ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

Estate/Court File No.: 31-2481648
Estate/Court File No.: 31-2481649

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH ENVIRONMENTAL PRODUCTS, A GENERAL PARTNERSHIP ESTABLISHED IN THE PROVINCE OF ONTARIO, AND GREEN EARTH STORES LTD., A CORPORATION INCORPORATED IN THE PROVINCE OF ONTARIO

Applicants

BOOK OF AUTHORITIES OF THE MOVING PARTY (RETURNABLE JUNE 13, 2019)

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TAB 1

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Most Negative Treatment: Distinguished
Most Recent Distinguished: M & K Construction Ltd. v. Kingdom Covenant International | 2015 ONSC 2241, 2015 CarswellOnt 5609, 252 A.C.W.S. (3d) 642 | (Ont. S.C.J., Apr 20, 2015)

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996
Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.
J. Gregory Murdoch, for Freure Group (all defendants).
John Lancaster, for Boehmers, a Division of St. Lawrence Cement.
Robb English, for Toronto-Dominion Bank.
William T. Houston, for Canada Trust

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.i General principles

Headnote

Receivers --- Appointment — Application for appointment — General

Receivers — Appointment — Application for appointment — Under s. 101 of Courts of Justice Act court to consider whether "just and convenient" to appoint receiver or receiver-manager — Fact that creditor has right under security to appoint receiver being important factor to be considered — Court appointment possibly allowing privately appointed receiver to carry out duties more efficiently — Courts of Justice Act, R.S.O. 1990, c. C.43.

The debtor companies owed a bank in excess of $13,200,000 on four mortgages relating to five properties. Three of the mortgages had matured but had not been repaid. The fourth had not yet matured, but was in default. The bank applied for summary judgment on the covenants on the mortgages and for the appointment of a receiver-manager for the five properties. The debtor companies argued that the bank had agreed to forbear for six months to a year and, therefore, the moneys were not due and owing at the commencement of the proceedings. They also argued that the bank could effectively exercise its private remedies and that the court should not intervene to grant the extraordinary remedy of appointing a receiver when the bank had not yet done so.

Held:

The motions were granted.

The debtor companies' arguments with respect to the motion for summary judgment were without merit. The principal of the companies admitted that he was well aware that the bank had not waived its rights under its security or to enforce its security. There was no triable issue.

Under s. 101 of the *Courts of Justice Act* (Ont.), the court has the power to appoint a receiver or receiver-manager when it is "just and convenient" to do so. The fact that a creditor has a right under its security to appoint a receiver is an important factor to be considered. Also to be considered is whether a court appointment is necessary to enable the privately appointed receiver-manager to carry out its duties more efficiently. A creditor need not prove that it will suffer irreparable harm if no appointment is made. Where the creditor seeking the appointment has the right under its security to appoint a receiver-manager itself, the remedy is less "extraordinary" in nature. Determining whether the appointment is "just and convenient" becomes a question of whether it is more in the interests of the parties to have the court appoint the receiver. In the case at bar, it was appropriate to appoint a receiver-manager. The debtor companies had been attempting to refinance for a year and a half without success. Further, the parties could not agree on the best approach for marketing the properties. A court-appointed receiver with a mandate to develop a marketing plan could resolve that impasse, whereas a privately appointed receiver could not likely do so without further litigation. Given, however, that there seemed to be a possibility of a refinancing agreement in the near future, the appointment was postponed for three weeks.

Table of Authorities

Cases considered:

Confederation Trust Co. v. Dentbram Developments Ltd. (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.) — *referred to*

Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, 20 R.P.R. (2d) 49 (note), 83 D.L.R. (4th) 734, 1 C.P.C. (3d) 248, *(*sub nom. *Ungerman (Irving) Ltd. v. Galanis)* 50 O.A.C. 176 (C.A.) — *referred to*

Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168, 33 C.P.R. (3d) 515 (Gen. Div.) — *referred to*

Royal Trust Corp. of Canada v. DQ Plaza Holdings Ltd. (1984), 54 C.B.R. (N.S.) 18, 36 Sask. R. 84 (Q.B.) — *referred to*

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]) — *referred to*

Third Generation Realty Ltd. v. Twigg Holdings Ltd. (1991), 6 C.P.C. (3d) 366 (Ont. Gen. Div.) — *referred to*

Statutes considered:

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

s. 101*referred to*

Rules considered:

Ontario, Rules of Civil Procedure

r. 20.01*referred to*

r. 20.04*referred to*

MOTION for summary judgment on covenant on mortgages; MOTION for appointment of receiver-manager.

