Court of Appeal File No. C68751
Court File No. CV-20-00643021-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 THE CONSTRUCTION ACT, R.S.O. 1990, C.30

BETWEEN:

C&K MORTGAGES SERVICES INC.

Applicant

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

BOOK OF AUTHORITIES OF ROSEN GOLDBERG INC.

November 27, 2020

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Eric Golden LSUC #38239M
(416) 593-3927 (Tel)
(416) 593-5437 (Fax)
Email: egolden@blaney.com

Chad Kopach LSUC #48084G
(416) 593-2985 (Tel)
(416) 593-5437 (Fax)
Email: ckopach@blaney.com

Lawyers for the Receiver,
Rosen Goldberg Inc.

TO: SERVICE LIST

Court of Appeal File No. C68751
Court File No. CV-20-00643021-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 THE CONSTRUCTION ACT, R.S.O. 1990, C.30

BETWEEN:

C&K MORTGAGES SERVICES INC.

Applicant

- and -

CAMILLA COURT HOMES INC. and ELITE HOMES INC.

Respondents

BOOK OF AUTHORITIES OF ROSEN GOLDBERG INC.

Tab	Authority
1.	*Forjay Management Ltd. v. 0981478 B.C. Ltd., 2018 BCSC 527, aff'd on appeal, Forjay Management Ltd. v. Peeverconn Properties Inc., 2018 BCCA 251*
2.	*Firm Captial Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816*
3.	*Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508
4.	*bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd. (2008),* 2008 CarswellBC 1421, 44 C.B.R. (5th) 171(B.C.S.C. [In Chambers]).

TAB 1

Most Negative Treatment: Check subsequent history and related treatments.

2018 BCSC 527
British Columbia Supreme Court

Forjay Management Ltd. v. 0981478 B.C. Ltd.

2018 CarswellBC 766, 2018 BCSC 527, [2018] 9 W.W.R. 357, 11 B.C.L.R. (6th) 395, 291 A.C.W.S. (3d) 177, 59 C.B.R. (6th) 304

Forjay Management Ltd. (Petitioner) and 0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Virdi, Mukhtiar Singh Nijar, Mohan Vilkhu, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd. and 1083516 B.C. Ltd. (Respondents)

Fitzpatrick J.

Heard: March 12-16, 2018
Judgment: April 4, 2018
Docket: Vancouver H170498

Counsel: Kibben Jackson, Daniel Byma, Layne Hellrung, for Petitioner and Reliable Mortgages Investment Corp.
Daniel Nugent, Janet Kwong, for The Bowra Group Inc.
Robert Cooper, Q.C., Nicolas Hooge, Eric Aitken, for 0981478 B.C. Ltd. and Mark Chandler
Kimberley Robertson, Thomas Boyd, for Kaur Group
Clinton Calwell, for Verne and Lorna Calwell, Margaret Cook, Marian Mahoney for herself and Mitsui Saito, Janet Milbradt, Purchasers for themselves or by agent
Ewan MacLeod, for Brigitte Osborn, Jacqueline and Earle Morriss, James and Judy MacLeod
Diego Solimano, for PeeverConn Properties Inc., Richard and Jacqueline Johnston
Amanda Pereira (A/S) (Agent), for Rebecca Darnell for Lucas Giuriato, Karen McIntosh, Gerrit and Thelma Smidt, Sheila Sharples and Susan Ternes
Steven Roxborough, for Josef and Maria Tomica
Patrick Selinger, John Wiebe, for David and Laurie Brummitt, Gary and Karen Janzen, Walter and Elsje Bisschop, Gopal Naidu, John Roberts, Guy and Myrena Bishop, Rosalie Hersch, Jagtar Kainth, Jordana Charlton, Thomas and Julie Wiebe
Trevor Hande, for Ingrid Kraus, Shannon Smyth, Gerald and Nicola Quinn, Rajeev and Dinsheet Gupta, Strephanie Fahlman, Alvin Los and Emily Rook, Colton Sommerville and Jessica Niven, Karen Batke, Drew St. Cyr, Frances Hansen, Allison Richardson, Elyse Vroom, Vitalii Lavrinovitch and Suk Da Kim, Kelly and Brigitte Burke, Gary and Linda Newton, Lisa McGhee, Warren Kindellan, David and Heather Ray, Nolan Killeen and Alisyn Burns, Alexandra Schoenit, Frederick and Joanne West, Doug and Laurie Lakusta, and Timothy Lamb
Joni Worton, Sandra Wilkinson, for Superintendent of Real Estate
Matthew Nied, Jeremy Shragge, for 625536 B.C. Ltd.
Gordon Plottel, Amanda Baron, for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust

Sanjeev Patro, for Baramundi Investments Ltd.
Ronald Argue, for Zuheir Abrahams Inc.
Travis Brine, for Morris Kadylo

Subject: Contracts; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Real property
VII Mortgages
VII.14 Priorities
VII.14.b Between types of creditors
VII.14.b.xiii Multiple parties

Headnote

Real property --- Mortgages — Priorities — Between types of creditors — Multiple parties

Court appointed receiver manager for respondent condominium developer — Receiver reviewed pre-sale contracts, given that no sales had been completed — Receiver questioned whether it should complete some 40 contracts between developer and applicant purchasers — Pre-sale purchasers and superintendent of real estate supported completion of contracts — Secured creditors opposed sales proceeding, claiming contracts were invalid — Receiver applied to court for directions — Receiver was directed to disclaim sales — Pre-sale purchasers were given right of first refusal — Condo units were not unique in physical character — Although purchase price was lower than similar units, this did not constitute uniqueness for purpose — Any loss suffered could be remedied through damage awards — Remarketing and selling units would increase value of assets to stakeholders — Failure to disclaim would give purchasers priority, that was properly to accrue to mortgagees under prior ranking security — Purchasers were properly notified of risks, and were not in danger of losing deposits — There were no public policy grounds to recommend against disclaimer — Court could not assess chances of success in related litigation, where mortgagees were seeking to recover funds.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Bank of Montreal v. Awards-West Ventures Inc. (1990), 50 B.C.L.R. (2d) 363, 14 R.P.R. (2d) 56, 1990 CarswellBC 243 (B.C. C.A.) — referred to

Bank of Montreal v. Probe Exploration Inc. (2000), 2000 CarswellAlta 1621, 33 C.B.R. (4th) 182 (Alta. C.A.) — referred to

Bernum Petroleum Ltd. v. Birch Lake Energy Inc. (2014), 2014 ABQB 652, 2014 CarswellAlta 1965, 35 B.L.R. (5th) 234, 598 A.R. 172, 14 Alta. L.R. (6th) 294 (Alta. Q.B.) — referred to

Bhasin v. Hrynew (2014), 2014 SCC 71, 2014 CSC 71, 2014 CarswellAlta 2046, 2014 CarswellAlta 2047, [2014] 11 W.W.R. 641, 27 B.L.R. (5th) 1, 464 N.R. 254, 379 D.L.R. (4th) 385, 20 C.C.E.L. (4th) 1, [2014] 3 S.C.R. 494, 584 A.R. 6, 623 W.A.C. 6, 4 Alta. L.R. (6th) 219 (S.C.C.) — followed

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

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — referred to

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd. (2012), 2012 ONSC 4816, 2012 CarswellOnt 10743, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) — followed

Mount Royal Painting Inc. v. Lomax Management Inc. (2018), 2018 CarswellOnt 5695, 2018 ONSC 2356 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2004), 2004 CarswellBC 3540, 19 C.B.R. (5th) 45, 2004 BCSC 1818 (B.C. S.C.) — referred to

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

Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd. (2014), 2014 BCCA 113, 2014 CarswellBC 753, 10 C.B.R. (6th) 54, [2014] 6 W.W.R. 264, 371 D.L.R. (4th) 430, 42 R.P.R. (5th) 25, (sub nom. *Pan Canadian Mortgage Group III Inc. v.*

0859811 B.C. Ltd.) 353 B.C.A.C. 83, *(*sub nom. *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.)* 603 W.A.C. 83, 59 B.C.L.R. (5th) 290 (B.C. C.A.) — considered

Philip's Manufacturing Ltd., Re (1992), 69 B.C.L.R. (2d) 44, 92 D.L.R. (4th) 161, [1992] 5 W.W.R. 549, 12 C.B.R. (3d) 149, *(*sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.)* 15 B.C.A.C. 247, *(*sub nom. *Philip's Manufacturing Ltd. v. Coopers & Lybrand Ltd.)* 27 W.A.C. 247, 1992 CarswellBC 490 (B.C. C.A.) — referred to

Pinto v. Revelstoke Mountain Resort Ltd. Partnership (2011), 2011 BCCA 210, 2011 CarswellBC 956, 18 B.C.L.R. (5th) 313, 304 B.C.A.C. 193, 513 W.A.C. 193 (B.C. C.A.) — referred to

Pope & Talbot Ltd., Re (2008), 2008 CarswellBC 1726, 2008 BCSC 1000, 46 C.B.R. (5th) 34 (B.C. S.C. [In Chambers]) — considered

Ravelston Corp., Re (2005), 2005 CarswellOnt 9058, 24 C.B.R. (5th) 256 (Ont. C.A.) — considered

Romspen Investment Corp. v. Horseshoe Valley Lands Ltd. (2017), 2017 ONSC 426, 2017 CarswellOnt 2671, 45 C.B.R. (6th) 309 (Ont. S.C.J.) — considered

Romspen Investment Corp. v. Woods Property Development Inc. (2011), 2011 CarswellOnt 2380, 2011 ONSC 3648, 75 C.B.R. (5th) 109, 4 R.P.R. (5th) 53 (Ont. S.C.J.) — referred to

Romspen Investment Corp. v. Woods Property Development Inc. (2011), 2011 ONCA 817, 2011 CarswellOnt 14462, 85 C.B.R. (5th) 21, 286 O.A.C. 189, 14 R.P.R. (5th) 1, 346 D.L.R. (4th) 273 (Ont. C.A.) — referred to

Royal Bank v. Melvax Properties Inc. (2011), 2011 ABQB 167, 2011 CarswellAlta 401, 75 C.B.R. (5th) 294 (Alta. Q.B.) — referred to

Royal Bank v. Penex Metropolis Ltd. (2009), 2009 CarswellOnt 5202 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd. (2002), 2002 CarswellOnt 1149, 59 O.R. (3d) 376, 21 C.L.R. (3d) 38, [2002] O.T.C. 248 (Ont. S.C.J. [Commercial List]) — referred to

Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd. (2014), 2014 BCCA 388, 2014 CarswellBC 3001, 377 D.L.R. (4th) 701, 48 R.P.R. (5th) 6, [2015] 1 W.W.R. 297, 65 B.C.L.R. (5th) 72, 362 B.C.A.C. 138, 622 W.A.C. 138 (B.C. C.A.) — referred to

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd. (2008), 2008 BCSC 897, 2008 CarswellBC 1421, 44 C.B.R. (5th) 171, 72 R.P.R. (4th) 68, 86 B.C.L.R. (4th) 114 (B.C. S.C. [In Chambers]) — followed

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

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONSC 199, 2016 CarswellOnt 2673, 34 C.B.R. (6th) 125 (Ont. S.C.J.) — referred to

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONCA 485, 2016 CarswellOnt 9527, 37 C.B.R. (6th) 173 (Ont. C.A.) — referred to

Statutes considered:

Real Estate Development Marketing Act, S.B.C. 2004, c. 41

Generally — referred to

s. 1 "market" — considered

s. 11(3) — considered

s. 16 — considered

APPLICATION by receiver to court, for directions on whether to complete contracts between applicant purchasers and respondent developer.

***Fitzpatrick J.*:**

INTRODUCTION

1 This receivership proceeding concerns a 92-unit strata condominium project, known as "Murrayville House", located in Langley, B.C. (the "Development").

2 In October 2017, I appointed The Bowra Group Inc. as receiver manager of the Development (the "Receiver"). At that time, the respondent developer 0981478 B.C. Ltd. ("098") and various purchasers were parties to a number of pre-sale contracts. However, despite the Development being ready for occupancy in August 2017, by the time of the receivership, none of the sales had completed. The Development remains vacant at this time.

3 The Receiver undertook an extensive review of the pre-sale contracts toward determining the status of those contracts. In addition, the Receiver has taken steps such that it is in a position to move forward toward monetizing the Development for the benefit of all stakeholders.

4 The Receiver now seeks directions from this Court as to how to proceed.

5 The crux of the application before me is whether the Receiver should complete 40 of the pre-sale contracts executed by 098, being ones that it describes as "without issues". Alternatively, the Receiver recommends that the strata units, which are the subject of those 40 pre-sale contracts, be marketed and sold as soon as possible.

6 A substantial number of pre-sale purchasers (even some who are not within the 40 that are the subject of this application) and the Superintendent of Real Estate (the "Superintendent") support the Receiver's recommendation to complete these sales. Conversely, the major secured creditors, 098 and 098's principal, the respondent Mark Chandler, oppose the completion of the sales. They argue that these contracts are not valid and enforceable and, alternatively, even if they are, the Receiver should disclaim the contracts to allow a market sale of the units.

