

COURT FILE NO. 2401 03935

Clerk's Stamp

COURT COURT OF KING'S BENCH
OF ALBERTA

JUDICIAL CALGARY
CENTRE

PLAINTIFF CANADIAN WESTERN BANK

DEFENDANT 2004639 ALBERTA LTD.

DOCUMENT **BOOK OF AUTHORITIES OF CANADIAN WESTERN BANK**

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TABLE OF AUTHORITIES

<u><i>Bankruptcy and Insolvency Act</i> R.S.C. 1985, c. B-3, s. 243(1)</u>	TAB 1
<u><i>Judicature Act</i>, RSA 2000, c J-2, s 13</u>	TAB 2
<u><i>Personal Property Security Act</i>, RSA 2000, c. P-7, s 65(7)</u>	TAB 3
<u><i>Business Corporations Act</i>, R.S.A. 2000, c. B-9, s. 99</u>	TAB 4
<u><i>Servus Credit Union Ltd. v Proform Management Inc</i>, 2020 ABQB 316</u>	TAB 5
<u><i>Kasten Energy Inc. v Shamrock Oil & Gas Ltd.</i>, 2013 ABQB 63</u>	TAB 6
<u><i>Paragon Capital Corp. v Merchants & Traders Assurance Co.</i>, 2002 ABQB 430</u>	TAB 7
<u><i>Schendel Management Ltd</i>, 2019 ABQB 545</u>	TAB 8
<u><i>Bank of Nova Scotia v Freure Village of Clair Creek</i>, 1996 CanLII 8258 (ON SC)</u>	TAB 9

TAB 1

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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.

Restriction on appointment of receiver

(1.1) 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

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(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.

Definition of receiver

(2) 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.

Definition of receiver — subsection 248(2)

(3) 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).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) 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

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l’exécution de la garantie à une date plus rapprochée;

b) qu’il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de séquestre

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), **séquestre** s’entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d’un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu’une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de séquestre — paragraphe 248(2)

(3) Pour l’application du paragraphe 248(2), la définition de **séquestre**, au paragraphe (2), s’interprète sans égard à l’alinéa a) et aux mots « ou aux termes d’une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d’un séquestre ou d’un séquestre-gérant ».

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d’un contrat ou d’une ordonnance mentionné à l’alinéa (2)b).

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu’il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l’égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

TAB 2

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2 Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

- (a) when expressly accepted by a creditor in satisfaction, or

- (b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver 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, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

- (a) to an equitable estate or right,
- (b) to relief on an equitable ground
 - (i) against a deed, instrument or contract, or
 - (ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

- (c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

TAB 3

- (b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

1988 cP-4.05 s63

Application to Court

64 On application by a debtor, a creditor of a debtor, a secured party or a sheriff, civil enforcement agency or a person with an interest in the collateral, the Court may

- (a) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure compliance with this Part or section 17, 36, 37 or 38,
- (b) give directions to any person regarding the exercise of the person's rights or discharge of the person's obligations under this Part or section 17, 36, 37 or 38,
- (c) relieve any person from compliance with the requirements of this Part or section 17, 36, 37 or 38,
- (d) stay enforcement of rights provided in this Part or section 17, 36, 37 or 38, or
- (e) make any order, including a binding declaration of right and injunctive relief, that is necessary to ensure protection of the interests of any person in the collateral.

1988 cP-4.05 s64;1990 c31 s51;1994 cC-10.5 s148

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

- (a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,
- (b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

- (c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,
- (d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,
- (e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act*, and
- (f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

- (7) On the application of any interested person, the Court may
- (a) appoint a receiver;
 - (b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;
 - (c) give directions on any matter relating to the duties of a receiver;
 - (d) approve the accounts and fix the remuneration of a receiver;
 - (e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;
 - (f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

1988 cP-4.05 s65;1990 c31 s52;1994 cC-10.5 s148

Part 6 Miscellaneous

Proper exercise of rights, duties and obligations

66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

TAB 4

- (b) deal with any property of the corporation in the receiver's or receiver-manager's possession or control in a commercially reasonable manner.

