The Court in Re Crompton & Co., [1914] 1 Ch. 954 stated:

> I think the right to the appointment of a Receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and whose security has become realizable as one of the steps in such realization. (at p. 967)

11 Similarly, in Truman v. Redgrave (1881), 18 Ch. 547, the Court was prepared to make an order appointing a "Receiver and Manager" if the principal and interest owing under a mortgage was in arrears. The ability to obtain the appointment of a Receiver and Manager was described as being a "... mere matter of course ...". (at p. 549) See also Prachett v. Drew [1924] 1 Ch. 280.

12 In British Columbia, the English line of authorities was adopted in Eaton Bay Trust v. Motherlode Developments Ltd. (1984) 50 B.C.L.R. 149 (B.C.S.C.) where McTaggart, J. stated:

> In practice, the appointment of a Receiver in a mortgage proceeding is frequently made without proof of jeopardy (Kerr on Receivers (15th ed.) (1979) pp. 6, 30 (Crompton & Co. In Re: Player v. Crompton & Co. [1914] 1 Ch. 954).

13 Of similar result is the decision in Royal Trust Corp. of Canada v. Exeter Properties Ltd., [1985] B.C.J. No. 942 (B.C.S.C.). However, the decision of Huddart, J., as she then was, in Korion Investment Corp. v. Vancouver Trade Mart Inc. [1993] B.C.J. No. 2352 (B.C.S.C.) is often cited as authority for the proposition that the appointment of a Receiver or Receiver Manager will not be made as a matter of course.

14 After noting that the indebtedness to the mortgagee represented only 6.6% of the assessed market value of the property, that the total indebtedness of the mortgagor represented only 29% of the value of the mortgaged assets, and that the mortgagor had offered to pay an amount equal to the monthly interest to the mortgagee during the remainder of the redemption period, Huddart, J. stated:

> Korion rests its application on the usual practice and its right to enjoy the profits from its property. ... .
>
> The willingness to appoint a receiver in a mortgage action, even post-judgment, seems to derive not so much from an analysis of the facts of an individual situation as from an accepted view of commercial reality. Kerr on Receivers, supra, says (at 6) that "[w]here there is an alternative legal remedy, as in the case of legal mortgages, the court has a discretion, but the appointment is now frequently made without proof of jeopardy" ... .
>
> Kerr suggests that "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled.
>
> It is on such a rule that Korion relies. However, it could not provide any B.C. authority for a presumption in favour of the appointment of a receiver in all mortgage foreclosure actions. In Citibank Canada v. Calgary Auto Centre (1909), 58 D.L.R. (4th) 447 (Alta. Q.B.) McDonald J. adopted as correct this approach from Price and Trussler, Mortgage Actions in Alberta, (1985) at p. 309:
>
> > Unless the mortgagor can point to reasons why the appointment of a receiver will prejudice his position, it is difficult to see why the mortgagee should not be entitled to a receiver, regardless of the equity position. The fact that there may be sufficient to pay the mortgage out if the property is ultimately sold is of little comfort to the mortgagee, who is faced with the prospect of no regular monthly return on his investment on which he may be budgeting, particularly where he holds the mortgage in trust for an investor. In addition, in considering what is "just and equitable" the Court must surely have regard to the mortgage covenant, which normally contains an express covenant agreeing to the appointment of a receiver in the event of default, and to the fact that although the mortgagor is receiving the rents, he is pocketing them or diverting them to other investments instead of paying the mortgage on the property as he has covenanted to do. In weighing the equities in this fashion, it is difficult to come down on the side of the defaulting mortgagor/landlord. Instead, it is "just and equitable" that a receiver be appointed.
>
> I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of

> the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument. (at paras. 8-12)

15 I am satisfied that the Korion decision must be limited to the facts which arose in that proceeding. First, counsel appears not to have drawn the long-established English practice to the attention of the Court. Second, the mortgagor appears to have established very good reasons why the appointment should not be made. In accordance with the English decisions and the decisions in Motherlode and Exeter, I am satisfied that, unless the mortgagor or charge holder can show that extraordinary circumstances are present, the appointment of a Receiver or Receiver Manager at the instigation of a foreclosing mortgagee should be made as a matter of course if the mortgagee can show default under the mortgage.

16 The Court should not force a mortgagee to become a mortgagee in possession in order to exercise the rights of possession available to it under the mortgage. As well, where the mortgagor has provided an express covenant agreeing to the appointment of a Receiver or a Receiver Manager in the event of default, the Court should not ordinarily interfere with the contract between the parties. Also, it would be inappropriate for the Court to countenance a situation where default in payments continues while the mortgagor or some subsequent mortgagee has the benefit of the income which is available from a property charged by a mortgage ranking in priority ahead of the interests of those having the benefit of the income.

