HSBC Bank of Canada v. Deloitte & Touche Inc.

[Indexed as: Regal Constellation Hotel Ltd. (Re)]

71 O.R. (3d) 355
[2004] O.J. No. 2744
Docket Nos. C41258 and C41257

Court of Appeal for Ontario,
Laskin, Feldman and Blair JJ.A.
June 28, 2004

Real property -- Land titles -- Vesting order -- No automatic stay of vesting order -- Once vesting order registered on title under Land Titles Act, its attributes as conveyance prevail and its attributes as order are spent -- Registered vesting order cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under Land Titles system -- Appeal from a registered vesting order moot -- Land Titles Act, R.S.O. 1990, c. L.5.

Regal Pacific (Holdings) Limited ("Regal Pacific") was the 100 per cent shareholder of Regal Constellation Hotel Limited ("Regal Constellation"), the operator of a hotel near Pearson Airport in Toronto. The hotel had been in financial difficulties for some time and, in November 1991, HSBC Bank of Canada ("HSBC"), Regal Pacific's secured creditor, demanded repayment of its loan. As a result, Regal Pacific and Regal Constellation retained Colliers International Hotels ("Colliers") to market the hotel. In the fall of 2002, a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group at a purchase price of $45 million. The transaction did not close and litigation between Regal Pacific and the Orenstein Group followed.

With the failure of the Orenstein Group transaction, and on the application of HSBC in July 2003, Deloitte & Touche Inc. was appointed receiver, and the receiver and Colliers continued the efforts to market the hotel. In August 2003, 13 offers to purchase were submitted and, from these, HSBC and the receiver accepted an offer from 2031903 Ontario Inc. ("203"), subject to court approval (the "First 203 Offer"). The First 203 Offer was for the fourth highest purchase price. The highest bid was by Hospitality Investors Group LLC ("HIG"), whose bid was accompanied by a non-certified deposit cheque for $1 million. However, the receiver was advised that the cheque could not be honoured, and the offer was withdrawn by HIG, a company controlled by the Orenstein Group.

The First 203 Offer was approved by the court but it did not close. Ultimately, the transaction was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs. The search for a purchaser for the hotel resumed. Another offer was received from 203 (the "Second 203 Offer"). It was for $24 million, and it was buttressed by a $20 million credit facility provided by Aareal Bank A.G. ("Aareal"). With a purchase price of $24 million, HSBC would be suffering a shortfall of approximately $9 million.

On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order. The transaction closed on January 6, 2004, and the vesting order was registered on the title under the Land Titles Act. Aareal's $20 million loan was secured on the title based on the vesting order. Aareal registered a $20 million mortgage against the title of the property.

A few days later, Regal Pacific learned from a newspaper article that the hotel had been sold to the Orenstein Group. On January 15, 2004, on a motion before Farley J. to approve the receiver's conduct, Regal Pacific requested an adjournment but also submitted that the receiver's failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request and approved the receiver's conduct and accounts. Farley J. concluded that the identity of the

purchaser was not material. Regal Pacific appealed and sought to set aside the orders of Sachs J. and Farley J. In a separate motion, 203 sought to quash the appeal. 203 submitted that the appeal was moot because no stay of the vesting order had been obtained and, therefore, the registration of the vesting order on title extinguished the court's power to set aside the vesting order. The motion to quash was argued during the argument of the appeal on its merits.

Held, the motion to quash should be granted and the appeal otherwise dismissed.

A vesting order has a dual character. It is, on the one hand, a court order and, on the other hand, a conveyance vesting an interest in real or personal property in the party entitled under the order. Once a vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent. Any appeal from the order is therefore moot.