***Blair J.*:**

1 There are two companion motions here, namely:

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

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

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of $850,000. The Bank is owed in excess of $13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

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

5 On his cross-examination, Mr. Freure admitted:

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

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the $13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

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

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

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

Receiver/Manager

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

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

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

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

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

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 1/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

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

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

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

Motions granted.

TAB 2

2013 ONSC 7101, 2013 CarswellOnt 15647, 245 A.C.W.S. (3d) 87, 7 C.B.R. (6th) 232

2013 ONSC 7101
Ontario Superior Court of Justice [Commercial List]

DeGroote v. DC Entertainment Corp.

2013 CarswellOnt 15647, 2013 ONSC 7101, 245 A.C.W.S. (3d) 87, 7 C.B.R. (6th) 232

Michael G. DeGroote Plaintiff and DC Entertainment Corporation, Don Carbone Entertainment Inc. Dream Corporation Inc., King Software Solutions Corp, Dream Casino Corporation S.R.L., Dream Software Solutions Inc., Dream Kiosk Solutions Inc., Antonio Carbone, Francesco Carbone and Andrew Pajak Defendants

Newbould J.

Heard: November 13, 2013
Judgment: November 18, 2013*
Docket: CV-12-9886-00CL

Counsel: W. Niels Ortved, Eric S. Block, Bryan Shaw for Plaintiff
Maurice J. Neirinck for DC Entertainment Corporation, King Software Solutions Corp., Dream Corporation Inc., Dream Casino Corporation, S.R.L., Dream Software Solutions Inc., Antonio Carbone and Francesco Carbone
Ronald Flom, Robert Trifts for Don Carbone Entertainment Inc., Dream Kiosk Solutions Inc., and Andrew Pajak

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.C Conduct of parties

Debtors and creditors
VII Receivers
VII.4 Order appointing receiver

Headnote

Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Conduct of parties
Plaintiff loaned USD $111,924,208 to corporate defendants for casinos and other gambling enterprises in Jamaica and Dominican Republic using electronic equipment manufactured in Ontario — Of that amount, $107,331,167 remained unpaid — Plaintiff had been requesting to review books and records of corporate defendants since May 2012 and each of his many requests had been met with excuses and delay — Between May 2012 and October 18 2012, defendants did not deliver any monthly revenue reports for casinos in Dominican Republic for which reports had previously been delivered and since that time, delivery of monthly revenue reports had been sporadic and incomplete — Plaintiff brought motion for order appointing receiver over all books and records of corporate defendants — Motion granted — Plaintiff was entitled to appointment of receiver — There were no preconditions for exercise of court's discretion to appoint receiver — Plaintiff established strong case of fraud, with reporting of false financial information regarding Jamaican contract but one example — Apparent misuse

of some $50 million lent under Dominican Republic contract by lending it to company unknown to plaintiff without his knowledge, contrary to agreement, was another example — It was not reasonable to wait 30 days in this case as there was little faith in defendants doing what needed to be done to have records produced, as history of matter belied any suggestion of good faith on their part.

Debtors and creditors --- Receivers — Order appointing receiver
Plaintiff loaned USD $111,924,208 to corporate defendants for casinos and other gambling enterprises in Jamaica and Dominican Republic using electronic equipment manufactured in Ontario — Of that amount, $107,331,167 remained unpaid — Plaintiff had been requesting to review books and records of corporate defendants since May 2012 and each of his many requests had been met with excuses and delay — Between May 2012 and October 18 2012, defendants did not deliver any monthly revenue reports for casinos in Dominican Republic for which reports had previously been delivered and since that time, delivery of monthly revenue reports had been sporadic and incomplete — Plaintiff brought motion for order appointing receiver over all books and records of corporate defendants — Motion granted — Plaintiff was entitled to appointment of receiver — There were no preconditions for exercise of court's discretion to appoint receiver — Plaintiff established strong case of fraud, with reporting of false financial information regarding Jamaican contract, which was but one example — Another example was apparent misuse of some $50 million lent under Dominican Republic contract by lending it to company unknown to plaintiff without his knowledge, contrary to agreement — It was not reasonable to wait 30 days in this case as there was little faith in defendants doing what needed to be done to have records produced, as history of matter belied any suggestion of good faith on their part.