17 A mortgagee is entitled to the appointment of a Receiver or Receiver Manager as a matter of course when the mortgage is in default. The Court should only exercise its discretion not to make such an appointment in those rare occasions where a mortgagor or subsequent charge holder can show compelling commercial or other reason why such an order ought not to be made. The onus will always be on the mortgagor or subsequent charge holder in that regard.

18 In the case at bar, the second mortgagee, J.T.S. has shown no good reason why a Receiver Manager should not be appointed. The situation which would allow the owners of this hotel to continue to collect some of the income available should be unacceptable to all charge holders. Accordingly, it is appropriate that a Receiver or a Receiver Manager be appointed. The second question which arises is whether United should be entitled to the appointment of a Receiver Manager even though United has no charge against either the chattels which are used in the hotel operation or the goodwill of the company that owns the hotel.

DISCUSSION AND CASE AUTHORITIES: RECEIVER OR RECEIVER MANAGER?

19 The text of s. 39 of the Law and Equity Act like similar provisions across Canada relating to the jurisdiction of courts to appoint a Receiver or Receiver Manager is based on s. 25(8) of the 1873 English Judicature Act. The provision allowing such an appointment was introduced in British Columbia in 1879 when s. 3(8) of the Judicature Act 1879, c. 12 incorporated the exact words from the English legislation in effect at the time:

> A mandamus or an injunction may be granted or a Receiver appointed by an interlocutory Order of the Court in all cases in which it shall appear to the Court to be just or convenient that such Order should be made ... .

20 That provision remained relatively unchanged in British Columbia until 1979 when the words "or Receiver Manager" were added after "Receiver". The explanation for this amendment provided in the explanatory notes to the first reading of Bill 29 (Attorney General Statutes Amendment Act, 1979) was:

> Amends section 30 of the Laws Declaratory Act to clarify that a person acting as a Receiver may also manage the assets he receives prior to distribution.

21 The current English statute does not contain the words "or Receiver Manager". The inclusion of the words "or a Receiver Manager" was made in the Ontario and Manitoba legislation after the 1979 amendment to the British Columbia legislation.

22 I am satisfied that a Receiver Manager can be appointed at the instigation of a mortgagee in foreclosure proceedings even though the applicant has no charge against chattels or the goodwill of a company. Section 39 of the Law and Equity Act makes reference only to "all cases in which it appears to the Court to be just or convenient ...". There is no requirement that the case must involve the enforcement of security where the chattels and the goodwill of a company are charged.

23 The addition of the words "receiver manager" in what was formerly known as the Laws Declaratory Act was a clear indication by the Legislature that the person appointed could not only receive rents and profits but could also manage. Provisions in the Law and Equity Act and formerly the Laws Declaratory Act are statutory declarations of what the law is and usually represent changes thought by the Legislature to be appropriate. I am satisfied that that was what was intended by the Legislature in 1979.

24 In the case of foreclosure proceedings where the mortgage is against a hotel or apartment, to allow a receiver to be appointed without the ability of that receiver to manage the property creates an illusory protection of the interests of a mortgagee. The "usual" form of order for an appointment under Rule 47 of the Rules of Court allows the management necessary to make effective the right of possession given to a mortgagee under a mortgage. The ability to enforce payment of rents, to re-rent, to repair and preserve, to employ assistants and to pay operating expenses gives effectiveness to the rights of the mortgagee. These rights are given to the mortgagee under the standard form of mortgage and it has become the practice of the Court to grant these powers to a Receiver appointed under Rule 47 of the Rules of Court even though that Rule only refers to the appointment of a "Receiver".

25 In the case of a hotel or an apartment, these "usual" powers are required so that the ability to collect rents and profits is effective. In the case at bar, the ability to manage the hotel is the only effective way for United to realize on its mortgage security and give effect to the contract agreed to by the mortgagor.

26 The English authorities are consistent in establishing the proposition that a receiver of the rents and profits of a property appointed on the application of a mortgagee would also not be appointed manager of the business unless the business or its good will is expressly or impliedly included in the mortgage security: Whitley v. Challis, [1892] 1 Ch. 64 (C.A.); Truman & Co. v. Redgrave (1881), 18 Ch. D.547 (C.A.); County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co., [1895] 1 Ch. 629 (C.A.); and Re Leas Hotel Co., [1902] 1 Ch. 332. However, these statements must be tempered by the fact that the British Columbia, Manitoba and Ontario legislation contains the words "or Receiver Manager" whereas the English legislation does not. As well, the ability of the Court in England to appoint a Receiver Manager is subject to the caveat that such an appointment can be made if it can be implied that a charge on the business or its good will is included in the mortgage security.