THE RECEIVER AND ITS RECOMMENDATIONS

7 On August 25, 2017, Forjay Management Ltd. ("Forjay") and Canadian Western Trust Company in trust and HMF Home Mortgage Fund Corporation ("CWT/HMF") commenced these foreclosure proceedings seeking to enforce their mortgage security against 098, the Development and Mr. Chandler, a guarantor of the indebtedness. Forjay and CWT/HMF's security ranks second in priority as against the Development.

8 When Forjay's foreclosure was filed, there were significant issues already affecting the Development. These included legal proceedings and certificates of pending litigation ("CPLs") which had been registered against the lands. In addition, regulatory action had been taken, as I will discuss in more detail below, arising in part from the suggestion that 098 had sold some of the units multiple times. The house of cards quickly disintegrated from there. The insurer under the new home warranty program then took steps toward terminating coverage.

9 Further complicating matters were that significant issues arose as between the stakeholders after Forjay's foreclosure was filed. For example, 098 disputed the amounts owing under various mortgages, including that of Forjay and CWT/HMF; and, various secured creditors disputed the priority, validity and/or amounts claimed under other security.

10 Some order was brought to this chaos by the appointment of the Receiver on October 4, 2017 (the "Receivership Order"). On October 12, 2017, that Order was amended to clarify that the appointment was not only over the lands, but also all of 098's assets, undertaking and property relating to the Development.

11 Relevant to this application, paragraph 3 of the Receivership Order grants broad powers to the Receiver in relation to the Development and in relation to various contracts entered into by 098, including the pre-sale contracts:

> c) to manage, operate and carry on the business of the Debtor [098], including the powers to enter into agreements, incur any obligations in the ordinary course of business . . . ., or cease to perform any contracts of the Debtor;
>
> . . .

h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

. . .

k) to market any or all of the Property, including advertising and soliciting in offers in respect of the Property or any parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court;

12 After its appointment, the Receiver began immediate efforts to put itself in a position to begin marketing and selling the units in the Development, all with substantial borrowings provided by Forjay. Those efforts included: filing a new disclosure statement, in accordance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"); obtaining coverage under the statutory new home warranty program; confirming that Langley was permitting occupancy of the Development (later confirmed to have been effective on August 8, 2017); completing the outstanding construction; and otherwise ensuring that all other matters relating to the Development were moving toward completion.

13 While these efforts were underway, the Receiver's other major task was to review the substantial number of pre-sale contracts that 098 had entered into prior to the receivership. The Receiver's efforts were discussed in its First Report to the Court dated November 16, 2017. That Report, updated to today's information, revealed various anomalies or issues:

a) 098 had entered into 151 pre-sale contracts for 91 units, meaning a number of the units had been sold more than once. A chart prepared by the Receiver indicates some units had been sold two or three times and one had been sold four times;

b) in 56 of the pre-sale agreements, 098 had been paid the full purchase price and the purchaser had received a promissory note;

c) a substantial majority of the contracts (79) provided for a credit or discount of between 10 and 100% of the purchase price from that indicated in a price list issued by 098's sales centre which was operational from March 2015 to May 2016 (the "Price List");

d) many pre-sale contracts had been signed after the closure of the sales centre in May 2016 and after market values had substantially increased beyond those indicated in the Price List; and

e) some pre-sale contracts had been signed prior to the issuance of 098's disclosure statement, contrary to *REDMA* requirements.

14 From this analysis, which led to its recommendations, the Receiver identified various "standard" pre-sale contracts dated from April 2015 to May 2016 that were "without issues" and which it considered "valid". In summary, those contracts are described as having the following characteristics:

a) they were entered into after 098's issuance of a disclosure statement;

b) a deposit of between 3 and 10% of the purchase price had been paid and was held in trust by a law firm;

c) the purchaser has yet to pay the balance of the purchase price;

d) the purchase price was within 90% of the Price List; and

e) the Receiver "believed" that the pre-sale contract prices were at fair market value at the time of signing.

15 In its First Report, the Receiver recommended that it be authorized to complete these "without issues" pre-sale contracts, after it had filed a new disclosure statement and obtained new home warranty coverage. These include the 40 pre-sale contracts that are the subject of this application. It should be noted that a number of the 40 units were sold twice, but the Receiver's intention is to disclaim these later contracts in favour of these 40 "first in time" contracts.

16 The Receiver's analysis and recommendations were not well received by the secured creditors. In particular, there was considerable disagreement that the prices in the pre-sale contracts were at the then fair market value. In addition, the secured creditors hotly contested the Receiver's contention that they were aware of the Price List and had agreed to provide partial discharges of their security for those prices. In addition, Forjay and one of the first mortgagees, Reliable Mortgages Investment Corp. ("RMIC"), vigorously disputed that they had agreed with the Receiver to discharge their mortgages on these pre-sales.

17 In January 2018, the Receiver brought this application for directions. The issues for which directions are sought are:

a) the validity and enforceability of the 40 pre-sale contracts that are "without issues"; and

b) whether the 40 pre-sale contracts should be allowed to complete (or, as I would frame it, whether the Receiver should be directed to disclaim them).

There is no dispute that, if the contracts are disclaimed, the Receiver should take immediate steps to market and sell the 40 strata units at current market value, subject to further court order.

18 Later events disclosed that there are substantial financial consequences to various stakeholders depending on whether or not the contracts are disclaimed. An appraisal obtained by the Receiver in late January 2018 indicates that the units' value is now collectively 46% higher than the contract prices, translating into a total increase in value of $5,461,005. In large part, the arguments advanced on this application are directed to a determination as to who should "reap the benefit" of this increase.

19 The Receiver's analysis and arguments are largely contained in its notice of application, the First Report and the affidavit of Mario Mainella #6 sworn January 26, 2018. The Receiver continues to advance the recommendations contained in its First Report. The Receiver's materials indicate that it has embarked upon some analysis as to validity and enforceability of these pre-sale contracts. For example, the Receiver points to the fact that on their face, these contracts have expired, yet the Receiver argues that they are still enforceable and not "void" because of the subsequent conduct of the parties to those contracts. In addition, in support of its recommendations, the Receiver refers to *REDMA* requirements and, also arguments of "good faith".

20 As best I can determine, there is no particular analysis by the Receiver of the disclaimer issue, beyond identifying the substantial increase in the value of the units that could maximize the recovery on the assets of 098, but "at the expense of the interest of the holders of the 40 pre-sale contracts". The Receiver also notes that there is an "urgent need to monetize the units in the Development and to provide certainty and closure for the holders of pre-sale contracts for units in the Development".

21 It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment. A receiver owes fiduciary duties to all parties, including the debtor, and to all classes of creditors: *Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd.* (2002), 59 O.R. (3d) 376 (Ont. S.C.J. [Commercial List]) at para. 15; *Philip's Manufacturing Ltd., Re* (1992), 69 B.C.L.R. (2d) 44 (B.C. C.A.) at para. 17.

22 The role of a court-appointed receiver was discussed in Frank Bennett, *Bennett on Receiverships*, 2nd Ed. (Toronto: Carswell, 1999) at 180:

> . . . As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide.* Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is

> afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not only facts favourable to pending applications, but also facts that are unfavourable.

23 The secured creditors take issue with both the Receiver's position and its recommendations, taking the view that the Receiver has improperly entered the fray in taking an active position on the issues where there are competing interests and in doing so, has preferred the interests of the pre-sale purchasers over theirs.

24 It is also trite law that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all interested parties. Its role is to be even handed, and not prefer one party over the other: *Bank of Montreal v. Probe Exploration Inc.* (2000), 33 C.B.R. (4th) 182 (Alta. C.A.) at para. 2 (WL). See also *Bennett* at 272.

25 In my view, there is some basis for that criticism here. I appreciate that in its materials, the Receiver has discussed the two positions and the effect on the various stakeholders of closing (or not closing) these 40 pre-sale contracts. In addition, the factual background outlined by the Receiver has been valuable in considering the issues, as acknowledged by many counsel. However, the Receiver's position here goes far beyond that.

26 The Receiver places great reliance on comments of the court in *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) (WL):

> [40] . . . Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others . . . . The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision . . .

27 Many counsel referred to the deference normally accorded to the views of a receiver, such as in considering the formulation of a sales process and any results of a sales process, citing *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 5 — 6. However, these types of sale issues typically involve the court relying on a receiver's expertise in such matters and in that event, deference is usually well justified. I see little relevance in that scenario to what is before me.

28 It is clear enough that some of the issues before the Court do not involve a consideration of "business choices" made by a receiver where some deference to the knowledge and experience of a receiver would likely be accorded. The issue as to the validity and enforceability of these pre-sale contracts is a legal issue and a complex one at that. The Receiver has no particular expertise in that regard and was not tasked by the Court with a determination of that issue. I have heard substantial argument and have been taken to a large body of evidence on that issue, as noted by the volume of materials before me and numerous counsel advocating their positions. In those circumstances, where other parties are in the fray, I think it would have been best for the Receiver to have provided facts as known to it and thought to be relevant to a determination, but otherwise to have remained neutral as to the result.

29 My comments equally apply to the Receiver's position in respect of the issue as to completing the pre-sale contracts or disclaiming them. Given the level of conflict on the issue, neutrality would have been a better course of action, after providing all necessary facts to the parties and the Court that inform that analysis and setting forth considerations on the issue. In any event, I unfortunately agree with many of the secured creditors that the Receiver's analysis is not particularly helpful in the determination of that issue. In some instances, the factual assertions in the First Report are unsupported (i.e. that the 40 sale prices were at fair market value); in another case, the assertion of fact (i.e. that Forjay and RMIC had agreed to discharge their security on these units) was simply wrong.

30 I appreciate that the Receiver's intention was to bring the matter forward as soon as possible, given the need to liquidate the units as soon as possible for the benefit of all stakeholders. In that respect, I do not question the Receiver's good faith motives.

If nothing else, the Receiver's actions have galvanized the warring camps to their positions and hastened this hearing so that the matter can move forward to some extent.

31 Accordingly, I intend to rely on the unchallenged factual assertions in the Receiver's materials, including the First Report, and the circumstances that the Receiver suggests are germane to the issues. Unfortunately, I have come to the conclusion that beyond that, the Receiver's recommendations should not be afforded any deference (*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at 111); rather, I will consider the detailed submissions put forth by the respective camps, since both were well represented on this application and all made extensive submissions on the facts and the law.

THE ISSUES

32 Many of the arguments addressed the first issue raised by the Receiver, namely, whether the 40 pre-sale contracts were valid and enforceable at this time. In addition, other purchasers asserted that 098 was estopped from asserting that the pre-sale contracts had expired by their terms.

33 Some arguments were based, not only on the facts as known to the Receiver and the parties, but also as to what other evidence *might* be available through ordinary litigation and the usual pre-trial discovery mechanisms. For obvious reasons, no one wishes to embark on what might be expensive and lengthy litigation to delay the matter further; however, in the absence of a full evidentiary record on at least some of the issues, it raises the definite prospect that this Court is being asked to decide legal issues in a vacuum. This also raises the unattractive prospect of an individual analysis of each of the 40 pre-sale contracts.

34 Having considered the matter, I am satisfied that the issue can be resolved by consideration of the disclaimer issue alone, premised on the assumption that the contracts remain valid and enforceable as against 098 at this time. Within that issue, many of the factual circumstances relating to the contract issues remain relevant. By that approach, the contract validity issue only becomes relevant if I decide that the contracts should *not* be disclaimed. For reasons set out below, I have concluded that disclaimer is appropriate here and there is no need to consider the first issue.

DISCLAIMER — GENERAL LEGAL PRINCIPLES

35 As noted in *Bennett* above at 180, one of the primary goals of a receiver is to maximize the recovery of the assets under its charge. See also *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONSC 199 (Ont. S.C.J.) at para. 103, leave to appeal ref'd 2016 ONCA 485 (Ont. C.A.).

36 Having said that, and as I will discuss in detail below, it is common ground that this is not the only consideration a receiver must take into account in the performance of its duties. The receiver is required to assess all equitable interests or "equities" in the disclaimer exercise: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2004 BCSC 1818 (B.C. S.C.) at para. 22, aff'd 2005 BCCA 154 (B.C. C.A.).

37 One of the tools by which a receiver maximizes the value of the assets for the benefit of the stakeholders is by considering whether it is beneficial to continue to abide by contracts between the debtor and other parties, or to disclaim them. For example, in the context of pre-sale contracts, although a better realization might be obtained by a disclaimer, the extra cost and delay of remarketing and selling the units might outweigh that benefit. I would add at this point that no one has argued that this is the case here.

38 In *Bennett* at 341-42, the author discusses that a disclaimer is considered within the context of this maximization exercise:

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

. . .

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

39 Disclaimer principles as found in numerous case authorities were summarized by Justice Burnyeat in *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 (B.C. S.C. [In Chambers]) at paras. 53-57. Burnyeat J. summarized the relevant considerations found in those authorities as follows:

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

40 As stated above, paragraph 3(c) of the Receivership Order specifically empowered the Receiver to "cease to perform any contracts of [098]". This would include the power to not complete the sales contemplated by the 40 pre-sale contracts before me: *bcIMC* at para. 60. I agree that the Receiver has properly sought directions from the Court on that issue, given the level of conflict between the stakeholder groups.