1981 cB-15 s94

Powers of the Court

99 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

- (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving the receiver's or receiver-manager's accounts;
- (b) an order determining the notice to be given to any person or dispensing with notice to any person;
- (c) an order fixing the remuneration of the receiver or receiver-manager;
- (d) an order
 - (i) requiring the receiver or receiver-manager, or a person by or on behalf of whom the receiver or receiver-manager is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;
 - (ii) relieving any of those persons from any default on any terms the Court thinks fit;
 - (iii) confirming any act of the receiver or receiver-manager;
- (e) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of the receiver's or receiver-manager's administration that the Court specifies;
- (f) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

1981 cB-15 s95;1987 c15 s9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

- (a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

TAB 5

Court of Queen's Bench of Alberta

Citation: Servus Credit Union Ltd v Proform Management Inc, 2020 ABQB 316

Date: 20200511
Docket: 2003 06374
Registry: Edmonton

Between:

Servus Credit Union Ltd.

Plaintiff/Applicant

- and -

**Proform Management Inc., Proform Concrete Services Inc.,
and Proform Construction Products Inc.,
formerly known as Proform Precast Products Inc.**

Defendants/Respondents

**Judgment
of the
Honourable Mr. Justice M. J. Lema**

A. Introduction

[1] Servus Credit Union Ltd. (Servus) seeks the appointment of a receiver of a group of related companies collectively indebted to it for approximately \$12 million. This follows two forbearance periods of approximately six months and three more months, respectively, and an additional month of interim monitoring. It holds a consent receivership order granted at the onset of forbearance and submits that the debtors' ongoing defaults allow Servus to submit it for entry.

- the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
- where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
- the proposed relief does not exceed that consented to; and
- consent aside, the ordered relief is warranted in the circumstances.

[61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the “we have consented” message, the Court can usually proceed on the basis that all of these elements are satisfied.

[62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.

[63] A safeguard here is the Court’s power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.¹⁴

Whether it is “just or convenient” to appoint a receiver in these circumstances

[64] The Court has the jurisdiction to grant a receivership order here, and no party pointed to a threshold statutory or common-law condition to the exercise of that jurisdiction. Similarly, there is no question that the debtors consented to the receivership order and, on the evidence here, that the consent was not tainted. Finally, as discussed above, the conditional consent here became unconditional with the expiry of the forbearance and stay periods and with the debtors continuing to be in default under the credit arrangements.

[65] The question becomes whether it is indeed “just or convenient” to appoint a receiver here.

[66] Here is where (as confirmed by the “consent-order-and-forbearance” cases) the debtors’ consent has its most critical effect: by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly any stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*.

[67] The debtors’ core position was that they had made very significant progress toward clearing their debts to Servus and that one more month would allow them to achieve even more, and very significant, progress. But the core state of affairs – continuing default – in which they provided the CRO, and which was prevailing when each of the first forbearance, second forbearance, and stay periods expired, continues to prevail.

¹⁴ See, for example, *TEHK v CLS*, 2011 ABCA 252. See also the discussion in *Civil Procedure Encyclopedia*, Stevenson & Côté (2003), c. 50 (“Judgments, Orders, and Settlements”), R. (“Consent Orders or Judgments”), 7. (“Setting Aside Consent Order). See also *Civil Procedure and Practice in Alberta*, Reed and Poelman (2020), annotation to R 9.15 (“Consent Orders as Evidence of a Contract Between Parties” and “Binding Effect of Consent Orders”) at p 303.

TAB 6

Court of Queen's Bench of Alberta

Citation: Kasten Energy Inc. v. Shamrock Oil & Gas Ltd., 2013 ABQB 63

Date: 20130128
Docket: 1203 15035
Registry: Edmonton

2013 ABQB 63 (CanLII)

Between:

Kasten Energy Inc.

Applicant

- and -

Shamrock Oil & Gas Ltd.

Respondent

**Memorandum of Decision
of the
Honourable Mr. Justice Donald Lee**

Introduction

[1] This is an application by Kasten Energy Inc. ("Kasten" or "Applicant") against Shamrock Oil & Gas Ltd. ("Shamrock" or "Respondent") seeking an Order of this Court, as a secured creditor, for the appointment of a Receiver and Manager of the Respondent's assets and undertaking.