Table of Authorities

Cases considered by *Newbould J.*:

Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc. (2002), 37 C.B.R. (4th) 277, 2002 CarswellOnt 3198 (Ont. S.C.J. [Commercial List]) — referred to

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — referred to

Schembri v. Way (2010), 76 B.L.R. (4th) 147, 2010 CarswellOnt 8675, 2010 ONSC 5176 (Ont. S.C.J.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

MOTION by plaintiff for order appointing receiver over all books and records of corporate defendants.

***Newbould J.*:**

1 The plaintiff moves for an order appointing a receiver over all of the books and records of the corporate defendants. In their factum, the defendants represented by Mr. Neirinck opposed outright any such order. However in argument their position softened. The defendants represented by Mr. Flom oppose the order sought.

Factual background

2 Mr. DeGroote has loaned USD $111,924,208 to certain of the corporate defendants for casinos and other gambling enterprises in Jamaica and the Dominican Republic using electronic equipment manufactured in Ontario. Of this amount, $107,331,167 (96%) remains unpaid.

3 More particularly, Mr. DeGroote advanced loans for specific purposes to three of the corporate defendants pursuant to three written agreements as follows:

(a) The "Jamaican Contract" — DC Entertainment is the borrower under a Credit Facility Agreement dated

November 29, 2010. DC Entertainment borrowed $5,000,000 from Mr. DeGroote for a casino in Jamaica called the Vegas Flamingo, of which $4,306,573 (86%) remains unpaid.

(b) The "Dominican Republic Contract" — Dream is the borrower under a Credit Facility Agreement dated August 22, 2011, as amended and/or restated by written signed instruments between the parties. Dream has borrowed $91,689,000 from Mr. DeGroote for various casinos, discos, sports betting, and lotto facilities in the Dominican Republic, of which $87,789,386 (96%) remains unpaid.

(c) The "VLMT Contract" — Dream Software is the borrower under a Credit Facility Agreement dated November 18, 2011. Dream Software has borrowed $15,235,208 from Mr. DeGroote for various in-room hotel gaming operations in the Dominican Republic, of which $15,235,208 (100%) remains unpaid.

4 Each Agreement provides that the borrower shall make debt repayments and pay interest on the loans monthly, including interest on overdue interest according to rates specified in the Agreements.

5 Article 7.3 of each Agreement provides, in respect of each casino or gaming facility for which funds have been advanced by Mr. DeGroote, that the borrower shall:

a. pay to Mr. DeGroote a percentage share of the profits in respect of the Funded Facility 30 days after the end of the month in which the profit was earned;

b. deliver a written report detailing the profit payment each month; and

c. deliver, within 120 days of the end of each fiscal year of the borrower, audited financial statements in respect of the Funded Facilities.

6 Article 7.3 of the Agreements provides:

... The Lender shall at its own expense, on THIRTY (30) DAYS' notice be entitled to review the books and records of the Borrower in respect of the funded Facilities. The Borrower agrees that its books and records shall be maintained in accordance with accounting principles generally accepted in Canada ("GAAP"). [Underlining added.]

7 Article 9.1(f) of the VLMT Contract provides:

... the Lender or its agents shall have free and full access at all times during normal business hours upon thirty (30) days notice to examine and copy them. This right of access of inspection shall include the right to examine as provided herein, all agreements, contracts, license agreements, leases and other documents which are the subject matter of this Agreement and the Facilities.

8 Mr. DeGroote claims that the defendants have perpetrated fraud and breached their obligations under the loan agreements.

9 On December 1, 2010, Mr. DeGroote advanced $5,000,000 to DC Entertainment pursuant to the Jamaican Contract in respect of the Vegas Flamingo. In August 2011, Mr. DeGroote stopped receiving monthly profits, monthly profit reports, and debt repayments for the Vegas Flamingo, contrary to art. 7.3 of the Jamaican Contract.