41 It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests — or consideration of the equities as between the parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. For example, in *bcIMC*, Burnyeat J., at para. 96, stated that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not otherwise available to other unsecured creditors. See also *Royal Bank v. Penex Metropolis Ltd.* [2009 CarswellOnt 5202 (Ont. S.C.J.)], 2009 CanLII 45848at para. 27.

42 Such an approach is evident from the court's reasoning in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 (Ont. S.C.J. [Commercial List]). In that case, where similar facts were in issue, Justice Morawetz (as he then was) determined the legal priority as between the pre-sale purchasers and the lenders, and then considered whether there were any "equities" in favour of the purchasers so as to displace those prior legal rights: paras. 27, 32.

43 In *Romspen Investment Corp. v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 (Ont. S.C.J.) [*Romspen/Horseshoe*], Justice Wilton-Siegel stated:

> [31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."

[32] In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[Emphasis added.]

44 Mr. Nied, co-counsel for the third mortgagee, 625536 B.C. Ltd. ("625"), advances an analytical framework for consideration of the disclaimer issue. I substantially agree with those submissions and would, therefore, frame the issues as follows:

a) Firstly, what are the respective legal priority positions as between the competing interests?

b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and

c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

DISCLAIMER — DISCUSSION

1) Respective Legal Priorities

45 I will now address the respective legal positions and interests of firstly, the mortgagees or lenders and secondly, the pre-sale purchasers.

(i) The Mortgagees' Interests

46 The first three mortgages came into existence in advance of the 40 pre-sale contracts.

47 In May 2014, 625's mortgage, a take back mortgage, was granted around the time of 098's purchase of the lands. The face amount of the mortgage is $1.8 million. In May 2014, RMIC and CWT registered their mortgage against the lands in the face amount of $4.2 million. In December 2014, Forjay and CWT/HMF registered their mortgage against the lands in the face amount of $10 million. There is a fourth mortgage registered against the Development by James Mercier, the principal of Forjay and RMIC. Mr. Mercier contends that the loans advanced by RMIC and Forjay were intended to be short-term construction loans, to be repaid by further construction financing.

48 As a result of priority agreements, the relative position of the mortgages is: (1) RMIC and CWT; (2) Forjay and CWT/HMF; (3) 625; and (4) Mr. Mercier.

49 There is nothing particularly unusual about any of the first three mortgages. They agreed to advance significant monies and in return, they expected to be repaid the full amount advanced, with interest and costs. In addition, on the subject of partial discharges upon sales of units, the mortgages all provided that partial discharges against strata units were entirely within the discretion of each of the lenders. The mortgages all provided in the standard terms:

13.(1) If the land is subdivided:

(a) this mortgage will charge each subdivided lot as security for payment of all the mortgage money, and

(b) the lender is not to discharge this mortgage as a charge on any of the subdivided lots unless all the mortgage money is paid.

> (2) Even though the lender is not required to discharge any subdivided lot from this mortgage, the lender may agree to do so in return for payment of all or a part of the mortgage money. . . .

50 The 40 pre-sale contracts were executed during the existence of 098's sales centre, which was open from March 2015 until it closed in May 2016, and accordingly, well after all three mortgages were registered against title. Section 4.3 of the March 2015 disclosure statement that 098 provided to all of the purchasers under the 40 pre-sale contracts makes express reference to the existing legal rights of the three mortgagees.

51 098's slide into insolvency, at least from the lenders' point of view, did not commence just prior to the appointment of the Receiver. Highlights from the course of events include:

> a) in September 2014, RMIC and CWT commenced a foreclosure proceeding under their first mortgage and they presumably filed a CPL against the lands. For reasons not clear to me, this proceeding was held in abeyance;
>
> b) the short-term nature of Forjay/RMIC's mortgages never materialized. The take out financing was never arranged by 098;
>
> c) in May 2016, Mr. Mercier was advised by 098 that it did not have funds and sources of financing to complete the Development. Either Forjay or RMIC went on to advance a further $14.2 million to 098 under their mortgages;
>
> d) in early July 2017, CWT/HMF filed a foreclosure action and registered a CPL against the lands. By this time, the amounts owing under the second mortgage (Forjay and CWT/HMF) were said to be just shy of $19 million;
>
> e) after the filing of CWT/HMF's foreclosure and CPL, things quickly went downhill;
>
> f) the Kaur Group of purchasers are largely identified as those having pre-sale contracts where the full price was paid and a promissory note was executed by 098 (they are not part of the 40 pre-sale purchasers here). In early August 2017, the Kaur Group lodged a complaint with the Superintendent to the effect that some units had been sold to more than one purchaser. On August 4, 2017, the Kaur Group filed an action against 098 and others and registered a CPL against certain units, claiming in part that 098 had used the funds paid by them for improper purposes;
>
> g) at least in part as a result of the filing of the CWT/HMF and Kaur actions and registrations of the CPLs, the Superintendent issued a cease marketing order pursuant to *REDMA*. Under s. 1 of *REDMA*, "market" includes engaging in any transaction that will or is likely to lead to a sale. Accordingly, this order prohibited 098 from completing any sale, save with the Superintendent's concurrence. This order also gave notice to 098 that it was required to file a new disclosure statement; and
>
> h) Forjay's foreclosure commenced August 25, 2017 and, as stated above, led fairly quickly to the appointment of the Receiver.

52 As I have referenced above, one of the major planks of the Receiver's positon found in the First Report was the contention that Forjay and RMIC had agreed with it to partially discharge their security if these 40 pre-sale contracts were completed. However, during the course of this hearing, it became quite evident that there was considerably more complexity to Forjay and RMIC's discussions with the Receiver. The agreement to discharge was premised on the discharges being granted in "normal circumstances". Further, Forjay and RMIC required that: there were valid pre-sale contracts (which remains in dispute); the closing would occur shortly after the Receiver's appointment; and, the net sale funds would be paid to the first mortgage. None of the latter events occurred.

53 Many of the purchasers, including the Kaur Group, suggested that Forjay agreed to partially discharge their mortgages if the units were sold for at least 90% of the Price List.

54 The broader allegations were that all the mortgagees implicitly agreed to partially discharge their security to allow the 40 pre-sales to close. The Kaur Group argued that it was a requirement under s. 11(3) of *REDMA* that the mortgagee pre-approve

such partial discharges or alternatively, that the developer make other arrangements satisfactory to the Superintendent to transfer title to a purchaser. Assuming, for present purposes, that 098 was in breach of this requirement, I fail to see that any breach *ipso facto* means that such an agreement existed on the part of the lenders.

55 By the conclusion of this hearing, there was either evidence or concessions by the various purchasers that no such agreement existed on the part of RMIC, Forjay or CWT/HMF.

56 Accordingly, there is no evidence of any agreement on the part of the first three mortgagees to discharge their security against the 40 units and some have expressly stated that they did not agree. There are examples where such lenders' agreements were before the court: see *bcIMC* at para. 10; *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 (B.C. S.C. [In Chambers]) at para. 18; *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 (Ont. S.C.J.) at para. 36, rev'd on other grounds 2011 ONCA 817 (Ont. C.A.). Such facts simply do not exist here. Nor is there any evidence that the lenders have conducted themselves in a manner to suggest that they would provide such partial discharges in certain circumstances, upon which 098 or any purchaser might rely.

(ii) The Purchasers' Interests

57 As I described above, all of the 40 pre-sale purchasers executed what the Receiver described as a "standard" contract, presumably prepared by 098. All contracts included an Addendum "A", which includes relevant provisions for this hearing's purposes.

58 The first provision is clause 1, titled "*Completion Date*":

> a) . . . The Completion Date will be that date set out in a notice to the Purchaser (the "*Completion Date*") from the Vendor and will be no less than 21 days after the Vendor . . . notifies the Purchaser . . . that the Strata Lot is ready to be occupied. . . . The notice of the Completion Date (the "*Completion Notice*") delivered from the Vendor . . . to the Purchaser . . . may be based on the Vendor's estimate as to when the Strata Lot will be ready to be occupied. If the Strata Lot is not ready to be occupied on the Completion Date so established, then the Vendor may delay the Completion Date from time to time as required, by notice of such delay to the Purchaser . . . If the Completion Date has not occurred by July 31, 2016 (the "*Outside Date*"), then this Agreement will be terminated, the Deposit and interest thereon will be returned to the Purchaser and the parties will be released from all of their obligations hereunder, provided that:
>
> > i) [a *force majeure* clause which is not relevant here]; and
> >
> > ii) the Vendor may, at its option, exercisable by notice to the Purchaser, in addition to any extension pursuant to Section 1 (a) and whether or not any delay described in Section 1(a) has occurred, elect to extend the Outside Date for up to 120 days.

59 The second relevant provision is clause 11, titled "*Entire Agreement/Representations*". In part, that clause provides that "No modification or waiver of this Agreement or any portion of this Agreement will be effective unless it is in writing and signed by the Vendor and Purchaser."

60 The third and final relevant provision is clause 19 and clearly sets out the rights acquired by a purchaser upon execution of a contract:

> **Contractual Rights**. This offer and the Agreement which results from its acceptance create contractual rights only and not any interest in land. The Purchaser will acquire an interest in land upon completion of the purchase and sale contemplated herein.

61 098 issued its first disclosure statement in March 2015, by which time completion of construction was anticipated to be from January to April 2016. It is common ground that 098 never issued a "Completion Notice" setting the "Completion Date". Needless to say, the Completion Date did not occur by the Outside Date of July 31, 2016 (clause 1(a)).

62 As the Receiver notes, based on a reading of the contracts themselves, all 40 pre-sale contracts were terminated by their terms on November 28, 2016, which marked the end of the only 120-day extension period permitted under clause 1(a)(ii). In that regard, the Receiver suggests that it be allowed to "amend" the existing contracts to permit them to complete, presumably meaning that the contracts could be resurrected and a new "Completion Date" set.

63 On the contract validity issue, both the Receiver and the purchasers rely on the fact that 098 continued to communicate with the 40 purchasers and purported to unilaterally "amend" the Outside Date on several more occasions, as follows:

a) in April 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between May and August 2016;

b) an undated first notice of extension was delivered to 39 of the 40 purchasers under cover of a letter dated July 29, 2016, by which 098 exercised its right under clause 1(a)(ii) of the contract to unilaterally extend the Outside Date by 120 days, i.e. to November 28, 2016. As noted by 625's counsel, it is not clear when the first notice of extension was sent out; in at least one case (SL 11), a notation on the July 29 covering letter indicates that it was mailed August 2, 2016, after the original Outside Date. In one case, the July 29, 2016 covering letter relied on clause 1(a)(i) — being the *force majeure* clause — to extend the Outside Date to November 28, 2016;

c) in September 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between November 2016 and February 2017;

d) in November 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between January and May 2017;

e) an undated second notice of extension was delivered to all 40 purchasers by which 098 purported to again unilaterally extend the Outside Date to March 31, 2017 under clause 1(a) of Addendum "A". Purchasers were asked to "acknowledge" the new Outside Date;

f) around March/April 2017, 098 sent out an addendum to all 40 purchasers that purported to amend the contracts by changing the Outside Date to May 31, 2017. In most cases, this addendum was not fully executed by both the purchasers and 098 until after March 31, 2017;

g) for the vast majority of the 40 purchasers, the May 31, 2017 Outside Date addendum was the last attempt by 098 to extend the Outside Date and there were no further formal extension notices received from 098;

h) a few purchasers received a third notice of extension from 098 dated May 31, 2017 extending the Outside Date to July 15, 2017 under clause 1(a)(ii) of Addendum "A"'; and

i) a few purchasers received a fourth notice of extension from 098 dated July 14, 2017 extending the Outside Date to August 31, 2017, under clause 1(a)(ii) of Addendum "A".

64 The spotty manner in which these last extensions took place is evident from the evidence of Jaspreet Dhaliwal, 098's chief financial officer, who states that 098 "attempted" to deliver these notices of extension through various means. In any event, Mr. Dhaliwal confirms that 098 did not deliver any further notices of extension purporting to extend the Outside Date beyond August 31, 2017.

65 In light of all these extensions, a number of purchasers actually inspected their units in the summer of 2017. In addition, some of them received notice from 098 that "occupancy had been received" just after Langley's notice was issued on August 8, 2017. They were also advised that 098 would "begin the closing process". When that did not happen, a number of purchasers even got to the point of filing an action in this Court for specific performance and registering a CPL against their units, all before the receivership.

66 What, then, is the nature of the purchasers' interests under their contracts?

67 Again, the pre-sale contracts clearly provide that they create "contractual rights only and not any interest in land", and that the purchasers will only acquire an interest in land "upon completion of the purchase and sale". There is no suggestion by the purchasers to the effect that this contractual provision is not applicable due to waiver or estoppel; certainly, no evidence has been filed in support of any such contention.

68 The law is clear that contracting parties may contract away their equitable interests, subject to the doctrines of undue influence and unconscionability (which none of the purchasers have argued): *Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd.*, 2014 BCCA 113 (B.C. C.A.) at paras. 45, 50; *Bernum Petroleum Ltd. v. Birch Lake Energy Inc.*, 2014 ABQB 652 (Alta. Q.B.) at para. 97.