Facts

[2] Kasten is incorporated in Alberta as body corporate involved in the business of exploring and developing oil and gas; and a successor in interest to Premier CAT Service Ltd. ("Premier CAT").

[3] Shamrock is incorporated in Alberta and has a petroleum and natural gas lease used to develop an oil well located at 2-02-90-13-W5 in the Sawn Lake region of Red Earth, Alberta ("Sawn Lake Well").

[4] The Respondent, Shamrock entered into a contract with Premier CAT on or about June 1, 2010 which required Premier CAT to construct a road to Shamrock's well site. Following services provided under the contract, Shamrock became indebted to Premier CAT in the principal sum of \$567,267.76. The debt was payable 60 days from the date of invoice at the interest rate of 24% per annum.

[5] On or about July 22, 2010, a General Security Agreement ("GSA") was granted by Shamrock to Premier CAT for a security interest in all present and after acquired personal property of Shamrock as security for repayment of the outstanding debt.

[6] By a Debt Assignment Agreement dated January 20, 2011 ("Debt Assignment"), Premier CAT assigned Shamrock's outstanding debt, along with the underlying security, to Kasten. The registration of the GSA at the Personal Property Registry was amended on February 4, 2011 to delete Premier CAT and substitute Kasten as the secured creditor. As a result, Shamrock became indebted to Kasten, the successor in interest to Premier CAT.

[7] As of July 30, 2012, the outstanding indebtedness of Shamrock to Kasten was \$777,216.26 based on the amount owed to Premier CAT at the date of the Debt Assignment, plus accrued interest at the agreed rate of 24% per annum.

[8] On or about October 31, 2011, Shamrock issued a Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 50.4 [*BIA*]. Later, on November 25, 2011, Shamrock submitted a *BIA*, Part III, Division 1 Proposal addressed to all its secured and unsecured creditors. Under the Proposal, Stout Energy Inc. ("Stout"), a grandparent company to Shamrock would retain BDO Canada Limited as proposal trustee; and Stout would operate the Sawn Lake Well under a joint operating agreement with Shamrock. This agreement contemplated that after recovery of Stout's capital investment, 80% of the net revenue generated from operations would be paid to secured creditors until full payment while unsecured creditors would receive 20% until full payment.

[9] At a meeting of Shamrock's creditors convened by the trustee on December 15, 2011, Kasten, a secured creditor voted against the proposal but all the unsecured creditors voted in favour of the proposal. Subsequently, on January 31, 2012, Shamrock made an application to the Court of Queen's Bench for an approval of the Proposal. Kasten opposed the application before Master Breitkreuz, the presiding Registrar. Ultimately, the Proposal was approved by the Court.

[10] On February 25, 2012, a Demand for Payment was issued to Shamrock on Kasten's instruction, along with a Notice of Intention to Enforce a Security, pursuant to the *BIA*, s 244. The total amount of indebtedness as at this demand date was \$760,059.18. As of October 9, 2012, the indebtedness had climbed to \$799,595.06 taking into account the sum of \$45,130.58

which was the only cheque that Kasten received from Shamrock since the Court approved the Proposal.

Issue

[11] The issue before me is whether a Receiver and Manager of Shamrock's assets and undertaking should be appointed.

Law

[12] The test for the grant of an Order of this Court appointing a Receiver is set out in the *Judicature Act*, RSA 2000, c J-2, s 13(2) which provides that:

An order in the nature of a mandamus or injunction may be granted or a receiver 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, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Parties' Positions and Analysis

[13] Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430 at para 27, 316 AR 128 [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:

- 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;

- 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.

See also, *Lindsey Estate v Strategic Metals Corp*, 2010 ABQB 242 at para 32, aff'd 2010 ABCA 191; and *Romspen Investment Corporation v Hargate Properties Inc*, 2011 ABQB 759 at para 20.

Kasten's Submissions

[14] The Applicant submits that the evidence before this Court is that since the Proposal was approved, the expenses on Shamrock's well production have exceeded revenues by a substantial margin such that it's unlikely that Shamrock would be able to pay the outstanding indebtedness in a timely manner. The revenue accruing from the Sawn Lake Well, which is Shamrock's primary asset, has not been directed at paying the debt owed Kasten.