27 Whitley has been applied in Canada in Big Country Holdings Ltd. v. Bodale Holdings Ltd., unreported, 20 March 1986, Supreme Court of British Columbia action number H860054 (Vancouver Registry) and First Investors Corp. Ltd. v. 237208 Alberta Ltd. et al (1982), 20 Sask. R. 335 (Sask. Q.B.). In Big Country, Leggatt, L.J.S.C., as he then was, refused to appoint a Receiver Manager where the mortgagee had only a chattel mortgage, an agreement for sale and where the chattel mortgage charged the "goods, personal chattels and personal property" of the mortgagor. However, I am satisfied that this

decision must be limited in that Leggatt, L.J.S.C. found that: "... the charge does not cover good will and the chattels covered do not of necessity imply the business is included." The mortgage in question makes specific and repeated reference to chattels only and no where indicates that good will is covered by the charge." In First Investors, Walker, J. refused the appointment of a Receiver Manager of a hotel and tavern where there was no chattel mortgage and there was no mention that the mortgage covered the business or good will of the mortgagor.

28 However, a Receiver Manager of a hotel business was appointed in Brooks v. Westshores Inn Ltd., [1989] B.C.J. No. 1633 (B.C.S.C.) despite the fact that the mortgage in question did not include a charge against the chattels and the good will of the mortgagor. In appointing a Receiver Manager, Houghton, L.J.S.C., as he then was, stated:

> In my opinion, the court should not put the petitioner in the position of running a risk of having the summer proceeds stripped without any payments being made. (at unnumbered paragraph 6).

29 Even if I am wrong in concluding that the change in 1979 made it clear that a Receiver Manager could be appointed even if the security of a plaintiff or a petitioner did not include a charge against chattels or the good will of the company, I am satisfied in the case at bar that the mortgage of United impliedly includes a charge against the chattels on the premises and the business and good will of the mortgagor. The definition of "lands" includes "all buildings, improvements and fixtures located on the land". Additionally, under paragraph 15.01 of the mortgage, any "receiver" appointed by United may: "(c) lease out the Lands or any parts of Lands on any terms the receiver decides; (d) collect all income from the Lands; ... (g) manage the Lands and maintain them in good condition; ... (i) carry on any business which the Mortgagor conducted on the Lands."

30 I am satisfied that the agreement by the mortgagor to allow any receiver appointed to carry on the business that the mortgagor conducted on the lands is sufficient evidence of an intention the mortgage charge would also charge the business and the good will of the mortgagor so as to permit the appointment of a Receiver Manager even though United did not have a General Security Agreement.

31 Accordingly, a Receiver Manager is appointed. The third question which arises is whether the Receiver Manager should be entitled to offer the property for sale even though an order for conduct of sale has already been granted to J.T.S.

DISCUSSION: SHOULD THE RECEIVER MANAGER BE GRANTED THE ABILITY TO OFFER THE HOTEL FOR SALE?

32 Despite the fact that J.T.S. was granted an order for conduct of sale on November 26, 2002, I am satisfied that the Receiver Manager should be granted the power to offer the hotel for sale as an ongoing operation.

33 First, the Receiver Manager will have the best access to the actual income and expense figures which will be relied upon by any prospective purchaser. That information would not necessarily be available to J.T.S. from the current owners. As well, the figures that were formerly available will not necessarily reflect any improvements to the income and any reductions in the expenses which can be occasioned by the Receiver Manager.

34 Second, the Receiver Manager will be charging on a time basis whereas any agent employed by J.T.S. will insist upon the payment of a negotiated real estate commission. Even if the "usual" rate of 7% on the first $100,000 and 2- 1/2% on the balance of any sale price above $100,000 can be reduced by

negotiation, I am satisfied that any negotiated fee would be far in excess of the fees charged on a time basis for the Receiver Manager to market the property. Third, I cannot be satisfied that the efforts of the Receiver Manager will be any less effective than any real estate agent that might be retained by J.T.S. In the circumstances of this case, I am satisfied that the Receiver Manager should be granted the ability to offer the property for sale.

BURNYEAT J.