69 Accordingly, there is no reason to disregard the clear intent of the parties as to the nature of the interest to be held by the purchasers upon execution of the pre-sale contracts. Numerous case authorities arrived at that same result in the context of pre-sale contracts of a development.

70 In *bcIMC*, the Court was addressing the nature of certain pre-sale contracts, which contained similar wording to that found in clause 19. Burnyeat J. discussed this issue at paras. 63-65 and concluded that he should give effect to that clause by confirming that no equitable interest arose.

71 In *Pan Canadian*, the court held that certain purchasers could not have purchaser's liens (an equitable remedy) in respect of land because their contracts expressly stated that only contractual rights were created. The court discussed that the "protective" clauses in the agreements negated any intention on the part of the contracting parties to create an interest in land: paras. 36, 43-51, 58.

72 Finally, the court in *Firm Capital* held that the lender had legal priority over the interests of purchasers where, at least in part, the pre-sale purchasers, by agreement, acquired a " . . . personal right only and not any interest in the Unit or property": paras. 26-27.

73 In the alternative, I have also considered the position of the pre-sale purchasers that they have an equitable interest even in the face of clause 19. Unfortunately, this also does not assist them in seeking what is essentially an order for specific performance against the Receiver.

74 The Court in *bcIMC* cited substantial authority at paras. 70-72 that an equitable interest cannot be specifically enforced in circumstances that are present here. Further, Burnyeat J. citing *CareVest*, stated:

> [73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest*, *supra*, Pitfield J. stated in this regard:
>
> > It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.
> >
> > As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which

> the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

[Emphasis added]

75 In *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.) (WL), Justice Wilton-Siegel stated:

> [33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. . . .

76 In *Pope & Talbot Ltd., Re*, 2008 BCSC 1000 (B.C. S.C. [In Chambers]), Justice Brenner, as he then was, was dealing with cross applications: the Receiver sought to disclaim an asset purchase agreement, which was in progress at the date of the receivership; and the purchaser sought an order compelling the receiver to complete the sale. Somewhat similar to the facts here, even after the agreed closing date, the parties continued making efforts to close. Then the receivership happened. At para. 25, Brenner J. noted that the purchaser asserted an equitable interest in the assets. However, the Court, as it did in *bcIMC*, considered at para. 26 that the purchaser's status was contingent upon the contract being specifically enforceable. That remedy was not available in *Pope & Talbot* since the parties were not *ad idem* on outstanding matters at the time of the receivership and the receiver did not affirm the contract: para. 29.

77 The statements of this Court in *bcIMC* at para. 73, citing *CareVest* at paras. 13-14, ring true here in the sense of assessing whether the pre-sale purchasers could have asserted specific performance claims against 098. The circumstances would indicate otherwise:

a) 098 did not have permission for occupancy for the units until Langley issued its notice on August 8, 2017;

b) there were indications even before August 8, 2017 that 098's fortunes were fading, given:

(1) the petering out of the extension notices after May 31, 2017 are indicative of 098 seeming to have "withdrawn from the field" (see *Pope & Talbot* at para. 31);

(2) in July 2017, 098 was subject to a foreclosure by CWT/HMF and their CPL had been registered against title. At that time, there was no agreement on the part of CWT/HMF to provide any partial discharges that would have allowed the completion of the sales of these units. No court order could have been enforceable as against CWT/HMF if no agreement was forthcoming;

c) by September 8, 2017, the Superintendent had shut down any sales of units by its cease marketing order. This order in part required that 098 file a new disclosure statement under *REDMA* before any further "marketing" could proceed. Again, I appreciate that 098 was making efforts to have the Superintendent's order lifted so that these sales could proceed, but it would be speculation to assume that this would have been forthcoming. In those circumstances, no order of specific performance could have required 098 to act in breach of that order;

d) on August 25, 2017, Forjay filed its foreclosure action and registered its CPL, adding to the barriers to any closing that might have been sought by any of the purchasers. Again, Forjay did not agree to any partial discharges at any time. It goes without saying that the purchasers would not have taken title to the units with 098's mortgages still registered against them; and

e) on September 30, 2017, 098 lost its new home warranty coverage.

78 In short, I see no basis upon which an order of specific performance could have compelled 098 to close these sales and provide clear title after occupancy had been confirmed on August 8, 2017. Certainly, there is no basis for any such remedy before that date.

79 The appointment of the Receiver on October 4, 2017, does not improve any argument on the part of the purchasers. The Receivership Order had no effect on the relative positions as between the mortgagees and the pre-sale purchasers: *Romspen/Horseshoe* at paras. 29, 33-35.

80 Further, the purchasers could not have sought specific performance as of or after the date of the Receivership Order. The Receiver never affirmed the contract through its conduct or otherwise: *Pope & Talbot* at paras. 31-32. As the Receiver has acknowledged, further efforts were required to complete the Development, including completing exterior work, common areas deficiencies (including landscaping) and in-suite deficiency work.

81 In addition, the Receiver has acknowledged that upon its appointment, it was not in a position to market, sell or complete the sale of any of the units because, among other things, it had to file a new disclosure statement and obtain new home warranty coverage. The Receiver sought and obtained substantial borrowing powers in order to complete the Development, which included this extra work.

82 In late January 2018, the Receiver described the Development as "substantially complete". Even as of February 19, 2018, the Receiver had still not obtained the new home warranty and was seeking funds from Forjay to complete that matter and others.

83 In *Firm Capital*, Morawetz J. stated:

> [28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.
>
> [29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

84 I agree. The Receiver could not have been forced to complete the Development so as to enable the purchasers to close their sales.

85 The other major obstacle in the path of the pre-sale purchasers lies in the requirement that specific performance is only available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available.

86 Uniqueness is a question of fact that must be assessed in light of the specific circumstances of the particular property in issue: *bcIMC* at paras. 95-96. A person asserting specific performance must show that the property has distinctive features that make an award of damages inadequate: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 (B.C. C.A.) at para. 45.

87 Many of the purchasers have stated that they were drawn to Murrayville by its close proximity to the Langley hospital, shopping and the municipal recreational facilities. However, there is no indication that other units in the same vicinity are not available. In fact, there is evidence from some of the purchasers to the effect that there are other similar units available in the marketplace. For example, Nicola Quinn in respect of SL 19 (one of the 40 pre-sales) states that there currently exist "apartments similar to our Murrayville unit".

88 I do note that at least two of the purchasers paid for improvements to their units, which could stand as some basis upon which to assert that those were unique.

89 When considering the purchasers' evidence as a whole, it is clear that the defining "uniqueness" is the *price* at which they can acquire the units under the existing contracts. Ms. Quinn states that these other apartments "cost much more". Even so, no authority has been cited to me that would support that these units are unique in character for that reason. Indeed, such a reason more supports that a damage award would be an adequate remedy.

90 In summary, the purchasers' interests are grounded in contract and no equitable interests have arisen in any of the units. Those purchasers' contractual rights have no legal priority over those held by the mortgagees. Even if the purchasers hold equitable interests in the lands, those interests are not enforceable in the circumstances.

(2) Realizations/Preferences

91 Turning to the second question in the analysis, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?

92 In light of the recent appraisal obtained by the Receiver, there can be no doubt that remarketing and selling these 40 units would enhance the value of the assets to be distributed to the stakeholders. The Receiver described the increase in value as "material". That fact clearly points to disclaimer as being appropriate.

93 I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. This would be an exceptional result and I know of no authority to order it in these circumstances. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees: *bcIMC* at para. 96; *Penex* at para. 27.

(3) The Equities

94 Turning to the third consideration, have the pre-sale purchasers established that the equities support overriding the mortgagees' legal priority in their favour, as opposed to allowing a disclaimer?

95 The circumstances set out above in relation to the respective interests and priorities of the mortgagees and the pre-sale purchasers remain relevant within this part of the disclaimer exercise, but I will not repeat them again.

96 The pre-sale purchasers, both those represented by counsel and those appearing in person, presented a wide range of arguments in support of completing the sales. I will attempt to distill their arguments, and those of the Receiver, into various categories. They are set out below, in no particular ranking of importance.

97 *Actions/Inactions of 098*. The Receiver states that the 40 pre-sale contracts "did not complete because of the actions of 098". The Receiver then argues that the purchasers took all steps required of them to buy their units, but that they were denied the ability to complete the purchase due to the actions of 098. Finally, the Receiver points to the fact that the purchasers remain ready, willing and able to complete, despite having received a further disclosure statement which would have afforded them rescission rights under *REDMA*. This leads to the Receiver's view that "fairness and equity" favour completing the pre-sale contracts.

98 With respect, this argument is simplistic and, in any event, unpersuasive.

99 I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the

nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.

100 Further, such general notions of fairness or equity, as cited by the Receiver, are not meant to *ex post facto* elevate the claims of a party so as to relieve that party of the consequences of a harsh result: *Bank of Montreal v. Awards-West Ventures Inc.* (1990), 50 B.C.L.R. (2d) 363 (B.C. C.A.) at para. 39. If that were the case, claimants would be lined up to do so.

101 Again, I do not intend to wade into the details of the contract validity/estoppel/misrepresentation/waiver issues, all in aid of the purchasers avoiding the argument that their pre-sale contracts were not even afoot at the time of the receivership such that no disclaimer is needed. However, I acknowledge the Receiver's and many purchasers' points that 098 did not provide any notice of default or termination, and that the purchasers have been waiting patiently for months, if not years now, based on 098's ongoing assurances that it was nearing completion. Some have been particularly patient, relying on temporary accommodations and moving items into storage. Many are seniors. Many question their ability to re-enter the market (even for lesser units) if they are required to go shopping for condominiums again. Certainly, the current state of the Lower Mainland real estate market is not for the faint of heart.

102 There is no doubt that some sympathy is in order for the purchasers in these circumstances, even assuming that the contracts remained valid and enforceable to the end. However, those circumstances are not unusual in the sense of pre-sale purchasers not getting their promised unit when a developer fails and the creditors are required to step in to finish the development and sell it and thereafter, distribute the proceeds.

103 I also consider that the purchasers are no doubt correct when they say that the mortgagees would likely be seeking to complete the pre-sale agreements if the market had gone down. The Kaur Group argues that, if the market had fallen, the mortgagees would have been supporting these sales, to the detriment of the purchasers. However, if a receiver is appointed, s. 16 of *REDMA* dictates that a new disclosure statement must be filed, in which case any purchaser would have the option of rescinding the contract to avoid completion.

104 *The Purchasers Knew the Risks*. It is obvious that the mortgagees took risks in advancing the funds to 098. Of course, the taking of security against the Development was meant to ameliorate those risks.

105 However, there was also some risk inherent in the pre-sale contracts. The disclosure statements alerted the purchasers to the fact that financing had been arranged and was secured against title to the Development. Further, the pre-sale contracts expressly provided that the purchasers were only obtaining contractual rights and not any interest in lands until the time of completion.

106 In addition, the purchasers were told in section 7.2(f) of the disclosure statement that, "if [098] fails to complete the sale", they would be paid their deposit monies together with accrued interest.

107 Accordingly, while the pre-sale purchasers enjoyed a potential upside in the event of an increase in real estate values between the date of the purchase agreement and completion, they also bore the risk that the developer would be unable to complete the contract. In this case, section 1.5(2) of the amended March 2015 disclosure statement expressly disclosed that Mr. Chandler had been issued cease marketing orders by the Superintendent in 2006 and 2007, a fact that would have highlighted the potential risk in this case.

108 *Purchasers Will Recover Deposits*. All of the purchasers under the pre-sale contracts have a deposit currently held in trust. There is no dispute that the purchasers are entitled to the return of their deposits with interest and no dispute that they will be paid those amounts. As stated in *Firm Capital* at para. 34, the purchasers will not suffer any financial loss in that respect.

109 As mentioned above, two of the purchasers have expended their own funds in making certain improvements to their proposed units. I do not consider this to be of great significance. These funds were paid to 098 before the closing and in doing so, the purchasers took the risk that the contracts might not close: *Firm Capital* at paras. 37-38.

110 *Purchasers' Claims against 098.* If the pre-sale contracts are valid and enforceable, the purchasers may have a damage claim against 098 for any losses suffered as a result of sales not completing. As in similar cases, the purchasers are free to bring a claim for damages against 098 if such a claim exists: *Re Urbancorp*, 2017 ONSC 2356 at para. 6; *Royal Bank v. Melvax Properties Inc.*, 2011 ABQB 167 (Alta. Q.B.) at para. 6.

111 I note that section 7.2(f) of the disclosure statement provides that, if 098 fails to complete and the deposit is repaid, "the Purchaser shall have no further claims against [098]". This section may affect any such claim but I would hasten to add that I am not making any determination as to the enforceability of the above restriction.

112 I appreciate that, if such a claim exists, this is likely only a hollow remedy, given the status of the receivership; however, this is the remedy the purchasers bargained for under their contracts. Even assuming they had equitable rights against the land, the purchasers were fully aware, or should have been aware through the disclosure statements provided to them, that prior legal rights against the Development may trump that interest. The fact that damages, if awarded, may not be recovered from an insolvent developer cannot affect that result.