[15] Kasten contends that it has the right to appoint a Receiver under the GSA (at para 8.2. It notes that on the basis of the evidence in this case, Shamrock is insolvent and this situation is not improving. The risk of waste under the joint operating agreement is palpably real as Stout is spending substantial amount of money as expenses for well operations while channelling revenues in a selective manner. Kasten submits that irreparable harm may result if a Receiver is not appointed, pending judicial resolution of this matter, to properly manage and preserve the value of the well and its associated lease, as well as to distribute revenues equitably to all interested parties.

[16] Kasten argues that the balance of convenience favours the appointment of a Receiver who would be better positioned to distribute revenues equitably to all interested parties and creditors

since Shamrock is unable to comply with the payment schedule. Kasten reiterates that nothing demonstrates its good faith in pursuit of its legitimate interest to get paid the debt owed more than the patience it has displayed towards Shamrock for nearly two years.

[17] The Applicant notes that Shamrock's argument on the issue of whether the GSA covers the oil and gas in the ground along with the right to extract the minerals distracts from the main issue of whether this Court should appoint a Receiver in the circumstances of this matter. Kasten argues that there is no doubt that a Crown oil-and-gas lease is a contract that contains a profit à prendre, which is an interest in land: *Amoco Canada Resources Ltd v Amax Petroleum of Canada Inc*, 1992 ABCA 93 at para 10, [1992] 4 WWR 499. Nevertheless, leases have a dual nature as both a conveyance and a commercial contract; and as such, are subject to normal commercial principles: *Highway Properties Ltd v Kelly, Douglas and Co Ltd*, [1971] SCR 562 at 576, [1972] 2 WWR 28. The contract is assignable and subject to seizure.

Shamrock's Submissions

[18] The Respondent Shamrock submits that Kasten has not demonstrated that irreparable harm may result if this Court refuses to appoint a Receiver. Instead, Stout has injected huge sums of money to improve the revenue potential of the Sawn Lake Well. Shamrock contends that if a Receiver is appointed, Stout may cease funding operations and oil and gas production will cease. Further, Shamrock says that it had also initiated a sale process and does not perceive any risk to Kasten while waiting for the completion of that process.

[19] Shamrock argues that by nature, the property involved in this case calls for a continuous operation by Stout and itself that are better equipped in developing and operating oil well than a Receiver, probably unfamiliar with the oil business. It notes that the Sawn Lake Well cannot be moved from its present location and there is no evidence of waste regarding the well. Shamrock apprehends that Kasten's motivation is "not a good faith pursuit of repayment of debt, but rather an attempt to obtain the Sawn Lake Well."

Should a Receiver be Appointed in this Case?

[20] The Alberta Court of Appeal notes in *BG International Limited v Canadian Superior Energy Inc*, 2009 ABCA 127 at paras 16-17 that a remedial Order to appoint a Receiver "should not be lightly granted" and the chambers judge should: (i) carefully explore whether there are other remedies, short of a receivership, that could serve to protect the interests of the applicant; (ii) carefully balance the rights of both the applicant and the respondent; and (iii) consider the effect of granting the receivership order, and if possible use a remedy short of receivership.

[21] The security documentation in the present case authorizes the appointment of a Receiver (GSA, para 8.2). Thus, even if I accept the argument that the Applicant Kasten has not been able to demonstrate irreparable harm, that itself would not be determinative of whether or not a Receiver should be appointed in this matter. It is not essential for a creditor to establish irreparable harm if a receiver is not appointed: *Paragon Capital* at para 27. I am also not

persuaded by Shamrock's suggestion that it is probable that Stout may cease funding its operations and this development would result in irreparable harm which may be avoided by the Court's refusal to appoint a Receiver. In my view, such a cessation of funding by Stout would likely amount to a breach under the joint operating agreement and Shamrock could accordingly, seek appropriate remedy. This factor or consideration should not stand in the way of an appointment of a Receiver, if it is otherwise just to do so.

[22] Shamrock objects to the appointment of a Receiver based on the nature of the property and the probability that a court-appointed Receiver may lack familiarity with oil well development and operation. However, this concern is not insurmountable, given the broad management authority and discretion that a court-appointed Receiver would possess to enable it do everything positively necessary to ensure that the operation of the relevant oil well continues in a productive and efficient manner.