10 Mr. DeGroote's power of attorney and senior advisor, James Watt, made inquiries with the Jamaican Betting, Gaming and Lottery Commission (the "Jamaican Commission"). The Jamaica Commission is a statutory body which regulates and controls the operations of betting gaming and the conduct of lotteries in Jamaica. The Jamaican Commission provided the following information in response:

(i) the Vegas Flamingo was closed as of December 20, 2011 or earlier;

(ii) the Jamaican Commission was not previously aware of any agreement between the entity that held the gaming licence for the Vegas Flamingo (CTS Associates (Jamaica) Ltd. ("CTS")) and DC Entertainment;

(iii) the Jamaican Commission never had any dealings with DC Entertainment, Antonio or Francesco;

(iv) a website that had been operated by DC Entertainment was shut down and a notice posted that the site was closed by the U.S. Federal Bureau of Investigations and the Department of Homeland Security; and

(v) the Jamaican Commission had no intention of re-licensing the technology for the gaming machines that had been used in the Vegas Flamingo.

11 The Jamaican Commission provided records of the gross sales and profits of the Vegas Flamingo to Mr. DeGroote's Jamaican lawyers. The records show that, between December 2010 and September 2011, the gross profits reported to the Jamaican Commission were 8% of the gross profits reported to Mr. DeGroote by the defendants in their monthly profit reports:

	Gross Sales	***Gross Profit***
Reported to Jamaican Commission	$823,745	$267,117
Reported to Mr. DeGroote	$6,025,286	$3,423,145
Variance	$5,201,541	$3,156,028
Figures Reported to Jamaican Commission as a Percentage of Figures Reported to Mr. DeGroote	14%	8%

12 Mr. DeGroote was never provided with copies of the bank statements for the Vegas Flamingo or any books and records of DC Entertainment.

13 In November 2012, in response to Mr. DeGroote's motion for access to the books and records of the corporate defendants, Mr. DeGroote was told, for the first time, that the books and records relating to the Vegas Flamingo had disappeared. Antonio admitted that DC Entertainment was contractually responsible for record-keeping and banking with respect to the revenues and expenses relating to the operation of the 149 gaming machines said to have been installed at the Vegas Flamingo. However, he testified that one Lancelot James ended up doing the recordkeeping, banking and reporting on DC Entertainment's behalf. Antonio testified that every single record relating to the Vegas Flamingo was stolen and destroyed by Mr. James; not a single piece of paper nor a byte of electronic data remain. According to Antonio, all transactions at the Vegas Flamingo were done in cash and all of the money was kept in a safe. The cash (in excess of USD $4,000,000.00) was said to have been stolen by Mr. James under cover of night. Antonio also stated in his cross-examination that the alleged theft of the money was never reported to the Jamaica police.

14 Between April 2011 and May 2012, Mr. DeGroote advanced $91,689,000 to Dream pursuant to the Dominican Republic Contract in specific tranches and for purchases of specific entities pursuant to the terms of that agreement. All funds advanced by Mr. DeGroote were made either to Don Carbone Entertainment or to the trust accounts of Bianchi Presta LLP or Austin Persico, lawyers acting for Dream.

15 From June 2011 to March 2012, Mr. DeGroote received what were purported to be monthly profit payments and revenue reports for certain casinos in the Dominican Republic.

16 In April 2012, Dream provided monthly revenue reports that differed from monthly revenue reports previously delivered. Specifically, Dream reduced Mr. DeGroote's profit by increasing operating costs and deducting Dream's repayment of Dream's shareholder loans by $107,916 for each of the 10 reporting casinos for a total of $1,079,160.

17 Between May 2012 and October 18, 2012, Dream did not deliver any monthly revenue reports for the casinos in the Dominican Republic for which reports had previously been delivered. Since that time, delivery of monthly revenue reports

has been sporadic and incomplete.

18 The statement of claim in this matter was served on October 16, 2012. Two days later, Dream's counsel sent revised monthly revenue reports up to and including April 2012 and monthly revenue reports from May through August 2012 for certain casinos. According to Dream's counsel, Mr. DeGroote was "overpaid on account of (i) profit and (ii) repayment of loans" and "operating costs... were inadvertently not included in the previously issued revenue reports for the months up to and including March 2012".

19 From May 2012 onward, Mr. DeGroote was not provided with any monthly profits or debt repayments on the assertion that he had previously been overpaid.