113 *Good Faith*. The Receiver and many purchasers also argue that the "organizing principle" of good faith applies, as discussed in *Bhasin v. Hrynew*, 2014 SCC 71 (S.C.C.). They argue that 098 owed the pre-sale purchasers a duty of good faith in the performance of its contractual obligations.

114 The Receiver states that there are many indications that 098 did not have an intention to treat the 40 pre-sale contracts as being at an end. Contrary indications are said to be that 098 "re-sold" some of the units and that 098 allowed the completion date to pass while electing not to complete.

115 The Receiver concludes that, since 098 failed to complete the sale of the 40 pre-sale contracts, while continuing to hold onto those deposits, and then sold some of the very same units to other purchasers without advising the first purchasers, 098's actions "cannot be described as acting in good faith".

116 Many of the participants on this application have levelled accusations against 098 concerning the conduct of its business over the course of this development. One purchaser alleged that they had been "strung along" by 098 as to why delays in closing were happening. Both the Kaur Group and the secured creditors have alleged that 098 improperly diverted funds advanced to 098 that were meant to be used to complete the Development. 098 denies all of these allegations. As for the Receiver's point above, 098 offers up explanations as to why the units were sold more than once; in addition, Mr. Dhaliwal's evidence is that 098 was making serious efforts right until the receivership to complete the sales.

117 None of these issues are before me for determination. I would hasten to add that, even if 098 was acting otherwise than in good faith under the pre-sale contracts, that does not mean that the secured creditors who wish to benefit from their security were similarly acting in bad faith. It remains the case that the competing equities here are as between the pre-sale purchasers and the mortgagees; not the pre-sale purchasers and 098.

118 Finally, in *CareVest*, Justice Pitfield affirmed that insolvency, the reasons for it, and the financial results flowing from it are independent of any concerns affecting the specific performance of land: para. 15. Further, as the court stated in *Romspen/Horseshoe*:

> [30] . . . as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.
>
> . . .

> [32] . . . The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

119 Accordingly, "good faith" issues such as have been raised by many of the purchasers are irrelevant to the exercise before this Court.

120 *Public Policy*. Some of the pre-sale purchasers argued that the Court's consideration of the equities should include public policy factors.

121 These arguments are grounded in *REDMA*, which unquestionably is consumer protection legislation: *Pinto v. Revelstoke Mountain Resort Ltd. Partnership*, 2011 BCCA 210 (B.C. C.A.) at para. 17. However, there is nothing in *REDMA* that addresses either of the issues before me (the disclaimer issue or the contract validity issue). As was stated a number of times on this application, the protection afforded to the pre-sale purchasers under *REDMA* was to allow them to rescind the pre-sale contracts in certain circumstances; otherwise, no other legislative protection is afforded to the purchasers.

122 In this case, the Court must consider the equities as between private parties. The fact that the purchasers have not availed themselves of their *REDMA* remedy does not mean that they enjoy any consideration here based on public policy. Any further protections for this cohort of purchasers must come from the Legislature, rather than this Court. I do not see that public policy arguments apply here in what is essentially a priority contest between these two camps.

123 *Winner and Losers*. First, let me state the obvious — there are no winners in these circumstances. The failure of the Development will affect most, if not all, of the stakeholders. I acknowledge here that, while there are principally financial consequences, other perhaps more ephemeral consequences will be felt by others, particularly the pre-sale purchasers.

124 Many counsel referred to the concept of "reaping the benefit" of the increase in value of the units, and more particularly, who should do the "reaping".

125 However, both camps rely on contractual obligations of 098. The purchasers were promised their units. The mortgagees were promised to be repaid with interest and that, if default occurred, payment would be secured against the Development. In those circumstances, the focus is simply on recovery of the asset or the value of the asset — not obtaining any "benefit". In that event, I reject the argument of the purchasers that allowing a disclaimer would result in a "windfall" to the mortgagees. They seek exactly what they are entitled to under their mortgages and nothing more.

126 As of February 2018, the amounts owing to the first and second mortgagees was approximately $44 million and accruing at approximately $450,000 per month. The amount owed to 625, the third mortgagee, is in excess of $7 million. Even assuming a sale of all units at the increased price confirmed in the appraisal, there will be a shortfall to the secured creditors. As noted by 625, its position is particularly vulnerable given its ranking.

127 Some of the purchasers submit that the mortgagees were able to do due diligence and negotiate their contracts to better protect themselves. The lenders are said to be in a better position to "bear the loss". That might be the case, but there is nothing unusual about the mortgages or the pre-sale contracts. Any failure to repay the lenders will be a real monetary loss, unlike the purchasers' "loss" of their ability to obtain the units, which is a loss of opportunity rather than a monetary loss. The purchasers will recover their deposit monies with interest so they will not be "out of pocket" any monies under the pre-sale contract.

128 It is also important to note that the Development's continued progression toward completion has been due solely to Forjay's funding of the Receiver's borrowings. Those are estimated to be $1.3 million at the end of the day. As of the hearing, approximately $683,000 had been advanced. Mr. Mercier understandably objects to the pre-sale purchasers compelling sales at less than fair market value when the Receiver has been able to complete those units only after the advance of further monies by Forjay. It bears noting that these further advances have only served to increase the risk of recovery under RMIC and Forjay's mortgages.

129 One purchaser also suggested that the mortgagees have other means of recovery at their disposal to shore up any shortfall, unlike the purchasers. He referred to Mr. Chandler's guarantee. He also referred to possible tracing remedies arising from allegations that 098 improperly diverted monies from the Development to other entities. Forjay has recently filed such an action, which is being vigorously defended.

130 In my view, it is not appropriate for the Court to rely on such a speculative matter, particularly where it is virtually impossible to assess the likelihood of success. It may be that the mortgagees recover nothing in that further litigation.

131 *Summary*. Having balanced all of the above considerations, I am satisfied that the equities in favour of the pre-sale purchasers do not justify overriding the mortgagees' legal priority and giving the purchasers a preference that they would not otherwise enjoy.

SUMMARY AND CONCLUSION

132 The Receiver is directed to disclaim the 40 pre-sale contracts that are the subject of this application. Further, the Receiver is directed to take immediate steps to remarket and sell these 40 units as soon as possible, subject to legal requirements, and subject to court order.

133 I have great sympathy for the position of the pre-sale purchasers who have become embroiled in this litigation and who have now potentially lost the ability to obtain what they hoped would be their homes. Mr. Nied, 625's counsel, has suggested that one way to somewhat ameliorate the position of the pre-sale purchasers is for the Receiver to allow them a right of first refusal in respect of their units. This seems a reasonable proposal and one I would adopt.

134 Accordingly, the Receiver is directed to fashion a process that would allow the 40 pre-sale purchasers a right of first refusal within the future marketing plan, provided that such right is exercised within a reasonable time so as not to unduly delay matters any further.

Disclaimer to take place; purchasers given right of first refusal for units.

End of Document

TAB 2

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

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

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

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

Morawetz J.

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

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

Subject: Property; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Real property
VII Mortgages
VII.14 Priorities
VII.14.b Between types of creditors
VII.14.b.xiii Multiple parties
Headnote
Real property --- Mortgages — Priorities — Between types of creditors — Multiple parties
Mortgagee versus subsequent purchasers and lessees — Debtor defaulted on first mortgage while developing commercial property (property) — First mortgagee on property appointed receiver and assigned its position to F Inc. — Receiver sought to sell property, which required "vesting out" of purchase agreements and leases that debtor had already entered into for units on property — Receiver brought motion for order approving sale and authorizing vesting out of purchase agreements and leases — Motion granted — Position of F Inc. took legal priority over interests of purchasers and lessees — Purchase agreements and leases were not registered and were all dated after date that mortgage was registered — In addition, purchase agreements and leases contained express clauses subordinating interests thereunder to first mortgagee — Neither F Inc. nor receiver had obligations to purchasers under ss. 78 and 79 of Condominium Act — Equities did not favour purchasers — Purchasers either had remedy to receive back their original deposits or, alternatively, they were responsible for any losses over and above that amount.
Table of Authorities
Cases considered by *Morawetz J.*:
Counsel Holdings Canada Ltd. v. Chanel Club Ltd. (1997), 1997 CarswellOnt 1163, 33 O.R. (3d) 285, 29 O.T.C. 193 (Ont. Gen. Div.) — referred to
1565397 Ontario Inc., Re (2009), 2009 CarswellOnt 3614, 54 C.B.R. (5th) 262, 81 R.P.R. (4th) 214 (Ont. S.C.J.) — followed
Statutes considered:
Condominium Act, 1998, S.O. 1998, c. 19
Generally — referred to

s. 78 — considered

s. 79 — considered

Land Titles Act, R.S.O. 1990, c. L.5

s. 44(1) ¶ 4 — considered

s. 93(3) — referred to

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

***Morawetz J.*:**

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

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

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

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

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

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

7 The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase

agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

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

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

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

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

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

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

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

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

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

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

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

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

19 Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act*, *1998* (the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> i. Those who paid deposits that are still held in trust;
>
> ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;
>
> iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;
>
> iv. Those who claim to have incurred expenses in renovating or improving their units.

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

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

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

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

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

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

Motion granted.

End of Document

TAB 3

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Arrangement relatif à Nemaska Lithium inc. | 2020 CarswellQue 10601 | (Que. Bktcy., Oct 15, 2020)

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Natural resources
II Mines and minerals
II.5 Remedies
II.5.f Vesting orders

Personal property security
X Statutory liens
X.6 Miscellaneous

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

Table of Authorities

Cases considered by *S.E. Pepall J.A.*:

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — referred to

Anglo Pacific Group PLC c. Ernst & Young Inc. (2013), 2013 QCCA 1323, 2013 CarswellQue 7724, 2013 CarswellQue 11251, [2013] R.J.Q. 1264 (C.A. Que.) — considered

Bank of Montreal v. Dynex Petroleum Ltd. (2002), 2002 SCC 7, 2002 CarswellAlta 54, 2002 CarswellAlta 55, 19 B.L.R. (3d) 159, 208 D.L.R. (4th) 155, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 281 N.R. 113, 30 C.B.R. (4th) 168, 1 R.P.R. (4th) 1, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 299 A.R. 1, (sub nom. *Bank of Montreal v. Enchant Resources Ltd.)* 266 W.A.C. 1, [2002] 1 S.C.R. 146, 2002 CSC 7 (S.C.C.) — considered

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

Bell, Re (2013), 2013 ONSC 2682, 2013 CarswellOnt 7249 (Ont. S.C.J.) — referred to

Big Sky Living Inc., Re (2002), 2002 ABQB 659, 2002 CarswellAlta 875, 37 C.B.R. (4th) 42, (sub nom. *Big Sky Living Inc. (Bankrupt), Re)* 318 A.R. 165 (Alta. Q.B.) — considered

Business Development Bank of Canada v. Astoria Organic Matters Ltd. (2019), 2019 ONCA 269, 2019 CarswellOnt 5177, 69 C.B.R. (6th) 13 (Ont. C.A.) — considered

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 5967, 32 C.B.R. (4th) 21 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2001), 2001 CarswellOnt 3952, 2001 CarswellOnt 3953, [2001] 4 C.N.L.R. iv (note), 284 N.R. 193 (note), 158 O.A.C. 199 (note) (S.C.C.) — referred to

Copthorne Holdings Ltd. v. R. (2011), 2011 SCC 63, 2011 CarswellNat 5201, 2011 CarswellNat 5202, 339 D.L.R. (4th) 385, [2012] 2 C.T.C. 29, 2012 D.T.C. 5006 (Fr.), 2012 D.T.C. 5007 (Eng.), (sub nom. *Copthorne Holdings Ltd. v. Minister of National Revenue)* 424 N.R. 132, (sub nom. *Copthorne Holdings Ltd. v. Canada)* [2011] 3 S.C.R. 721 (S.C.C.) — referred to

Enbridge Gas Distribution Inc. v. Froese (2013), 2013 ONCA 131, 2013 CarswellOnt 2423, 114 O.R. (3d) 636 (Ont. C.A.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — considered

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd. (2012), 2012 ONSC 4816, 2012 CarswellOnt 10743, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) — considered

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd. (2011), 2011 ABCA 158, 2011 CarswellAlta 883, 77 C.B.R. (5th) 278, [2011] 8 W.W.R. 221, 44 Alta. L.R. (5th) 81, 505 A.R. 146, 522 W.A.C. 146 (Alta. C.A.) — referred to

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]) — considered

Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of) (2013), 2013 ONCA 697, 2013 CarswellOnt 15576 (Ont. C.A.) — referred to

Koska, Re (2002), 2002 ABCA 138, 2002 CarswellAlta 764, 34 C.B.R. (4th) 233, [2002] 8 W.W.R. 610, (sub nom. *Koska (Bankrupt), Re)* 303 A.R. 230, (sub nom. *Koska (Bankrupt), Re)* 273 W.A.C. 230, 4 Alta. L.R. (4th) 73 (Alta. C.A.) — considered