[23] In terms of apprehended or actual waste, there is no concrete evidence before this Court one way or the other. However, it is apparent that Shamrock has not made any substantial payments to Kasten from the alleged revenues flowing from the operation and production in the Sawn Lake Well. This situation also ties in to one of the factors that this court should consider, i.e. whether the manner in which Shamrock is making payments to Kasten (as a security-holder) forms a reasonable basis for Kasten to expect that it would encounter difficulty with Shamrock (as the debtor). Kasten contends that it is critical that there is no evidence before this Court to demonstrate the veracity of the claim that the Sawn Lake Well is generating the alleged production; and neither is there any evidence as to where the alleged revenues accruing from the production is being diverted.

[24] In my view, the approach which Shamrock has adopted in paying the debts owed to Kasten seems to be a justifiable basis for Kasten's apprehension that it would likely and ultimately encounter difficulties with Shamrock. And based on this ground, it would be inaccurate to characterize Kasten's tenacious pursuit of Shamrock for its indebtedness as an activity motivated by bad faith, as Shamrock alleges.

[25] Shamrock states that it had initiated a sale of Sawn Lake Well. At this point however, there is no indication that Shamrock's initiative or endeavour is moving ahead in a positive manner. After the chambers application before me on November 29, 2012, Mr. Nathan Richter (on behalf of Stout) sent a letter dated December 14, 2012 to Kasten (see, attachment to Shamrock's supplemental brief filed Dec. 14, 2012). The letter indicated that four postdated cheques were sent to Kasten as payments of monthly interests until March, 2013 and pending the anticipated sale of Sawn Lake Well in April, 2013. Mr. Richter also confirmed in the letter that no formal bids were received as at the bid deadline date of December 12, 2012.

[26] After carefully considering whether there are other remedies, short of a receivership, that could serve to protect the interests of the Applicant in this matter and also carefully balancing the rights and interests of both Kasten and Shamrock, I have come to the conclusion that a remedial

Order to appoint a Receiver and Manager is just, convenient and appropriate in the circumstances of the developments and delays in this matter.

Is Shamrock's Oil and Gas Lease Covered by the GSA?

[27] Kasten submits that while the GSA is not directly enforceable against the oil and gas under (or in) the ground, once the oil and gas comes out of the ground and captured by Shamrock it becomes subject to the GSA in much the same manner as the production facilities that are clearly covered by the GSA. It agrees that the oil and gas lease contains a *profit à prendre*, but submits that the right of Shamrock to extract oil and gas as granted by the Crown is transferable.

[28] Shamrock agrees that a Receiver could only be appointed over its personal property, which includes the oil when it is produced and removed from the ground. However, it contends that the authority of the Receiver does not extend to the lease or the sale of Sawn Lake Well since Kasten has no security over the PNG lease under the GSA and can only receive revenue from the Well. Shamrock takes the position that the oil and gas lease is a *profit à prendre*, which is an interest in land excluded under Alberta's *PPSA*, s 4(f).

[29] I note that the Supreme Court of Canada in *Saulnier v Royal Bank of Canada*, 2008 SCC 58, [2008] 3 SCR 166 [Saulnier] discussed the term "property" in the context of a commercial fishing licence under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 [*BIA*] and *Nova Scotia's Personal Property Security Act*, SNS 1995-96, c 13 [*PPSA*]. The provision of the relevant section of Nova Scotia's *PPSA* is identical to that of *Alberta's Personal Property Security Act*, RSA 2000, c P-7.

[30] The Supreme Court in *Saulnier* held that the *BIA* and *PPSA* should be interpreted in a way best suited to enable them accomplish their respective commercial purposes. Binnie, J, writing for the Court, observed that:

[28] ... [A] fishing licence ... bears some analogy to a common law *profit à prendre* which is undeniably a property right. A *profit à prendre* enables the holder to enter onto the land of another to extract some part of the natural produce, such as crops or game birds ...