20 While Mr. DeGroote has received some revenue reports for certain Dominican Republic casinos and discos, he has not received any monthly reports for several casinos and sports betting and lotto operations that he has funded. The facilities for which he has received no information at all represent $51,781,000 (56%) of the total funds advanced pursuant to the Dominican Republic Contract. In other words, Mr. DeGroote has received absolutely no records at all for approximately $52,000,000 of his investment.

21 $46,600,000 of the funds for which Mr. DeGroote has received no information are with respect to facilities referred to in Mr. Carbone's affidavits in response to this motion as "Naco," "Merengue," and "Virgilio"/"Vilorio." Mr. DeGroote first learned that his funds had been invested in Virgilio and Vilorio upon reading Mr. Carbone's affidavits delivered in response to this motion. Mr. DeGroote had understood that he was investing in businesses known as "King" and "King Lotto," for which he received executed notes and guarantees. Mr. DeGroote does not know what happened to King or King Lotto, or how the new entities came to be.

22 Mr. DeGroote has been requesting to review the books and records of Dream since May 2012. Each of his many requests has been met with excuses and delay. For example, by letter dated June 5, 2012, the defendants' counsel advised that the Defendants did not agree to a proposed review by PricewaterhouseCoopers, citing concerns about proprietary information and the fact that his clients had an "extreme travel and work schedule." After this action was commenced, scheduled reviews of the books and records of Dream and Dream Software were called off by the defendants on short notice on four successive occasions. It is said by the defendant Antonio Carbone that there was good reason to call these off because of concerns regarding Mr. DeGroote and threats made. Virtually all of the evidence of that is hearsay once or twice over. It is all denied by Mr. DeGroote.

23 The VLMT Contract provided that Mr. DeGroote would loan up to $28,138,000 to Dream Software for in-room hotel entertainment and gaming units for use in hotels in the Dominican Republic in return for the repayment of principal, interest and a share of the profits for each Hotel VLMT Operation.

24 In November 2011, Mr. DeGroote loaned $15,235,208 to Dream Software in respect of VLMTs. Mr. DeGroote has received no interest, principal or profit payments on his investment.

25 Mr. DeGroote has not received any profits or monthly reports under the VLMT Contract.

26 Mr. DeGroote's requests to examine the books and records of the corporate Defendants continued throughout 2012. In a with prejudice letter from his lawyers dated August 10, 2012, Mr. DeGroote gave notice to inspect the books and records of DC Entertainment and Dream. In his statement of claim issued on October 19, 2012, Mr. DeGroote sought an interim, interlocutory, and permanent order:

> ... requiring the defendants to forthwith deliver, or cause to be delivered, the books and records of DC Entertainment, Don Carbone Entertainment, King Software, Dream, Dream Casino, Dream Software, Dream Kiosk and any affiliated or associated companies.

27 The defendants continued to refuse to provide access to the books and records after the action was commenced. As a result, Mr. DeGroote brought a motion, which was heard by Wilton-Siegel J. on December 21, 2012.

28 In relation to the Dominican Republic Contract, Wilton-Siegel J. held that section 7.3 provides Mr. DeGroote with a right of access to the books and records at any time. He rejected the defendants' argument that the review should occur only after the audited financial statements had been delivered. In relation to the Dream Software Agreement, Wilton-Siegel J. held that section 9.1(f) provides an independent and general right to review the books and records of Dream Software and its affiliates.

29 The defendants then engaged in what appears to have been an obvious tactical manoeuvre to delay. On January 4, 2013 they appealed the order of Wilton-Siegel J. to the Divisional Court. The motion for leave was scheduled to be heard on January 31, 2013 but on January 23, 2013 they abandoned their motion for leave. On January 28, 2013, the last day of the 30-day appeal period, the defendants delivered a notice of appeal to the Court of Appeal. On February 6, 2013, Mr. DeGroote brought a motion before the Court of Appeal seeking to quash the appeal.

30 The next day, on February 7, 2013, Mr. DeGroote's counsel wrote to the defendants' counsel and advised that Mr. DeGroote's accountants and lawyers would attend at the offices of Dream and Dream Software on February 15, 2013 to review the books and records. Defendants' counsel refused to schedule the review of the books and records "for several reasons including the outstanding Appeal," and directing that "no one should travel to the Dominican Republic" on February 15, 2013.