Loewen Group Inc., Re (2001), 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134, [2001] O.T.C. 1011 (Ont. S.C.J. [Commercial List]) — considered

Marche v. Halifax Insurance Co. (2005), 2005 SCC 6, 2005 CarswellNS 77, 2005 CarswellNS 78, 18 C.C.L.I. (4th) 1, 248 D.L.R. (4th) 577, [2005] I.L.R. 4383, 330 N.R. 115, 230 N.S.R. (2d) 333, 729 A.P.R. 333, [2005] 1 S.C.R. 47, [2005] R.R.A. 1, 2005 CSC 6 (S.C.C.) — referred to

Meridian Credit Union Ltd. v. 984 Bay Street Inc. (2005), 2005 CarswellOnt 4202 (Ont. S.C.J.) — considered

Meridian Credit Union Ltd. v. 984 Bay Street Inc. (2006), 2006 CarswellOnt 4783 (Ont. S.C.J.) — referred to

Meridian Credit Union Ltd. v. 984 Bay Street Inc. (2006), 2006 CarswellOnt 2625 (Ont. C.A.) — referred to

Montreal (Ville) v. 2952-1366 Québec inc. (2005), 2005 SCC 62, 2005 CarswellQue 9633, 2005 CarswellQue 9634, 201 C.C.C. (3d) 161, 32 Admin. L.R. (4th) 159, 15 M.P.L.R. (4th) 1, 33 C.R. (6th) 78, (sub nom. *Montreal (City) v. 2952-1366 Québec Inc.)* 340 N.R. 305, 258 D.L.R. (4th) 595, 18 C.E.L.R. (3d) 1, (sub nom. *Montréal (City) v. 2952-1366 Québec Inc.)* 134 C.R.R. (2d) 196, [2005] 3 S.C.R. 141 (S.C.C.) — referred to

Moore, Re (2013), 2013 ONCA 769, 2013 CarswellOnt 17670, 53 M.V.R. (6th) 169, 7 C.B.R. (6th) 167, (sub nom. *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.)* 118 O.R. (3d) 161, (sub nom. *Moore (Bankrupt), Re)* 314 O.A.C. 152, 369 D.L.R. (4th) 385 (Ont. C.A.) — considered

Moss, Re (1999), 1999 CarswellMan 482, (sub nom. *Moss (Bankrupt), Re)* 138 Man. R. (2d) 318, (sub nom. *Moss (Bankrupt), Re)* 202 W.A.C. 318, 13 C.B.R. (4th) 231 (Man. C.A. [In Chambers]) — considered

National Trust Co. v. 1117387 Ontario Inc. (2010), 2010 ONCA 340, 2010 CarswellOnt 2869, 262 O.A.C. 118, 67 C.B.R. (5th) 204, 52 C.E.L.R. (3d) 163 (Ont. C.A.) — considered

Nautical Data International Inc., Re (2005), 2005 NLTD 104, 2005 CarswellNfld 175, 11 C.B.R. (5th) 138, 249 Nfld. & P.E.I.R. 247, 743 A.P.R. 247 (N.L. T.D.) — referred to

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

Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd. (2014), 2014 ONCA 500, 2014 CarswellOnt 8586, 17 C.B.R. (6th) 91, 323 O.A.C. 101, 37 C.L.R. (4th) 191 (Ont. C.A.) — considered

Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

Romspen Investment Corp. v. Woods Property Development Inc. (2011), 2011 CarswellOnt 2380, 2011 ONSC 3648, 75 C.B.R. (5th) 109, 4 R.P.R. (5th) 53 (Ont. S.C.J.) — considered

Romspen Investment Corp. v. Woods Property Development Inc. (2011), 2011 ONCA 817, 2011 CarswellOnt 14462, 85 C.B.R. (5th) 21, 286 O.A.C. 189, 14 R.P.R. (5th) 1, 346 D.L.R. (4th) 273 (Ont. C.A.) — referred to

Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1982), [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 135 D.L.R. (3d) 1, 18 B.L.R. 1, 65 C.P.R. (2d) 1, 42 N.R. 181, 1982 CarswellOnt 952, 1982 CarswellOnt 727 (S.C.C.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — considered

Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — considered

Scenna v. Gurizzan (1999), 1999 CarswellOnt 1417, 11 C.B.R. (4th) 293 (Ont. S.C.J.) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

Smoke, Re (1989), 77 C.B.R. (N.S.) 263, 1989 CarswellOnt 197 (Ont. C.A.) — considered

Solloway, Mills & Co., Re (1934), 16 C.B.R. 161, [1935] O.R. 37, [1935] 1 D.L.R. 340, 1934 CarswellOnt 112, [1934] O.W.N. 703 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2018), 2018 ONCA 253, 2018 CarswellOnt 3694, 57 C.B.R. (6th) 171, 420 D.L.R. (4th) 657, 141 O.R. (3d) 192, 8 P.P.S.A.C. (4th) 181 (Ont. C.A.) — considered

Trick v. Trick (2006), 2006 CarswellOnt 4139, 213 O.A.C. 105, 54 C.C.P.B. 242, 81 O.R. (3d) 241, 271 D.L.R. (4th) 700, 31 R.F.L. (6th) 237, 83 O.R. (3d) 55 (Ont. C.A.) — referred to

Trick v. Trick (2007), 2007 CarswellOnt 575, 2007 CarswellOnt 576, 364 N.R. 397 (note), 229 O.A.C. 395 (note) (S.C.C.) — considered

Turgeon v. Dominion Bank (1929), 11 C.B.R. 205, [1930] S.C.R. 67, [1929] 4 D.L.R. 1028, 1929 CarswellQue 17 (S.C.C.) — considered

Winick v. 1305067 Ontario Ltd. (2008), 2008 CarswellOnt 900, 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]) — considered

bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd. (2008), 2008 BCSC 897, 2008 CarswellBC 1421, 44 C.B.R. (5th) 171, 72 R.P.R. (4th) 68, 86 B.C.L.R. (4th) 114 (B.C. S.C. [In Chambers]) — considered

407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy) (2015), 2015 SCC 52, 2015 CSC 52, 2015 CarswellOnt 17183, 2015 CarswellOnt 17184, 85 M.V.R. (6th) 1, 30 C.B.R. (6th) 207, 391 D.L.R. (4th) 248, (sub nom. *Moore (Bankrupt), Re)* 340 O.A.C. 1, (sub nom. *Moore (Bankrupt), Re)* 477 N.R. 1, [2015] 3 S.C.R. 397, 135 O.R. (3d) 400 (note) (S.C.C.) — referred to

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

7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al (2019), 2019 MBCA 28, 2019 CarswellMan 190 (Man. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 47 — considered

s. 47(1) — considered

s. 47(2) [rep. & sub. 2007, c. 36, s. 14(2)] — considered

s. 47(2)(c) — considered

s. 65.13 [en. 2005, c. 47, s. 441] — considered

s. 65.13(7) [en. 2007, c. 36, s. 27] — considered

s. 183(2) — considered

s. 193 — considered

s. 195 — considered

s. 243 — considered

s. 243(1) — considered

s. 243(1)(c) — considered

s. 243(2) "receiver" — considered

s. 244(1) — considered

s. 246 — considered

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36

Generally — referred to

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

Generally — referred to

s. 36 — considered

s. 36(6) — considered

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34
Generally — referred to

s. 21 — considered
Conveyancing and Law of Property Act 1881, 1881 (44 & 45 Vict.), c. 41
Generally — referred to
Court of Chancery, Act respecting the, C.S.U.C. 1859, c. 12
s. 63 — referred to
Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 100 — considered

s. 101 — considered
Courts of Justice Act, 1984, S.O. 1984, c. 11
s. 113 — referred to
Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to
Judicature Act, R.S.O. 1897, c. 51
s. 36 — referred to
Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to

s. 159 — considered

s. 160 — considered
Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 66(4) — considered
Planning Act, R.S.O. 1990, c. P.13
Generally — referred to
Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, An Act to establish the, S.C. 2005, c. 47
Generally — referred to

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

R. 31 — considered

R. 31(1) — considered

R. 126 — considered
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

R. 3.02 — considered

R. 61.04(1) — considered

R. 63.02 — considered

Authorities considered:

Bennett, Frank *Bennett on Bankruptcy, 21st ed*Lexis Nexis, 2019

Bish, David, and Lee Cassey, *"Vesting Orders Part 1: The Origin and Development"* (2015), 32(4) Nat. Insol. Rev. 41

Bish, David, and Lee Cassey, *"Vesting Orders Part 2: The Scope of Vesting Orders"* (2015), 32(5) Nat. Insol. Rev. 53

Brown, Donald J.M. *Civil Appeals*Carswell, 2019

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra *The 2018-2019 Annotated Bankruptcy and Insolvency Act*Thomson Reuters Canada Limited, 2019

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra, eds., *Bankruptcy and Insolvency Law of Canada, 4th ed.* (Toronto: Carswell, 2009)

Johnson, G. Thomas in Anne Warner La Forest, ed., Anger & Honsberger *Law of Real Property, 3rd ed*Thomson Reuters Canada Limited, 2017

Jackson, Justice Georgina R. & Professor Janis Sarra, Janis P. Sarra, ed. *"Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", Annual Review of Insolvency Law 2007*Thomson Reuters Canada Limited, 2008

Morin, Luc & Nicholas Mancini, Janis P. Sarra, ed. *"Nothing Personal: the Bloom Lake Decision and the Growing Outreach of Vesting Orders Against in personam Rights", Annual Review of Insolvency Law 2017*Thomson Reuters Canada Limited, 2018

Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors *Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*Senate of Canada

Sullivan, Ruth *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016

Wood, Roderick J. *Bankruptcy and Insolvency Law, 2nd ed.*Irwin Law, 2015

Driedger, E. A., *Construction of Statutes, 2nd ed.* (1983)

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

(1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters'" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> 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.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property. [5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the

parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had 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).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125;

and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 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.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n 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 a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6] .

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce,

Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. [8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(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. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described,

which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view

it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s.

101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical

positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under

any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

End of Document

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Pan Canadian Mortgage Group Inc. v. 679972 B.C. Ltd. | 2014 BCCA 113, 2014 CarswellBC 753, [2014] B.C.W.L.D. 2201, [2014] B.C.W.L.D. 2298, 42 R.P.R. (5th) 25, [2014] 6 W.W.R. 264, 59 B.C.L.R. (5th) 290, 371 D.L.R. (4th) 430, 10 C.B.R. (6th) 54, 239 A.C.W.S. (3d) 795, 353 B.C.A.C. 83, 603 W.A.C. 83 | (B.C. C.A., Mar 24, 2014)

2008 BCSC 897
British Columbia Supreme Court [In Chambers]

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

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

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

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

Burnyeat J.

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

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

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure; Contracts; Property
Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.2 Effect of order
Contracts
XIV Remedies for breach
XIV.4 Specific performance
XIV.4.c Availability in particular contracts
XIV.4.c.x Sale of land
Debtors and creditors
VII Receivers

VII.3 Appointment
VII.3.c Validity of appointment
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.b Actions against receiver
VII.7.b.iii Miscellaneous
Remedies
III Specific performance
III.2 Availability in particular contracts
III.2.f Sale of land

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

In two foreclosure actions, receiver and manager was appointed of assets, undertakings and properties of developers, Chandler and Cook — Receiver was authorized, where "necessary and desirable," to enter into or cease to perform any of debtor's contracts, and to sell or otherwise dispose of debtor's property in ordinary course of business — After review of pre-sales that had been arranged by Chandler and Cook, receiver determined that certain contracts should be disclaimed as pre-sales, for many units were significantly below current market value — Receiver applied for directions to disclaim these contracts, or to allow it to sell strata lots involved at current market value free and clear of any obligation of Chandler or Cook that might arise under contracts on bases that discount contained in contracts constituted payment of pre-receivership unsecured claim, or that purchase price did not represent fair market value — Receiver had power to disclaim contracts — Court-appointed receiver and manager has ability to disclaim contracts, even though effect of doing so is that contract holder will have claim for damages — Receiver is not bound by existing contracts made by debtor unless it decides to be bound by them, and is not personally liable for performance of contracts entered into before receivership — Receiver should seek leave of court before disclaiming contracts — Duty to preserve goodwill of debtor is owed to that entity and not to its creditors — Ability to disclaim contracts applies even if party contracting with debtor has equitable interest as result of contract — Refusal to complete contracts was included within power given to receiver to cease part of business of Chandler and Cook — Contract holders did not have equitable interest in strata lots such that receiver should not be able to disclaim their contracts — Receiver was at liberty to disclaim contract in respect of which one contract holder had filed certificate of pending litigation — Specific performance was not available to contract holders — Receiver was directed to disclaim contracts or alternatively, to offer strata lots for sale at current market value free and clear of any obligation of Chandler and/or Cook that might arise under contracts with contract holders.