[29] Fichaud J.A. in the court below noted numerous cases where it was held that "during the term of a license the license holder has a beneficial interest to the earnings from his license" (para. 37) ... The earnings flow from the catch which is lawfully reduced to possession at the time of the catch, as is the case with a *profit à prendre*.

[30] Some analytical comfort may be drawn in this connection from the observations of R. Megarry and H. W. R. Wade on *The Law of Real Property* (4th ed. 1975), at p. 779:

A licence may be coupled with some proprietary interest in other property. Thus the right to enter another man's land to hunt and take away the deer killed, or to enter and cut down

a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a *profit à prendre*) in the deer or tree.

And at p. 822:

A right to "hawk, hunt, fish and fowl" may thus exist as a profit, for this gives the right to take creatures living on the soil which, when killed, are capable of being owned.

[31] The analogy of a commercial fishing licence to the *profit à prendre* has already been noted by the High Court of Australia in *Harper v. Minister for Sea Fisheries* (1989), 168 C.L.R. 314 [where] Brennan J. [observed]:

A fee paid to obtain such a privilege is analogous to the price of a *profit à prendre*; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee. [p. 335]

...

[33] In my view these observations are helpful ... there are important points of analogy between the fishing licences issued to the appellant *Saulnier* and the form of common law property called a *profit à prendre* ...

[34] My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" [which in] this connection the property in question is the fish harvest.

(emphasis added)

[31] In my view, the oil and gas lease in this case which grants a right (or licence) to Shamrock to access, drill for and extract the resource or substance from the ground is analogical and identical to a commercial fishing licence which grants the right to harvesting of fish resource as discussed in *Saulnier*. This is in the sense that during the term of the oil and gas lease/licence, Shamrock, the lease holder has a beneficial interest to the earnings from its oil and gas lease: *Saulnier* at para 29. The right to exclusively extract oil and gas by Shamrock, the lease holder coupled with a proprietary interest in the extracted resource pursuant to the terms of the lease/licence, "bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature": *Saulnier* at para 34.

[32] In the result, I conclude that Shamrock's oil and gas lease is a proprietary interest within the purposive contemplation of Alberta's *Personal Property Security Act*: *Saulnier* at para 34;

Stout & Company LLP v Chez Outdoors Ltd, 2009 ABQB 444 at para 39, 9 Alta LR (5th) 366 [*Chez Outdoors*]. Shamrock's oil and gas lease is covered by the GSA and Alberta's Personal Property Security Act in the category of "intangibles": *Chez Outdoors* at para 15. That right is transferable and falls within the power and authority of a court-appointed Receiver, subject to the terms of the oil and gas lease as agreed with the Crown.

Scope of the Court-Appointed Receiver's Authority

[33] This Court has the authority to make an Order either "unconditionally or on any terms and conditions" it thinks just, including a restriction of the powers of a Receiver and Manager if necessary in the circumstances of the case before it: *Judicature Act*, s 13(2).

[34] Kasten seeks a court-appointed Receiver who is a court officer owing a fiduciary duty to all parties, including the debtor: *Philip's Manufacturing Ltd v Coopers & Lybrand Ltd*, 92 DLR (4th) 161 at para 17, [1992] 5 WWR 549 (WL). It argues that the court-appointed Receiver would take instructions from the Court and not from Kasten. The Receiver would be bound to act in the best interests of all parties. In a *volte-face*, Kasten seeks in its supplemental brief that this Court should appoint it as a Receiver. There was no reason specifically advanced by Kasten for its new position.

[35] Shamrock submits that a Consent Receivership Order should be granted and the Receiver should not be conferred with a power of sale. It wants the Order held in abeyance until April 1, 2013 or when Shamrock/Stout fails to make a payment of interest as scheduled, whichever occurs first, in order to allow for the sale of Sawn Lake Well.

[36] The Respondent notes that Kasten now seeks to be appointed as the Receiver and Manager instead of the earlier proposed independent body corporate, MNP Ltd. which had given its consent to act as Receiver and Manager of Shamrock, the debtor.