31 The motion to quash the appeal was scheduled to be heard on March 26, 2013. On March 18, 2013, the defendants wholly abandoned their appeal to the Court of Appeal.

32 After the defendants abandoned their appeal, Mr. DeGroote's counsel once again renewed efforts to review of the books and records in the Dominican Republic. The review was scheduled on four separate occasions, only to be called off at the eleventh hour each time. The Carbone defendants assert that there was good reason to call these off, allegedly because Mr. DeGroote was trying to take over Dream. This is all based on hearsay evidence that cannot be given credit on this motion.

33 There is evidence, which Mr. DeGroote acknowledges, that he spoke to someone about obtaining evidence and paying the deponents for the evidence. He says, and there is no evidence to contradict it, that he asked the person he was dealing with, a disbarred lawyer whom the Carbones had earlier hired, if that would be legal. He was told probably not. He then obtained advice from a Bermuda lawyer that it would be illegal and he then said he was not going to follow through with it. He acknowledges that he should not have started down that road. I would not in the circumstances of this case deny any relief because of this. Mr. DeGroote is 80 years of age and a huge amount of money appears to have been misused, and it is understandable that without any reports that he was entitled to, he would try to obtain evidence from someone who would know the situation in the Dominican Republic.

34 This motion was originally returnable on August 2, 2013. Prior to the motion, counsel to the Carbone defendants agreed to make the books and records available for review in the Dominican Republic. On that basis, Mr. DeGroote accepted the offer and agreed to adjourn this motion and the review was scheduled to commence on September 9, 2013.

35 The books and records were not made available for review on September 9, 2013 as promised. On September 4, 2013, counsel to the Carbone defendants advised that the review could not proceed due to "ongoing serious security concerns". Counsel to the Carbone defendants agreed to make the books and records available for review at the offices of Collins Barrow LLP, their corporate auditors, in Vaughan, Ontario instead of the Dominican Republic. Counsel further advised that there would be fifty-five banker's boxes of documentation available for review commencing on September 16, 2013.

36 The documents were not made available for review at Collins Barrow on September 16, 2013 as promised.

37 Mr. DeGroote has not received audited financial statements for DC Entertainment in respect of the $5,000,000 loan advanced pursuant to the Jamaican Contract. According to Antonio, all books and records for the Vegas Flamingo were stolen. According to the incredible explanation given by Antonio, Mr. DeGroote will never receive any audited financial statements for DC Entertainment. I expect a receiver would try to determine whether the books and records exist somewhere.

38 One of the reasons given for delaying and denying access to the books and records was that Dream was busy preparing

its audited financial statements. The defendants have repeatedly extended the supposed deadlines for completion of the audit of Dream.

39 Dream purported to change its year-end on multiple occasions in 2012:

> (1) on May 9, 2012, Antonio advised that Dream's year-end would be May 31, 2012;
>
> (2) on August 20, 2012, Mr. Persico wrote to Mr. DeGroote's counsel and advised that the "deemed fiscal year-end for [Dream] is set as August 31"; and
>
> (3) on October 12, 2012, Dream's counsel advised that "Dream's first fiscal year end has been selected as December 31, 2012 based on professional advice from its chartered accountants... Baker, Tilley in Santo Domingo".

40 In his affidavit sworn November 26, 2012 in response to the access motion, Antonio swore that they had a firm commitment from Dream's chartered accountants for the completion of the audited financial statements for the funded facilities by March 15, 2013. Dream did not deliver audited financial statements by March 15, 2013. On March 18, 2013, counsel to the Carbone defendants advised that audited financial statements would be delivered later in March. Dream did not deliver audited financial statements by the end of March 2013.

41 On April 11, 2013, the parties attended at a 9:30 a.m. appointment before Wilton-Siegel J. Pursuant to his endorsement of that date, Dream was obligated to deliver its audited financial statements by April 19, 2013. Dream failed to do so. At 4:10 p.m. on April 19, 2013, counsel to the Carbone defendants advised Mr. DeGroote's counsel that Dream's auditors, Collins Barrow, would release its audited financial statements on Monday, April 22, 2013, and that he would forward them upon receipt.

42 The Carbone Defendants provided draft financial statements for Dream on April 22 and May 9, 2013. The draft statements contain significant financial and accounting irregularities.