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BANKRUPTCY AND INSOLVENCY ACT [FEDERAL]

Published by Quickscribe Services Ltd.

Printed on: May. 21, 2020, 10:43am

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BANKRUPTCY AND INSOLVENCY ACT [FEDERAL]

CHAPTER B-3 [R.S. 1985]

[includes 2018 Chap. 27 and 2019 Chap. 29 (SI/2019-90) amendments (effective November 1, 2019)]

PART XI – SECURED CREDITORS AND RECEIVERS

Court may appoint receiver

(SUB) Sep 18/09 **243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

(ADD) Sep 18/09 (1.1) **Restriction on appointment of receiver** - In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

(SUB) Sep 18/09 (2) **Definition of "receiver"** - Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

(SUB) Sep 18/09 (3) **Definition of "receiver" — subsection 248(2)** - For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

(ADD) Sep 18/09 (4) **Trustee to be appointed** - Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

(ADD) Sep 18/09 (5) **Place of filing** - The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

(ADD) Sep 18/09 (6) **Orders respecting fees and disbursements** - If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the

receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

(ADD) Sep 18/09

(7) **Meaning of "disbursements"** - In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

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LAW AND EQUITY ACT

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LAW AND EQUITY ACT

CHAPTER 253 [RSBC 1996]

[includes 2009 Bill 4, c. 13 (B.C. Reg. 148/2013) amendments (effective March 31, 2014)]

-- Sections 21 - 40 --

Injunction or mandamus may be granted or receiver appointed by interlocutory order

39. (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

(2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

(3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

RS1979-224-36.

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SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

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SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 1 – Interpretation

Rule 1-3 – Object of Rules

Object

(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

Proportionality

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 2 – How To Make A Claim

Rule 2-1 – Choosing the Correct Form of Proceeding

Commencing proceedings by notice of civil claim

(1) Unless an enactment or these Supreme Court Civil Rules otherwise provide, every proceeding must be started by the filing of a notice of civil claim under Part 3.

Commencing proceedings by petition or requisition

(2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:

(a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;

(b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;

(c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;

(SUB) Mar 31/14

(d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;

(e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;

(f) the relief sought is for payment of funds into or out of court;

(g) the relief sought relates to land and is for

(i) a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,

(ii) a declaration that settles the priority between interests or charges,

(iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or

(iv) an order of partition or sale;

(h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

[am. B.C. Reg. 149/2013.]

(ADD) Mar 31/14

Estate proceedings

(2.1) Without limiting any other provision of this Rule, a proceeding to which Part 25 applies may be started by

(a) the filing of a submission for estate grant under Rule 25-3 (2),

(b) the filing of a submission for resealing under Rule 25-6 (2),

(SUB) Jul 01/19 (c) the filing of a requisition under Rule 25-12 (2), 25-14 (1) or 25-14 (1.11), or

(SUB) Jul 01/19 (d) the filing of a petition under Rule 25-14 (1.1), (2) or (4).

[en. B.C. Reg. 149/2013; am. B.C. Reg. 115/2019.]

Procedures applicable to particular proceedings

(AM) Mar 31/14 (3) Without limiting subrules (1) to (2.1), the following provisions apply to the following applications and proceedings:

(a) Rule 8-3 applies to an application for an order by consent;

(b) Rule 8-4 applies to an application of which notice need not be given;

(c) Rule 10-3 applies to a proceeding brought to obtain relief by way of interpleader or in which such relief is sought;

(c.1) Rule 14-1 (21) applies to an appointment for a review of a bill or an examination of an agreement under the *Legal Profession Act*;

(d) Rule 15-1 applies to a fast track action;

(e) Rule 18-2 applies to a stated case;

(f) Rule 18-3 applies to an appeal that is authorized, by an enactment, to be made to the court;

(g) Rule 19-3 applies to a proceeding to register a reciprocally enforceable judgment within the meaning of Rule 19-3;

(h) Rule 21-1 applies to a proceeding brought in rem against a ship or other property;

(SUB) Mar 31/14 (i) Part 25 applies to a proceeding in relation to the administration of an estate;

(REP) Mar 31/14 (j) *Repealed.* [B.C. Reg. 149/2013]

(k) Rule 21-7 applies to a proceeding for foreclosure of the equitable right to redeem mortgaged property, for redemption or for cancellation of an agreement for sale.

[am. B.C. Reg. 149/2013.]

SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 10 – Property and Injunctions

Rule 10-2 – Receivers

Appointment of receiver

(1) The court may appoint a receiver in any proceeding either unconditionally or on terms, whether or not the appointment of a receiver was included in the relief claimed by the applicant.