Bankruptcy and insolvency --- Receiving order — Effect of receiving order

In two foreclosure actions, receiver and manager was appointed of assets, undertakings and properties of developers, Chandler and Cook — Receiver was authorized, where "necessary and desirable," to enter into or cease to perform any of debtor's contracts, and to sell or otherwise dispose of debtor's property in ordinary course of business — After review of pre-sales that had been arranged by Chandler and Cook, receiver determined that certain contracts should be disclaimed as pre-sales, for many units were significantly below current market value — Receiver applied for directions to disclaim these contracts, or to allow it to sell strata lots involved at current market value free and clear of any obligation of Chandler or Cook that might arise under contracts on bases that discount contained in contracts constituted payment of pre-receivership unsecured claim, or that purchase price did not represent fair market value — Receiver had power to disclaim contracts — Court-appointed receiver and manager has ability to disclaim contracts, even though effect of doing so is that contract holder will have claim for damages — Receiver is not bound by existing contracts made by debtor unless it decides to be bound by them, and is not personally liable for performance of contracts entered into before receivership — Receiver should seek leave of court before disclaiming contracts — Duty to preserve goodwill of debtor is owed to that entity and not to its creditors — Ability to disclaim contracts applies even if party contracting with debtor has equitable interest as result of contract — Refusal to complete contracts was included within

power given to receiver to cease part of business of Chandler and Cook — Contract holders did not have equitable interest in strata lots such that receiver should not be able to disclaim their contracts — Receiver was at liberty to disclaim contract in respect of which one contract holder had filed certificate of pending litigation — Specific performance was not available to contract holders — Receiver was directed to disclaim contracts or alternatively, to offer strata lots for sale at current market value free and clear of any obligation of Chandler and/or Cook that might arise under contracts with contract holders.

Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver

In two foreclosure actions, receiver and manager was appointed of assets, undertakings and properties of developers, Chandler and Cook — Receiver was authorized, where "necessary and desirable," to enter into or cease to perform any of debtor's contracts, and to sell or otherwise dispose of debtor's property in ordinary course of business — After review of pre-sales that had been arranged by Chandler and Cook, receiver determined that certain contracts should be disclaimed as pre-sales, for many units were significantly below current market value — Contract holder, Crestmark, applied for order that it be at liberty to commence action against Chandler, Cook, and receiver so that it could seek order for specific performance, certificate of pending litigation, and other relief in relation to contracts for units in Cook's project which it had agreed to purchase — Application dismissed — Contracts specified that any agreement resulting from acceptance of offer by Chandler and/or Cook created contractual rights only and not interest in land — Specific performance was not available to Crestmark — There was nothing which would allow court to conclude that receiver had adopted contract and agreed to perform pursuant to it — Accordingly, there could be no action against receiver for specific performance — Crestmark was at liberty to commence action against Chandler or Cook for damages, but not for specific performance — Crestmark had not met onus of establishing reasonable cause of action.

Remedies --- Specific performance — Availability in particular contracts — Sale of land

In two foreclosure actions, receiver and manager was appointed of assets, undertakings and properties of developers, Chandler and Cook — Receiver was authorized, where "necessary and desirable," to enter into or cease to perform any of debtor's contracts, and to sell or otherwise dispose of debtor's property in ordinary course of business — After review of pre-sales that had been arranged by Chandler and Cook, receiver determined that certain contracts should be disclaimed as pre-sales, for many units were significantly below current market value — Contract holder Crestmark applied for order that it be at liberty to commence action against Chandler, Cook, and receiver so that it could seek order for specific performance, certificate of pending litigation, and other relief in relation to contracts for units in Cook's project which it had agreed to purchase — Application dismissed — Contracts specified that any agreement resulting from acceptance of offer by Chandler and/or Cook created contractual rights only and not interest in land — Specific performance was not available to Crestmark — There was nothing which would allow court to conclude that receiver had adopted contract and agreed to perform pursuant to it — Accordingly, there could be no action against receiver for specific performance — Crestmark was at liberty to commence action against Chandler or Cook for damages, but not for specific performance — Crestmark had not met onus of establishing reasonable cause of action.

Debtors and creditors --- Receivers — Appointment — Validity of appointment

No notice to contract holders to appoint receiver and manager.

Table of Authorities

Cases considered by *Burnyeat J.*:

Abramowich v. Azima Developments Ltd. (1993), 34 R.P.R. (2d) 174, 86 B.C.L.R. (2d) 129, [1994] 2 W.W.R. 525, 35 B.C.A.C. 193, 57 W.A.C. 193, 1993 CarswellBC 348 (B.C. C.A.) — referred to

Ambassador Industries Ltd. v. Kastens (2001), 2001 BCSC 484, 2001 CarswellBC 927 (B.C. S.C. [In Chambers]) — referred to

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

Behnke v. Bede Shipping Co. (1927), [1927] All E.R. Rep. 689, 96 L.J.K.B. 325, 136 L.T. 667, 43 T.L.R. 170, 71 Sol. Jo. 105, 17 Asp. Mar. Law Cas. 222, 32 Com. Cas. 134, [1927] 1 K.B. 649 (Eng. K.B.) — referred to

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

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

Central Trust & Safe Deposit Co. v. Snider (1915), [1916] 1 A.C. 266, 35 O.L.R. 246, 25 D.L.R. 410 (Ontario P.C.) — referred to
Cheema v. Chan (2004), 2004 BCSC 1342, 2004 CarswellBC 2476 (B.C. S.C. [In Chambers]) — referred to
Cornwall v. Henson (1899), [1899] 2 Ch. 710 (Eng. Ch. Div.) — referred to
DiGuilo v. Boland (1958), [1958] O.R. 384, (sub nom. *Di Guilo v. Boland)* 13 D.L.R. (2d) 510, 1958 CarswellOnt 102 (Ont. C.A.) — referred to
Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd. (2007), [2008] 5 W.W.R. 763, 2007 BCSC 1379, 2007 CarswellBC 2132, 61 R.P.R. (4th) 277, 78 B.C.L.R. (4th) 120 (B.C. S.C.) — considered
Freevale Ltd. v. Metrostore (Holdings) Ltd. (1983), 47 P & CR 481, [1984] Ch. 199, [1984] 1 All E.R. 495, 81 L.S.G. 516, 128 S.J. 116, [1984] 2 W.L.R. 496 (Eng. Ch. Div.) — referred to
International Paper Industries Ltd. v. Top Line Industries Inc. (1996), 20 B.C.L.R. (3d) 41, 2 R.P.R. (3d) 1, [1996] 7 W.W.R. 179, 135 D.L.R. (4th) 423, 76 B.C.A.C. 114, 125 W.A.C. 114, 1996 CarswellBC 1108 (B.C. C.A.) — considered
Kimniak v. Anderson (1929), 63 O.L.R. 428, [1929] 2 D.L.R. 904 (Ont. C.A.) — referred to
Lochson Holdings Ltd. v. Eaton Mechanical Inc. (1984), 55 B.C.L.R. 54, 33 R.P.R. 100, 52 C.B.R. (N.S.) 271, 10 D.L.R. (4th) 630, 1984 CarswellBC 572, 53 C.B.R. (N.S.) 177 (B.C. C.A.) — considered
Miller v. Howard (1914), 7 W.W.R. 627, [1915] A.C. 318, 20 B.C.R. 230, 22 D.L.R. 75, 1914 CarswellBC 309, 30 W.L.R. 112 (British Columbia P.C.) — referred to
Nesrallah v. Pagonis (1982), 1982 CarswellBC 172, [1982] 5 W.W.R. 175, 24 R.P.R. 200, 38 B.C.L.R. 112, 136 D.L.R. (3d) 762 (B.C. S.C.) — considered
New Skeena Forest Products Inc., Re (2005), 2005 BCCA 154, 2005 CarswellBC 578, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) — considered
Newdigate Colliery Ltd., Re (1912), [1912] 1 Ch. 468 (Eng. Ch. Div.) — referred to
Norfolk v. Aikens (1989), 7 R.P.R. (2d) 235, 41 B.C.L.R. (2d) 145, 64 D.L.R. (4th) 1, [1990] 2 W.W.R. 401, 1989 CarswellBC 221 (B.C. C.A.) — referred to
Pope & Talbot Ltd., Re (May 29, 2008), Doc. Vancouver Registry No. S077839 (B.C. S.C. [In Chambers]) — considered
Romfo v. 1216393 Ontario Inc. (2006), 2006 CarswellBC 2731, 2006 BCSC 1648 (B.C. S.C.) — considered
Semelhago v. Paramadevan (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — considered
St. James (Rural Municipality) v. Bailey (1956), 64 Man. R. 365, 7 D.L.R. (2d) 179, 1957 CarswellMan 6, 21 W.W.R. 1 (Man. C.A.) — considered
Strata Plan VIS2968 v. K.R.C. Enterprises Inc. (2007), 74 B.C.L.R. (4th) 89, 59 R.P.R. (4th) 183, 2007 CarswellBC 1243, 2007 BCSC 774 (B.C. S.C.) — referred to
Terra Nova Management Ltd. v. Halcyon Health Spa Ltd. (2006), 25 C.B.R. (5th) 199, 2006 CarswellBC 2565, 2006 BCCA 458, 58 B.C.L.R. (4th) 64 (B.C. C.A.) — considered

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90
R. 18A — referred to

R. 47 — referred to

R. 50 — referred to

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

***Burnyeat J.*:**

1 These are foreclosure Actions. To date, no Orders Nisi have been granted. In both Actions, an order was made on November 28, 2007 appointing The Bowra Group Inc. as Receiver and Manager without security ("Receiver and Manager"), of all of the

assets, undertakings and properties of Chandler Homer Street Ventures Ltd. ("Chandler") and Cook and Katsura Homes Inc. ("Cook"). As part of that Order, the Receiver and Manager was granted a number of powers including the ability to: "... manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of other business, or cease to perform any contracts of the Debtor".

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

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

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

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

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

Background

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

6 The Receiver and Manager has provided the following estimates of the present secured debt owing: (a) *Vancouver Project*: $59,800,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); $3,500,000.00 (second charge holder); $6,300,000.00 (third charge holder); $20,300,000.00 (fourth charge holder having a charge for this amount against both the Vancouver Project and the Richmond Project; (b) *Richmond Project*:

$25,400,000.00 (Petitioner); $1,000,000.00 (New Home Warranty provision); $1,000,000.00 (borrowings of the Receiver and Manager); and $20,300,000.00 (second charge holder having a charge for this amount against both the Richmond Project and the Vancouver Project). The Receiver and Manager also estimates that the unsecured creditors claim $30,100,000.00 against the Vancouver Project and $32,300,000.00 against the Richmond Project. Approximately $30,000,000.00 of those amounts are said to be owing to the Respondent, Theodore Freeman a.k.a. Ted Freeman.

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

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

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

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

3.3 Prepayment

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

(b) Provided that:

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

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

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

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

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

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

B. Real estate commissions;

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

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

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

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

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

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

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

8. Completion

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

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

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

10. Delay

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

16. Risk

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

25. Assignment by Purchaser

The Purchaser may not assign or list for sale on MLS (Multiple Listing Service) the Purchaser's interest in this Agreement until all Deposits contemplated under this Agreement have been paid in full and thereafter may not list without the prior written consent of the Vendor,. No assignment by the Purchaser shall release the Purchaser from his/her obligations hereunder. This Agreement creates contractual rights only between the Vendor and the Purchaser and does not create an interest in the Strata Lot The Purchaser shall pay the Vendor an administration fee of $2,000 plus GST for any assignment of this Agreement or conveyance of the Strata Lot other than to the Purchaser named herein provided that the Vendor shall waive such fee for an assignment to a Spouse, child or parent of the Purchaser on receipt of evidence of such relationship satisfactory to the Vendor.

26. Liability of Purchaser

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

28. Contractual Rights Only

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

MPC Intelligence Inc. Report

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

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

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

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

> ... it is obvious that there are a selection of units that have been sold for well below the market value at the time. Determining the market value for a period of time starting almost two years ago is a difficult challenge because prices in the Downtown condo market have risen so quickly. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. This does not mean that the units that were sold initially were under priced, as the overall market can shift quite quickly as was experienced when the Woodward's project sold out at $600/sq ft and instantly increased what all other projects could achieve.
>
> From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2006 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

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

> When analyzing the sale prices of the units at Garden City there does not appear to be many units that were sold below market values. Determining the market value for a period of time starting over two years ago is a difficult challenge because prices in the Richmond condo market have rose very quickly from 2005 to 2007. It is also important to acknowledge the way that sales campaigns work. It is considered standard for prices on units to increase by anywhere from $15,000 to over $50,000 at the grand opening depending on the demand being shown by buyers. Any good sales & marketing company would also try to aggressively raise the prices during the weeks and months after the launch to try to earn more money for the developer. The Richmond market is also unlike most of the other markets in the Lower Mainland when it comes to purchaser incentives. The Chinese buyer in this market almost always expects for there to be some sort of incentive or negotiation process to save money. This was seen in the second phase of Garden City with the first 20 buyers at the public grand opening receiving $5,000 off the purchase price along with no GST (4.48% value). This resulted in many of the units having credits of approximately $20,000 to $25,000. This is very typical in the Richmond market and is considered a cost of doing business.
>
> From looking at the sales prices for units in the building we believe that overall, the building sold for fair market value. This backs up our initial perception from when it launched in 2005 and was considered to be achieving good pricing levels in that market. Since we have assumed that the majority of units in the building were sold at fair market value, the best way to determine which units were under priced is to compare them to similar units in the building that sold at roughly the same time. We have excluded any of the units that look like they were under priced by less than $20,000 because of the difficulty in reaching consensus on the value of these units.