43 Mr. DeGroote has not received any financial statements for Dream Software.

44 Antonio admits that audited financial statements for Dream Software have not yet been completed, despite the passage of over two years since Mr. DeGroote advanced approximately $15.2 million under the VLMT Contract. Antonio stated that the audited financial statements for Dream Software are "far less important" than those for Dream. He asserts that the business is not yet operating and that Dream's supposedly extensive and profitable operations have necessitated a complicated, expensive and time-consuming audit. He later stated that the preparation and completion of audited statements for Dream Software was "forgotten about" as a result of the alleged conspiracy and sabotage campaign supposedly carried out by Mr. DeGroote.

45 In his affidavit sworn July 17, 2013, Mr. Carbone testified that since recently being served with the plaintiff's motion record, he had requested that the Dream Software audited financial statements be prepared and completed and said that they would be released as soon as they were in hand. Mr. DeGroote has still not received any audited financial statements for Dream Software.

46 On April 11, 2013, Wilton-Siegel J. ordered that the defendants produce by May 3, 2013 a long list of documents. The defendants failed to provide this documentation by May 3, 2013. Two and a half months later, some of the documents were produced, being the formal licenses for the casinos operated by Dream. However, these were inconsequential and did nothing to indicate where Mr. DeGroote's money ended up.

47 The Carbone defendants agreed to make the books and records available for review at Collins Barrow in Vaughan on September 16, 2013. They indicated that fifty five boxes of records would be sent to Toronto for review. The first tranche of documents, totalling only eight boxes, were available for review at Collins Barrow's offices on October 31, 2013, less than two weeks before the return of this motion. To date, only nine boxes in total have been made available.

48 Mr. DeGroote retained Gary Moulton, a managing director of Duff & Phelps Canada Limited. Mr. Moulton is a chartered accountant with a specialty designation in investigative and forensic accounting from the Canadian Institute of Chartered Accountants. He is a Fellow of the Institute of Chartered Accountants of Ontario and has practised in the area of forensic and investigative accounting for over 30 years.

49 Mr. Moulton has reviewed the draft financial statements for Dream as well as the other information made available to Mr. DeGroote. Mr. Moulton concludes that:

> 1. Mr. DeGroote's loans were not used in a manner consistent with the Dominican Republic Contract and the underlying descriptions in the promissory notes. Mr. Moulton was unable to conclude how the loans were invested on a property-by-property basis or whether the funds were used for the specific properties for which they were intended.
>
> 2. The draft audited financial statements do not enable verification of the specific casino licenses or the valuation of the assets listed on Dream's balance sheet.
>
> 3. Only $41,543,872 of the proceeds from Mr. DeGroote's loans to Dream under the Dominican Republic Contract were invested in casino licenses and property and equipment. There is approximately $50,145,378 from Mr. DeGroote's loans to Dream remaining after taking into account the funding of casino licenses and property and equipment shown on the draft financial statements.
>
> 4. Approximately $48,634,000.00 of the monies advanced by Mr. DeGroote to Dream pursuant to the Dominican Republic Contract was lent by Dream to an entity called Empresas de Negocio BSE, SRL, a related party entity previously unknown to Mr. DeGroote. Mr. Moulton states that he had no "details regarding the nature of business conducted by [Empresas], the quality of the underlying security of the assets, or the purpose or use of the funds invested by Dream with [Empresas]".
>
> 5. Approximately $4,873,333 of Mr. DeGroote's money was used by Dream to repay a related party entity (Dream Kiosk Inc. in St. Lucia) for an equipment loan.
>
> 6. The draft statements contain numerous accounting irregularities, including the failure to disclose contingent liabilities and the failure to disclose sufficient information about large related-party transactions totalling $64,170,930.

50 Mr. Moulton has reviewed the material in the nine boxes provided to date and advises that the contents of the few boxes received contain mostly information related to the day-to-day operational data of various casinos operated by Dream and limited documentation relating to capital expenditures made by the casinos, consisting of receipts signed by the provider of services. The material made available for review falls far below the amount of information requested to date. According to Mr. Moulton the information and material provided is insufficient to enable the determination of the accuracy of the monthly reports provided, or the accuracy of the 2012 Draft Audited Financial Statements.

Analysis

51 Section 101 of the *Courts of Justice Act* provides that a court may appoint a receiver where it appears to a judge of the court to be just or convenient to do so.