Form of security

(2) Unless the court otherwise orders, a receiver must give security as the court may direct in either Form 38 or Form 39 and, until that security is given, the order appointing the receiver must not be presented for entry.

Remuneration of receiver

(3) The court must fix any remuneration to be paid to a receiver.

Accounts of receiver

(4) Unless the court otherwise orders, a receiver must file and deliver his or her accounts annually.

SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 14 – Costs

Note

[Special rules apply to costs in fast track actions – see Rule 15-1 (15) to (17).]

Rule 14-1 – Costs

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

(a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;

(b) the court orders that

(i) the costs of the proceeding be assessed as special costs, or

(ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;

(d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;

(e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;

(f) subject to subrule (10) of this rule,

(i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100,000 or less, exclusive of interest and costs, or

(ii) the trial of the action was completed within 3 days or less,

in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Assessment of party and party costs

(2) On an assessment of party and party costs under Appendix B, a registrar must

(a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and

(b) consider Rule 1-3 and any case plan order.

Assessment of special costs

(3) On an assessment of special costs, a registrar must

(a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and

(b) consider all of the circumstances, including the following:

(i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

Assessment officer

(4) The officer before whom costs are assessed is a registrar.

Disbursements

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

(REP) Mar 31/14 **Repealed**

(6) *Repealed.* [B.C. Reg. 44/2014, Sch. 2]

Directions

(7) If the court has made an order for costs,

(a) any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,
(b) the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and
(c) the registrar is bound by any direction given by the judge or master.

Tax in respect of legal services and disbursements

(8) If tax is payable by a party in respect of legal services or disbursements, a registrar must, on an assessment under subrule (2) or (3), allow an additional amount to compensate for that tax as follows:
(a) if the tax is payable in respect of legal services, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by,
(i) in the case of a judgment entered on default of response to civil claim, the costs allowed under Item 1 or 2, as the case may be, of Schedule 1 of Appendix B,
(ii) in the case of a writ of execution, a garnishing order, a subpoena to debtor in Form 56, a notice of application for committal in Form 58 or an order of committal in Form 59, the costs allowed under Item 1 or 2, as the case may be, of Schedule 2 of Appendix B, or
(iii) in any other case, the monetary value of the units assessed;
(b) if the tax is payable in respect of disbursements, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by the monetary value of the disbursements as assessed.

Costs to follow event

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

Costs in cases within small claims jurisdiction

(10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

Costs where party represented by an employee

(11) A party is not disentitled to costs merely because the party's lawyer is an employee of the party.

Costs of applications

(12) Unless the court hearing an application otherwise orders,
(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

Costs payable from estate or property

(16) If it is ordered that any costs are to be paid out of an estate or property, the court may direct out of what portion of the estate or property the costs are to be paid.

Set-off of costs

(17) If a party entitled to receive costs is liable to pay costs to another party, a registrar may assess the costs the party is liable to pay and may adjust them by way of deduction or set-off or may delay the allowance of the costs the party is entitled to receive until the party has paid or tendered the costs the party is liable to pay.

Costs of one defendant payable by another

(18) If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful

defendant.

Unnecessary expense after judgment

(19) If after pronouncement of judgment a party puts another party to unnecessary proceedings or expense, a registrar may award costs as the registrar considers appropriate against the offending party.

Form of bill of costs

(20) A bill of costs must be in Form 62 or, if the bill of costs pertains to a judgment under Rule 3-8, Form 63.

Appointment to review a bill, examine an agreement or assess costs

(21) Except as provided in subrule (26), a person who seeks a review of a bill or an examination of an agreement under the *Legal Profession Act* or who seeks to have costs assessed must

(a) obtain a date for an appointment before a registrar,

(b) file an appointment in Form 49 to which is attached

(i) the bill to be reviewed,

(ii) the agreement to be examined, or

(iii) the bill of costs to be assessed, and

(c) at least 5 days before the date of the appointment, serve a copy of the filed Form 49 appointment and any affidavit in support,

(i) in the case of a bill to be reviewed, on the lawyer whose bill is to be reviewed, on the person who is charged with the bill or on the person who has agreed to indemnify the person charged, as the case may be,

(ii) in the case of an agreement to be examined, on the lawyer who is a party to the agreement to be examined, or

(iii) in the case of a bill of costs to be assessed, in accordance with subrule (25).