While a vesting order is in the ordinary course subject to appeal, in the absence of a stay, it remains effective and may be registered on the title under the Land Titles system. When no stay is obtained and the order is registered, the appeal rights are lost. Under the Land Titles Act, a vesting order upon registration is deemed to be embodied in the register and to be effective according to its nature and effect. When it is embodied in the register, it becomes a creature of the Land Titles system and subject to the dictates of that regime. Once a vesting order that has not been stayed is registered on title, it is effective as a registered instrument and its characteristics as an order are overtaken by its characteristics as a registered conveyance on title. It cannot be attacked except by the means that apply to any other instrument transferring absolute title and registered under the Land Titles system. This interpretation of the effect of a vesting order was consistent with the purpose of the Land Titles regime. Title had been effectively changed and innocent third parties were entitled to rely upon that change.

Assuming the appeal from the vesting order was not moot, the

appeal from it and from the approval orders should be dismissed on the merits. The fact that the Orenstein Group was involved in the 203 bid was not material to the sale process conducted by the receiver. Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, the facts of that transaction were of little more than historical interest in the context of the receivership sale. The circumstances of the HIG bid and its withdrawal did not assist Regal Pacific. There was no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

Cases referred to

Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56 (C.A.); Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1 (C.A.), supp. reasons (2001), 204 D.L.R. (4th) 744, 14 C.P.C. (4th) 7 (Ont. C.A.); Durrani v. Augier (2000), 50 O.R. (3d) 353, 190 D.L.R. (4th) 183, 36 R.P.R. (3d) 261 (S.C.J.); Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198 (C.A.); National Life Assurance Co. of Canada v. Brucefield Manor Ltd., [1999] O.J. No. 1175 (C.A.); R.A. & J. Family Investment Corp. v. Orzech (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.); Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 46 O.A.C. 321, 83 D.L.R. (4th) 76, 7 C.B.R. (3d) 1 (C.A.); Royal Trust Corp. of Canada v. Karenmax Investments Inc., [1998] A.J. No. 1160, 71 Alta. L.

R. (3d) 307 (Q.B.); Toronto-Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 24 C.B.R. (4th) 303, 17 M.P.L.R. (3d) 57 (Ont. C.A.), affg (1997), 50 C.B.R. (3d) 127, 40 M.P.L.R. (2d) 293 (Ont. Gen. Div.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100

Land Titles Act, R.S.A. 2000, c. L-4, s. 191

Land Titles Act, R.S.O. 1990, c. L.5, ss. 25, 57, 69, 78, 155-57, Parts IX, X

Rules and regulations referred to

Ontario Land Titles Regulations, O. Reg. 26/99, s. 4

Authorities referred to

Bennett, F., Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999)

Lamont, D., Lamont on Real Estate Conveyancing, 2nd ed., looseleaf, vol. 1 (Toronto: Carswell, 1991)

APPEAL from a vesting order of Sachs J., dated December 19, 2003, and an order of Farley J., dated January 14, 2004, approving the conduct and accounts of a receiver.

J. Brian Casey and John J. Pirie, for Deloitte & Touche Inc.

Robert Rueter and A. Chan, for Regal Pacific (Holdings) Limited.

Tim Gilbert and Sandra Barton, for 2031903 Ontario Inc.

James P. Dube, for Aareal Bank A.G.

The judgment of the court was delivered by

[1] BLAIR J.A.: -- Regal Pacific (Holdings) Limited is the 100 per cent shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.1

[2] Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004,

Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

[3] This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

[4] In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

[5] For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

[6] The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

[7] At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

[8] Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

[9] When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order.

[10] The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

[11] A summary of the 13 bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who

had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

[12] The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

[13] HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

[14] Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

[15] On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

[16] At the receiver's request, Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined

above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

[17] The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

[18] The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all 13 of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

[19] The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million i n deposits that 203 had previously forfeited, the receiver views

the purchase price as being the equivalent of $27 million.

[20] On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24 million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

[21] A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

. . . . .

> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis--vis the Receiver and that duty, it does not

appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

[22] The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

[23] Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -- particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[24] In Soundair, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of the parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

[25] In Soundair as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See Toronto-Dominion Bank v. Usarco Ltd. (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in Toronto-Dominion Bank v. Usarco, supra, at p. 459 D.L.R.