[37] In the absence of any clear objection to the appointment of MNP Ltd., an independent and neutral entity in this matter, an Order will issue to name MNP Ltd. as the court-appointed Receiver and Manager of all the current and future assets, undertakings and properties of Shamrock Oil and Gas Ltd. until Kasten and other creditors (secured and unsecured) are paid in full. The Receiver and Manager will have no power of sale, except as approved by an Order of this Court. However its authority is suspended until April 1, 2013 in order to accommodate any potential sale of Sawn Lake Well by Shamrock. To be clear, if Sawn Lake Well is not sold on or before April 1, 2013, the power and authority of the Receiver and Manager is to become effective immediately on that day.

[38] If parties are unable to agree on costs, they should arrange to speak to me within 30 days of the issue of this decision.

Heard on the 29th day of November, 2012.

Dated at the City of Edmonton, Alberta this 24th day of January, 2013.

Donald Lee
J.C.Q.B.A.

Appearances:

Terrence M. Warner
Miller Thomson LLP
for the Applicant

Brian W. Summers
Fraser Milner Casgrain LLP
for the Respondent

TAB 7

**Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB
430**

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS & TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL
CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND
GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

[1] On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company (“MTAC”) and 586335 British Columbia Ltd. (“586335”), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

[2] The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

[3] On March 15, 2000, Paragon loaned MTAC \$2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of \$72,000.00 per month.

[4] The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation (“Georgia Pacific”), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

- a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;
- b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;
- c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;
- d) an assignment of mortgage-backed debentures;
- e) an assignment of a \$200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;
- f) \$250,000 to be held in trust by Paragon’s counsel; and
- g) \$986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

[5] The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

[6] Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of \$2,629,129.99 with a then per diem rate of \$2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended

[7] MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

[8] Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

[9] It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

[10] The loan was not repaid by February 22, 2001. As of June 26, 2001, \$2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

[11] On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, \$986,000 in a cash account, \$200,000 in trust with a lawyer, the \$250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the *ex parte* receivership order have been granted?

[12] Rule 387 of the *Alberta Rules of Court* provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: *Metropolitan Life Insurance Company v. Hover*, 1999, 237 A.R. 30 at paragraph 23, referring to *Royal Bank v. W. Got & Associates* (1994), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

[13] The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

[14] There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

[15] There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

[16] Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon's counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon's counsel were actually in Vancouver, intending to speak to those parties.

[17] There were also concerns arising over whether or not there actually was \$200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

[18] There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the \$986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

[19] The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex*

parte order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

[20] In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": *Canadian Urban Equities Ltd. v. Direct Action for Life et al*, [1990] A.J. No. 253 (Q.B.) at pages 7 and 8.

[21] The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the *ex parte* order be precluded from acting in this case due to conflict?

[22] This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

[23] Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

- 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;
- 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.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

[30] The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the \$200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain \$986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

[31] The balance of convenience in these circumstances rests with Paragon, which is owed nearly \$3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* [1995] O.J. No. 144 at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

[32] I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

[33] To be granted a stay of an order pending appeal, an applicant must establish:

- a) that there is a serious issue to be tried on appeal;
- b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and
- c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

R.J.R. McDonald Inc. v. Canada (A.G.), [1994] S.C.J. No. 17 (S.C.C.); *Schacter v. National Park Services*, [1999] A.J. No. 599 (Q.B.).

[34] On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to

indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

[35] With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in Georgia Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

[36] The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

[37] Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

[38] I therefore decline to grant a stay, or to vary the order as granted.

[39] If the parties are unable to agree on the matter of costs, they may be spoken to.

DATED at Calgary, Alberta this 29th day of April, 2002.

J.C.Q.B.A.

TAB 8

Court of Queen's Bench of Alberta

Citation: Schendel Management Ltd, 2019 ABQB 545

Date: 20190719
Docket: BK03 115990, BK03 115991
Registry: Edmonton

2019 ABQB 545 (CanLII)

In the Matter of

**the Notice of Intention to Make a Proposal of
Schendel Mechanical Contracting Ltd**

**the Notice of Intention To Make a Proposal of
Schendel Management Ltd.**

**the Notice of Intention To Make a Proposal of
687772 Alberta Ltd.**

**Endorsement
of the
Honourable Mr. Justice M. J. Lema**

A. Introduction

[1] A secured creditor applies under ss. 50(12) and s. 69.4 of the *Bankruptcy and Insolvency Act (BIA)* for orders deeming refused a joint proposal made by three related corporations, lifting the proposal stay of proceedings, and appointing a receiver and manager. The corporations oppose all aspects. The proposal trustee provided stage-setting submissions but did not take a position.