Place for review or examination

(22) An appointment for review of a bill, examination of an agreement or assessment of costs must be taken out,

(a) in the case of a bill to be reviewed or an agreement to be examined,

(i) if the bill or agreement relates to a court proceeding, at the registry at which the proceeding is being conducted, or

(ii) if the bill or agreement does not relate to a court proceeding, at the registry nearest to the place of business of the lawyer concerned,

(b) in the case of a bill of costs to be assessed, at the registry at which the proceeding is being conducted, or

(c) at any other registry to which the parties to the appointment may agree.

Further particulars

(23) A registrar may order further particulars or details of

(a) a bill under review,

(b) an agreement under examination, or

(c) a bill of costs being assessed.

Assessment of sheriff's fees

(24) If a sheriff who has charged fees for services set out in Schedule 2 of Appendix C or a person affected by those fees wishes to have those fees assessed, the person seeking the assessment must

(a) obtain an appointment from a registrar in Form 49 and attach to that appointment a copy of the bill to be assessed, if available, and

(b) at least 5 days before the assessment, serve a copy of the filed appointment and any filed affidavit in support on all persons affected by the fees.

Service of appointment

(25) A person seeking an assessment of costs must serve an appointment in Form 49, to which is attached the bill of costs, and any affidavit in support on

(a) the person against whom costs are to be assessed, and

(b) every other person whose interest, whether in a fund or estate or otherwise, may be affected.

Costs on default judgment

(26) On signing a default judgment, a registrar may, without an appointment, fix the costs to which the plaintiff is entitled against the defendant in default, and set out the amount allowed in

(a) the judgment, or

(b) a separate certificate.

Certificate of costs

(27) On the conclusion of an assessment of costs, or if the party charged has consented to the amount, a registrar must, either by endorsing the original bill or by issuing a certificate of costs in Form 64, certify the amount of costs awarded, and the party assessing costs must file the certificate.

Certificate of fees

(28) On the conclusion of a review of a bill under the *Legal Profession Act*, or if the parties to the review have consented to the amount due under the bill, a registrar must, by issuing a certificate of fees in Form 65, certify the amount due, and either party to the review may file the certificate.

Review of an assessment

(29) A party who is dissatisfied with a decision of a registrar on an assessment of costs may, within 14 days after the registrar has certified the costs, apply to the court for a review of the assessment.

Form of bill in certain cases

(30) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.

Description of services

(31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

Evidence of lawyer

(32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.

Disallowance of fees and costs

(33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

(a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;

(b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;

(c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;

(d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

Costs may be ordered without assessment

(34) If the court makes an order under subrule (33), the court may

(a) direct a registrar to conduct an inquiry and file a report with recommendations as to the amount of costs, or

(b) subject to subrule (37), fix the costs with or without reference to the tariff in Appendix B.

Notice

(35) An order against a lawyer under subrule (33) or (34) must not be made unless the lawyer is present or has been given notice.

Order to be served

(36) A lawyer against whom an order under subrule (33) or (34) has been made must promptly serve a copy of the entered order on his or her client.

Limitation

(37) An order by the court under subrule (34) (b) in respect of the costs of an application must not exceed $1 000.

Refusal or neglect to procure assessment

(38) If a party entitled to costs fails to assess costs and prejudices another party by failing to do so, a registrar may certify the costs of the other party and certify the failure and disallow all costs of the party in default.

Referrals

(39) Unless the court otherwise orders, fees to lawyers, accountants, engineers, actuaries, valuators, merchants and other scientific persons to whom any matter or question is referred by the court must be determined by a registrar, subject to an appeal to the court.

SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 16 – Petition Proceedings

Rule 16-1 – Petitions

Definitions

(1) In this rule, **"petition respondent"** means a person who files a response to petition under subrule (4).

Petitions

(2) A person wishing to bring a proceeding referred to in Rule 2-1 (2) by filing a petition must file a petition in Form 66 and each affidavit in support.

Service

(3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.

Response to petition

(4) A person who has been served with a copy of a filed petition under subrule (3) of this rule must, if the person wishes to receive notice of the time and date of the hearing of the petition, do the following:

(a) file a response to petition in accordance with subrule (5);

(b) file, with the response to petition, all affidavits that have not already been filed and on which the person intends to rely at the hearing of the petition;

(c) unless the court otherwise orders, serve on the petitioner 2 copies and on every other party of record one copy of each document filed under paragraph (a) or (b) as follows:

(SUB) Jul 01/11 (i) if the petition respondent was served with the petition anywhere in Canada, within 21 days after that service;

(SUB) Jul 01/11 (ii) if the petition respondent was served with the petition anywhere in the United States of America, within 35 days after that service;

(SUB) Jul 01/11 (iii) if the petition respondent was served with the petition anywhere else, within 49 days after that service.