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

Applications of the Receiver and Manager

17 Originally, the Receiver and Manager sought directions to disclaim 17 Contracts relating to the Vancouver Project and 10 Contracts relating to the Richmond Project. The Motion of the Receiver and Manager is now restricted to Strata Lots 12 and 85 of the Vancouver Project and Strata Lots 12, 46, 85, 92 and 95 of the Richmond Project. The Petitioner supports most

of the applications of the Receiver and Manager. However, the Petitioner does not support the application of the Receiver and Manager to disclaim the Contract relating to Strata Lot 12 in the Vancouver Project as it is satisfied that the proposed purchase price met the minimum pre-sale criteria set in the agreement reached with Chandler.

(a) Contracts of Siu Chun Chao-Dietrich

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

19 Ms. Chao-Dietrich is a former employee of Chandler and is a licensed realtor. Ms. Chao-Dietrich states that she was instrumental in arranging for the purchase by Cook of the land that later would be the site of the Richmond Project. By reason of her efforts, Ms. Chao-Dietrich claims to be entitled to a fee of $200,000.00 and that this fee remains unpaid. In a September 20, 2006 agreement with Chandler, Ms. Chao-Dietrich was to receive a further $100,000.00 "... for deferring paying the commission which you earned on July 16, 2007. The owed commission and compensate [sic] payment in total of $300,000.00 shall be discounted from the purchase price." In her March 25, 2008 Affidavit, Ms. Chao-Dietrich states that the purchase price for Strata Lot 46 of the Richmond Project was to be further reduced in order to reflect $34,800.00 in commissions on previous sales in that Project and $6,000.00 to reflect late closing expenses relating to the "...original unit of that she was to have obtained in satisfaction of the amount owing in respect of the commission".

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

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

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

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

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

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

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

24 Regarding Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich states that the purchase price was in the aggregate of $500,800.00 but that "Much of that consideration, however, was paid by way of set off of various commissions and interest

stated to be owed by the vendor to the purchaser". After deductions, the remaining amount owing is stated to be $160,000.00. It is this amount which is shown as the sale price in the Contract. A deposit of $40,000.00 was paid in two instalments: $32,000.00 on September 20, 2006 and $8,000.00 on April 30, 2007. The Richmond Project is now complete. On August 21, 2007, Ms. Chao-Dietrich received a Notice of completion.

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

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

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

This unit was severely under priced. An example why would be the unit below (801) selling for $283,620 more 10 months later. Another example is the unit beside it (908) which is the same plan but with a SE instead of SW exposure sold for $378,259 more than it sixteen months previous. It is assumed that unit 901 could have sold for somewhere near what 908 sold for with the increase in the market over the four months being balanced by the fact that the 08 units were more popular and commanded a higher value.

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

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

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

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

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

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

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

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

Estimated Market Value at time of Pre Sale	$649,000

Estimated Selling Discount	$32,450

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

(c) Contracts of Crestmark Holdings Corp.

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

33 In July of 2007, Chandler contacted Edward Wong & Associates Realty Inc. ("Wong") requesting that Wong submit a marketing proposal for the unsold units in Tower I and Tower II in the Richmond Project. On July 18, 2007, Wong signed an Exclusive Listing Agreement relating to the Richmond Project ("Listing Agreement"). 37 units in Tower I and 50 units in Tower II were unsold at the time of the Listing Agreement. The term of the Listing Agreement was to end on November 30, 2008 but Chandler had the right to terminate the Listing Agreement after December 15, 2007 if Wong had not sold 20 units by that time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Estimated Market Value at time of Pre Sale	$519,900
Estimated Selling Discount	$83,170

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

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

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

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

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

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

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

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

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

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

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

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

Can the Receiver and Manager Disclaim Contracts?

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

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

54 There are numerous decisions which establish the principle that a Court appointed receiver and manager has the ability to disclaim contracts even though the effect of doing so is that the contract holder will have a claim for damages against the

company. In *New Skeena Forest Products Inc., Re* (2005), 39 B.C.L.R. (4th) 327 (B.C. C.A.), the issue was whether the receiver and manager was entitled to disclaim "executory contracts" and apply to approve a better offer. Braidwood J.A. with Oppal J.A. concurring stated:

> In a recent decision of the Alberta Court of Queen's Bench *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 2002 ABQB 706, Wachowich C.J.Q.B., in considering whether to grant a declaration to a receiver-manager that certain seating equipment would vest in the receiver free and clear of claims by a secured creditor, observed at para. 11:
>
> > The law is clear to the effect that in a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor: *Re Bayhold Financial v. Clarkson* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.), *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at 169, 341.
>
> (at para. 16)
>
> In another leading case, *Bayhold Financial Corp. v. Clarkson* (1991), 108 N.S.R. (2d) 198, 10 C.B.R. (3d) 159 (N.S.C.A.), the Nova Scotia Court of Appeal considered the content of the order appointing the receiver determinative of the receiver's powers, and rejected the proposition that a court cannot approve the repudiation of contracts entered into by a debtor prior to the receiver's appointment.
>
> The powers of the Receiver in this case are set out in the appointment order of 20 September 2004, in which Brenner C.J.S.C. included in clause 14, *inter alia*:
>
> > The Receiver be and it is hereby authorized and empowered, if in its opinion it is necessary or desirable for the purpose of receiving, preserving, protecting or realizing upon the Assets or any part or parts thereof, to do all or any of the following acts and things with respect to the assets, forthwith and from time to time, until further or other order of this Court:
> >
> > . . . . .
> >
> > (c) *apply for any vesting Order* or Orders which may be necessary or desirable in the opinion of the Receiver in Order *to convey the Assets or any part or parts thereof to a purchaser or purchasers thereof free and clear of any security, liens or encumbrances* affecting the Assets ....
>
> [Emphasis added.]
>
> In my view, this clause is the end of the matter. The court's order contemplates a power in the Receiver to apply to court for a vesting order to convey the assets to a purchaser free and clear of the interests of other parties. That is what happened in this case, and no serious challenge was mounted to the equitable considerations Chief Justice Brenner took into account when deciding whether to grant the vesting order.
>
> (at paras. 19-21)

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

> ... The *Newdigate* case is authority for the following valid proposition (p. 468):
>
> > It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.
>
> In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be

> inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims. (at paras. 27-8)

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

> There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:
>
> > The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.
> >
> > [Emphasis added.]
>
> The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts.
>
> (at paras. 55-6)

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

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

In Braidwood J.A.'s opinion the foregoing clause determined the issue. (at paras. 17-8)

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

59 Ms. Chao-Dietrich and Messrs. Ratansi and Jiwa submit that the content of the Order appointing the Receiver is determinative of the powers available to the Receiver and Manager and that paragraph 2(c) of the Order only granted the Receiver and Manager the power to "... cease to perform any contracts of the Debtor". They submit that no performance was required under their Contracts until completion dates came into effect and that the completion dates for the purchase of Strata Lot 85 by Ms. Chao-Dietrich and the purchase of Strata Lot 12 by Mr. Jiwa and Mr. Ratansi in the Vancouver Project has not been set because the units remain unfinished. Regarding the completion date for Strata Lot 46 in the Richmond Project, Ms. Chao-Dietrich submits that the completion date was September 14, 2007, that she was ready willing and able at that time to complete the purchase, a caveat was filed when Chandler did not complete the sale, and an action seeking specific performance was commenced. In the absence of a power given to disclaim, it is the submission that the remedy that will be available for anticipatory breach of contract is both a specific performance and/or a mandatory injunction and only in the alternative, for damages.

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

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

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

Do the Contract Holders Have an Equitable Interest?

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

64 The contract in *Enigma Investments Corp. v. Henderson Land Holdings (Canada) Ltd.* (2007), 61 R.P.R. (4th) 277 (B.C. S.C.) contained this provision: "This offer and the agreement which results from its acceptance create contractual rights only and not any interest in land." In deciding that the certificates of pending litigation should not be discharged, Goepel J. made reference to that provision and concluded:

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

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

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

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

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

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

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

> Ranking high on the list of venerable doctrines postulated by high authority is the equitable landmark decreeing that *instanter* a valid contract for the sale of land comes into existence the vendor becomes in equity a constructive trustee for the purchaser and (1) the beneficial ownership passes to the purchaser, the vendor retaining a reciprocal right to the purchase money carrying with it and for its security a lien on the premises; (2) the vendor, in the absence of an agreement to the contrary, is entitled to retain possession and is entitled to the rents and profits up to the date fixed for completion. But it is then said that although the vendor becomes a constructive trustee, he does so *sub modo* only: (1) he is not a mere dormant trustee; (2) he is a trustee having a personal and substantial interest in the property: he has a right to protect and an active right to assert that interest if anything is done in derogation of it; (3) his right to protect his own interest is paramount and overriding, and until he is bound to convey he retains for certain purposes his old dominion over the estate.
>
> Further, the purchaser's status as equitable owner is contingent upon the contract being specifically enforceable.
>
> It is clear, then, that the precise position in which the parties stand with respect to each other is *in fieri*, until certainty as to the consummation of the contract by conveyance or transfer is established, at which point the respective characters of the parties as trustee and *cestui que trust* relate back to the date of the contract and confirm that throughout the contract the legal estate was in the vendor and the equitable interest in the purchaser. (at pp. 1-12 and 1-13) (footnotes omitted)

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

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

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

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

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

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

> It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and

> obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.
>
> As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.
>
> (at paras. 13-4)

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

Disclaiming Contracts Relating to the Vancouver Project

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

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

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

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

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

80 In coming to this conclusion, I rely on the following related to Strata Lot 85: (a) the $100,000.00 discount made available to Ms. Chao-Dietrich would amount to now preferring Ms. Chao-Dietrich in priority to other unsecured creditors of Chandler as she would be entitled to a fee for services rendered by a reduction of the purchase price agreed to on July 6, 2007; (b) there

appears to be at least some evidence that the net selling price at July 6, 2007 was significantly less than the net selling price of $349,900.00 that was to be made available to Ms. Chao-Dietrich as the net selling price acceptable to the Petitioner was significantly higher than the price made available to Ms. Chao-Dietrich; and (c) I can find no obligation on the Petitioner to provide a partial discharge of its security in order to accommodate the contemplated sale to Ms. Chao-Dietrich.

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

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

82 As well, holders of Contracts signed after the security of the Petitioner was registered had notice that partial discharges would only be provided in accordance with the net sale prices established in accordance with the provisions of the security. Additionally, now that the security of the Petitioner is in default, I am satisfied that there is no obligation on the Petitioner to provide partial discharges even if the net sale prices agreed to between Chandler and/or Cook and the Petitioner were being met.

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

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

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

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

Disclaiming Contracts Relating to the Richmond Project

87 The question which then arises is whether the Receiver and Manager should be allowed to disclaim the Contracts relating to the Richmond Project. Regarding the Contract of Ms. Chao-Dietrich relating to Strata Lot 46, I am satisfied that it is in order for the Receiver and Manager to disclaim the Contract. First, the considerable discount of $340,800.00 that was made available to Ms. Chao-Dietrich for what was described as payments: "... by way of set off of various commissions and interest stated to be owed by the vendor to the purchaser" would create a significant preference to Ms. Chao-Dietrich if the Contract was allowed to stand. Second, the "analysis" of MPC even though flawed allows me to conclude that a similar unit in the floor below Strata Lot 46 sold for $283,620.00. Third, the proposed price to Ms. Chao-Dietrich is well below the net sale price agreed to between

the Petitioner and Chandler which I take to be an indication of the market value at the time. Fourth, the inability to provide a discharge of the security against Strata Lot 46. All of those factors allow me to conclude that the Receiver and Manager is not acting arbitrarily in the exercise of its discretion to request a Direction that it be at liberty to disclaim this Contract. I provide that Direction to the Receiver and Manager. If Ms. Chao-Dietrich does not volunteer to remove the Certificate of Pending Litigation filed against Strata Lot 46 in the Richmond Project, then I will hear any application on behalf of the Receiver and Manager that the Certificate of Pending Litigation be discharged from title.

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

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

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

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

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

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

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

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

> Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available. The guideline proposed by Estey J. in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, with respect to contracts involving chattels is equally applicable to real property. At p. 668, Estey J. stated:
>
> > Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

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

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

The Application of Crestmark

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

Costs

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

Order accordingly.

Footnotes

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

Court of Appeal File No. C68751
Court File No. CV-20-00643021-00CL

C&K MORTGAGES SERVICES INC. and **CAMILLA COURT HOMES INC. and ELITE HOMES INC.**

Applicant (Respondent in Appeal) Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF ROSEN GOLDBERG INC.

BLANEY MCMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Eric Golden LSUC #38239M
(416) 593-3927 (Tel)
(416) 593-5437 (Fax)
Email: egolden@blaney.com

Chad Kopach LSUC #48048G
(416) 593-2985 (Tel)
(416) 593-5437 (Fax)
Email: ckopach@blaney.com

Lawyers for the Receiver/Respondent,
Rosen Goldberg Inc.