[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

Analysis

The vesting order and the motion to quash

[28] Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title -- no stay having been obtained -- its effect was spent, the court's power

to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

[29] In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

[30] Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

[31] In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[32] The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment

or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, Snell's Equity, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

(Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

[35] In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system -- indeed, the land registrar is required to register it on a proper application to do so: see the Land Titles Act, R.S.O. 1990, c. L.5, ss. 25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement -- as there is in some other jurisdictions2 -- to show that no appeal is pending and that all appeal rights have terminated: see Ontario Land Titles Regulations, O. Reg. 26/99, s. 4.

[36] Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the

order has been registered?

[37] In answering that question I start with the provisions of ss. 69 and 78 of the Land Titles Act, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

69(1) Where by order of a court of competent jurisdiction . . . registered land or any interest therein is stated by the order . . . to vest, be vested or become vested in, or belong to . . . any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,

(a) until an application to be registered as owner is made by or on behalf of the . . . other person in or to whom the land is stated to be vested or to belong; or

(b) until the land is transferred to the . . . person by the registered owner, as the case may be, in accordance with the order or Act.

. . . . .

78(4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

(Italics added)

[38] Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.3 When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

[39] Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

[40] This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the Land Titles Act. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

[41] Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, Lamont on Real Estate Conveyancing, 2nd ed., looseleaf (Toronto: Carswell, 1991), vol. 1 at p. 1-10, as follows:

The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset.

(Italics added)

[42] Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in Durrani v. Augier (2000), 50 O.R. (3d) 353, 190 D.L.R. (4th) 183 (S.C.J.). At paras. 40-42 she observed:

The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave, "Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

[43] Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is

absolutely immune from attack. It simply means that any such attack must be made within the parameters of the Land Titles Act.

[44] That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,4 in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a bona fide purchaser for value in the interest as registered: see R.A. & J. Family Invest ment Corp. v. Orzech (1999), 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (C.A.); and Durrani v. Augier, supra, at paras. 49, 75 and 76.

[45] Vesting orders properly registered on title, then -- like other conveyances -- are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent.

[46] Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -- although not based upon the same reasoning -- in Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 71 Alta L.R. (3d) 307 (Q.B.). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [sic] in fact or law by the learned Master . . . .

[47] In a brief three-paragraph endorsement, this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in National Life Assurance Co. of Canada v. Brucefield Manor Ltd., [1999] O.J. No. 1175 (C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this backdrop", Catzman J.A. noted [at para. 2], "we agree with [the] submission that the order under appeal is spent".

[48] This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

[49] I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the Land Titles Act (Remedy of person wrongfully deprived of land), or the rules of professional

conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

[50] The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The appeals on the merits

[51] Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 -- just the day before the First 203 Offer for $25 million was submitted -- and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made, Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and ac cordingly the sale must be set aside.

[52] On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information,

but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance -- and, in the case of the Second 203 Offer, the only offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

[53] 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203, Mr. Gilbert argues in addition that 203 is a bona fide purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

[54] I do not accept the argument advanced by the appellant.

[55] In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

[56] Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel

and, as well, the acquisition of certain other assets. None of the 13 bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of t his earlier transaction to the sale process conducted by the receiver.

[57] I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

[58] First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer -- and which had not been certified, as required by the court-approved bidding process -- could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary -- which was not the case here -- a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

[59] The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203

Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were no other offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

[60] A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

[61] There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything, to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

[62] In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

[63] I would dismiss the appeals for the foregoing reasons.

Disposition

The appeals

[64] For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003, approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

[65] The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

[66] The receiver and 203 requested that costs be fixed on a substantial indemnity basis -- the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (C.A.). I would therefore award costs on a partial indemnity scale.

[67] Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such

an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see Boucher v. Public Accountants Council for the Province of Ontario (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.).

[68] Costs are awarded, on a partial indemnity basis, as follows:

(a) To the receiver, in [the] amount of $40,000;

(b) To 203, in the amount of $40,000; and,

(c) To Aareal Bank, in the amount of $12,225.

[69] These amounts are inclusive of fees, disbursements and GST.

Order accordingly.