[am. B.C. Reg. 95/2011, Sch. A.]

Contents of response to petition

(5) A response to petition must be in Form 67 and must

(a) indicate, for each order sought, whether the petition respondent consents to, opposes or takes no position on the order, and

(b) if the petition respondent wishes to oppose any of the relief sought in the petition,

(i) briefly summarize the factual and legal bases on which the orders sought should not be granted,

(ii) list the affidavits and other documents on which the petition respondent intends to rely at the hearing of the petition, and

(iii) set out the petition respondent's estimate of the time the petition will take for hearing.

Petitioner may respond

(6) A petitioner may file affidavits in response to any document served on the petitioner under subrule (4) (c) and, in that event, must serve copies of those filed responding affidavits on each petition respondent no later than the date on which the notice of hearing is served on that petition respondent under subrule (8) (b).

No additional affidavits

(7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).

Setting application for hearing

(8) A petitioner wishing to set a petition down for hearing must,

(a) in the case of a petition to which no response to petition has been served under subrule (4) (c), file a notice of hearing in Form 68 at any time before the hearing of the petition, or

(b) in the case of a petition to which a response to petition has been filed and served under subrule (4) (c), file a notice of hearing in Form 68, and serve a copy of the filed notice of hearing on each petition respondent, at least 7 days before the date set for the hearing of the petition.

Date and time of hearing

(9) The hearing of a petition must be set for 9:45 a.m. on a date on which the court hears petitions or at such other time or date as has been fixed by the court or a registrar.

Date and time if hearing time more than 2 hours

(10) If the estimate, set out in the petition, of the time that the hearing of the petition will take is more than 2 hours, the date and time of hearing must be fixed by a registrar.

Petition record

(11) Subject to subrule (13), the petitioner must provide to the registry where the hearing is to take place, no later than 4 p.m. on the day that is one full day before the date set for the hearing, a petition record as follows:

(a) the petition record must be in a ring binder or in some other form of secure binding;

(b) the petition record must contain, in consecutively numbered pages, or separated by tabs, the following documents in the following order:

(i) a title page bearing the style of proceeding and the names of the lawyers, if any, for the petitioner and the petition respondents;

(ii) an index;

(iii) a copy of the filed petition;

(iv) a copy of each filed response to petition;

(v) a copy of each filed affidavit that is to be referred to at the hearing;

(c) the petition record may contain

(i) a draft of the proposed order,

(ii) a written argument,

(iii) a list of authorities, and

(iv) a draft bill of costs;

(d) the petition record must not contain

(i) affidavits of service,

(ii) copies of authorities, including case law, legislation, legal articles or excerpts from text books, or

(iii) any other documents unless they are included with the consent of all the parties.

Service of petition record

(12) The petitioner must serve a copy of the petition record index on each petition respondent no later than 4 p.m. on the day that is one full day before the date set for the hearing.

If petition respondent's application is to be heard at the hearing

(13) If a petition respondent intends to set an application for hearing at the same time as the hearing of the petition, the parties must, so far as is possible, prepare and file a joint petition record and agree to a date for the hearing of both applications.

Petition record to be returned

(14) Unless the court otherwise orders, the applicant must retrieve the petition record

(a) at the conclusion of the hearing, or

(b) if the hearing of the petition is adjourned to a date later than the following court day, after the hearing is adjourned.

Petition record to be returned to registry

(15) If the petition record has been retrieved by the petitioner under subrule (14) (b), the petitioner must return the petition record to the registry between 9:00 a.m. on the second court day before, and 4 p.m. on the day that is one full day before, the new date set for the

hearing of the petition.

Provision of amended petition record

(16) If any additional affidavits are filed and served under subrule (7), the petitioner must provide to the registry an amended petition record containing those affidavits.

Resetting adjourned hearings

(16.1) To reset the hearing of a petition that has been adjourned without a date being set for it to be heard ("adjourned generally"), the petitioner must

(a) file a requisition in Form 17 setting out the date and time of the hearing, and

(b) serve a copy of the filed requisition on the petition respondents at least 2 days before the date set for the hearing.

(SUB)**Petition respondent may apply for directions**
Jul
01/11

(17) If the petitioner does not

(a) set the petition for hearing within a reasonable time after being requested to do so by a petition respondent, or

(b) after the hearing of the petition has been adjourned generally, reset the petition for hearing within a reasonable time after being requested to do so by a petition respondent,

a petition respondent may apply, by requisition in Form 17 on 2 days' notice, for directions.