[2] I find, under ss. 50(12) *BIA*, that the application is not likely to be accepted by the creditors (and is thus deemed refused), that the corporations are bankrupt as a result, and that

proceedings. Steeves J. found that the debtor should have more time to assemble its proposal and that the creditors should wait for it i.e. not effectively vote it down “sight unseen.”

[42] In the current case, ATB has seen the proposal and rejects it. The wait-and-see dimension of *Andover* provides no guidance here.

Conclusion on “proposal deemed refused” application

[new para] For these reasons, I find that ATB has established that the proposal is unlikely to be approved and that, in the circumstances here, the proposal should be deemed refused.

E. Appointment of receiver

[43] ATB also applied to have PwC appointed as receiver and manager of Schendel. It invokes s. 243 *BIA* and s. 13(2) of the *Judicature Act*. Schendel opposes.

Test for appointing a receiver

[44] In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*¹³, Romaine J held:

The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

- 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;
- 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;

¹² 2013 BCSC 1833

¹³ 2002 ABQB 430 at paras 26-32

- 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.

Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases).

In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry [authority omitted].

[45] In *Murphy v Cahill*¹⁴, Veit J updated that factor list, noting that:

... the current [2011] edition of Bennett emphasizes, in relation to the second factor, the risk to the security holder, that “*the court may not consider this factor to be important if there is no danger or jeopardy to the security holder or in other words, there is a substantial equity that will protect the security holder*”. ... One factor which is not mentioned in the *Paragon* list is “the rights of the parties [to the property]”. Similarly, in relation to the factor of the effect of the order on the parties, the current edition of Bennett adds “If a receiver is appointed, its effect may be devastating upon the parties and their business and, where the business has to be sold, the appointment of a receiver may have a detrimental effect upon the price”. Along the same lines, in relation to the length of the order, the current edition of Bennett adds “. . . where a claimant moves for an order appointing a receiver for a short period, say six weeks, the court is reluctant to make such an appointment as it has devastating effects on the parties”. Finally, the current edition of Bennett adds the following factor: “(18) the secured creditor’s good faith, commercial reasonableness of the proposed appointment and any questions of equity.” [emphasis added]

Arguments

[46] ATB argues that appointing a receiver-manager is warranted because:

- “the debtors are unable to continue as viable entities or continue operations as
 - the Proposal is not viable;
 - the Debtors operate at a loss;
 - the Proposal will not be approved by [ATB]; and
 - the Proposal cannot, even by its own terms, be implemented;
- [ATB] is the Debtors’ senior secured and fulcrum creditor;

¹⁴ 2013 ABQB 335 at para 71

TAB 9

Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

John J. Chapman and John R. Varley, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust.

May 31, 1996. Endorsement.

[1] BLAIR J.: – There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by “Freure Management” and “Freure Village” to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears.

The total tax arrears outstanding are in excess of \$850,000. The Bank is owed in excess of \$13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

[3] There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the “good hard look at the evidence” which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

[4] On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that

they did not have the money to pay and the \$13,200,000 indebtedness was “due and owing” (see cross-examination questions 46-54, 88-96, 233-243).

[5] As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issue exists in that regard.

[6] No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor – Mr. Freure – are the same. Finally, the evidence which is relied upon for the change in the Bank’s position – an internal Bank memo from the local branch to the credit committee of the Bank in Toronto – is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

[7] Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

[8] The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

[9] It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement – which they are, and are not, respectively – the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants – supported by the subsequent creditor on one of the properties (Boehmers, on the Glencairn property) – urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately \$20,000,000 between them, take no position on the motion.

[10] The Court has the power to appoint a receiver or receiver and manager where it is “just or convenient” to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. **It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).**

[11] The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no

evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

[12] While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplates, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[13] Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 11/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank’s attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor’s solicitors themselves refer to the prospect of “costly, protracted and unproductive” litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court’s approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

[14] I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

[15] Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

[16] Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.