[en. B.C. Reg. 95/2011, Sch. A.]

Powers of court

(18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

Amendment of petition or response to petition

(19) A party may amend a petition or response to petition filed by the party

(a) at any time with leave of the court, and

(b) subject to Rules 6-2 (7) and (10) and 7-7 (5),

(i) once without leave of the court, at any time before service of the notice of hearing, and

(ii) at any time with the written consent of all the parties,

and for that purpose Rule 6-1 (2) to (7) applies.

Renewal of original petition

(20) An original petition does not remain in force for more than 12 months, but if a respondent named in a petition has not been served, the court, on the application of the petitioner made

before or after the expiration of the 12 months, may order that the original petition be renewed for a period of not more than 12 months.

Further renewal of petition

(21) If a renewed petition has not been served on a respondent named in the petition, the court, on the application of the petitioner made during the currency of the renewed petition, may order the renewal of the petition for a further period of not more than 12 months.

When renewal period begins

(22) Unless the court otherwise orders, a renewal period ordered under subrule (20) or (21) begins on the date of the order.

After renewal of notice of civil claim

(23) Unless the court otherwise orders, a copy of each entered order granting renewal of a petition must be served with the renewed petition, and the renewed petition remains in force and is available to prevent the operation of any statutory limitation and for all other purposes.

SUPREME COURT CIVIL RULES (B.C. Reg. 168/2009)

B.C. Reg. 168/2009

[includes B.C. Reg. 18/2019, Sch. 2 amendments (effective February 1, 2020)]

PART 22 – General

Rule 22-1 – Chambers Proceedings

Definition

(1) In this rule, **"chambers proceeding"** includes the following:

(a) a petition proceeding;

(b) a requisition proceeding that has been set for hearing under Rule 17-1 (5) (b);

(c) an application, including, without limitation, the following:

(i) an application to change or set aside a judgment;

(ii) a matter that is ordered to be disposed of other than at trial;

(d) an appeal from, or an application to confirm, change or set aside, an order, a report, a certificate or a recommendation of a master, registrar, special referee or other officer of the court;

(e) an action that has, or issues in an action that have, been ordered to be proceeded with by affidavit or on documents before the court, and stated cases, special cases and hearings on a point of law;

(f) an application for judgment under Rule 3-8, 7-7 (6), 9-6 or 9-7.

Failure of party to attend

(2) If a party to a chambers proceeding fails to attend at the hearing of the chambers proceeding, the court may proceed if, considering the nature of the chambers proceeding, it considers it will further the object of these Supreme Court Civil Rules to do so, and may require evidence of service it considers appropriate.

Reconsideration of order

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

Evidence on an application

(4) On a chambers proceeding, evidence must be given by affidavit, but the court may

(a)

order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

(b) order the examination of a party or witness, either before the court or before another person as the court directs,

(c) give directions required for the discovery, inspection or production of a document or copy of that document,

(d) order an inquiry, assessment or accounting under Rule 18-1, and

(e) receive other forms of evidence.

Hearing of application in public

(5) Except in cases of urgency, a chambers proceeding must be heard in a place open to the public, unless the court, in the case of a particular chambers proceeding, directs that for special reasons the chambers proceeding ought to be dealt with in private.

Adjournment of application set for hearing on a holiday

(6) If a chambers proceeding has been set for hearing on a day on which the court does not hear chambers proceedings, the chambers proceeding stands adjourned without order to the next day on which the court hears chambers proceedings.

Power of the court

(7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may

(a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,

(b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,

(c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and

(d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

Powers of court if notice not given

(8) If it appears to the court that notice of a chambers proceeding ought to have been but was not served on a person, the court may

(a) dismiss the chambers proceeding or dismiss it only against that person,

(b) adjourn the chambers proceeding and direct that service be effected on that person or that notice be given in some alternate manner to that person, or

(c) direct that any order made, together with any other documents the court may order, be served on that person.

Urgent chambers proceeding

(9) Rules 8-4 and 8-5 apply to chambers proceedings.

Adjournment

(10) The hearing of a chambers proceeding may be adjourned from time to time by a registrar.

Notes of applications

(11) A registrar must

(a) attend at and keep notes of the hearings of all chambers proceedings, and

(b) include, in the notes kept under paragraph (a) in relation to the hearing of a chambers proceeding, a short statement of the questions or points decided or orders made at the hearing.