52 A court must have regard to the circumstances of the case and the rights of the parties. In this case, equity cries out for the need to have all books and records produced now. The defendants have appeared to have done their best to prevent this from happening. It is Mr. DeGroote who is suffering the prejudice by this. A receiver can be appointed for the purpose of gaining access to the books and records of a company. See *Great Atlantic & Pacific Co. of Canada Ltd. v. 1167970 Ontario Inc.*, [2002] O.J. No. 3717 (Ont. S.C.J. [Commercial List]) and *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.) at paras. 14-17. See also *Schembri v. Way*, [2010] O.J. No. 4873 (Ont. S.C.J.) at paras. 12 and 18-19

53 There are no pre-conditions for the exercise of a court's discretion to appoint a receiver. Each case depends on its own facts. While proving a strong case in fraud can obviously be of great significance in establishing the need for a receiver, it is in my view not a *sine qua non*. Having said that, in this case Mr. DeGroote has established a strong case in fraud. The reporting of false financial information regarding the Jamaican contract is but one example. The apparent misuse of some $50 million lent under the Dominican Republic contract by lending it to a company unknown to Mr. DeGroote without his knowledge, contrary to the agreement, is another example. There are very serious breaches of the agreements in the failure to produce financial information that the defendants appear to have countenanced, if not actively sought.

54 Mr. Neirinck in opening his argument on behalf of the Carbone defendants acknowledged that there was no dispute regarding the history of the matter and that Mr. DeGroote had a right to financial information which had not occurred. He said however that the order sought was premature. His position was that his clients are trying to get the balance of the 55 boxes delivered to Toronto and that if this could not happen within 30 days, it would be appropriate to make the order sought by Mr. DeGroote. He said his clients had now been locked out of the premises in the Dominican Republic by Mr. Pajak, with whom they are in litigation regarding the shares of Dream, but they were taking some legal steps in the Dominican Republic, the details of which he could not say, to try to get back in.

55 I do not think it reasonable in this case to wait for 30 days. I have little faith in the Carbones doing what needs to be done to have records produced. The history of the matter belies any suggestion of good faith on their part.

56 Moreover, there are very important documents that are not in the 55 boxes. Dream's Chief Financial Officer, Mr. Ed Kremblewski, advised Mr. Moulton that the corporate documents relating to the purchase agreements for bancas, lottos and casinos are in the possession of Mr. Austin Persico and not available to either Mr. Kremblewski or Collins Barrow. These very basic documents have not been produced. They were the subject of the order of Wilton-Siegel J. which was ignored.

57 As well, Mr. Persico's trust records of the money advanced by Mr. DeGroote for the Dominican Republic and VMLT contracts are of crucial importance to understand what happened to the money. Mr. Persico was the solicitor for Dream and the money advanced by Mr. DeGroote under those contracts went to Mr. Persico. It is quite clear that Mr. Persico has been taking his instructions from the Carbones who have operated the business. In the *Carbone v. Pajak* action, in which competing applications were heard by me last week immediately following the hearing of this motion, documents disclosed made clear that Mr. Persico is taking instructions from the Carbones and that he has been evading service of an appointment to be examined.

58 Mr. Neirinck also asserted that some of the companies over which the receiver is sought were not parties to the lending agreements other than being guarantors. I think this not important. It is very clear that all of the companies are associated and the businesses are interwoven, with money flowing to some of them and the officers and directors being common to all of them, either the Carbones or Mr. Pajak.

59 The draft order provides that copies of any records obtained by the receiver are to be provided to any of the defendants as their cost. Mr. Neirinck objected to his clients having to bear the copying costs. In reply, Mr. Ortved said that his client would pay the photocopying costs.

60 Mr. Flom for the Pajak defendants contended that there is no basis for an order regarding the Pajak companies, being Don Carbone Entertainment Inc. and Dream Kiosk Solutions Inc. However, both of those companies were involved in the movement of funds. The $5 million lent by Mr. DeGroote on the Jamaican contract was paid to Don Carbone Entertainment and Dream Kiosk Solutions routed some money to Mr. DeGroote. It is clear that these companies were involved and that their books and records should be produced.

61 Mr. Flom asserted that Mr. Pajak had given what was asked and thus there was no basis for an order over these two corporations. However, he could not say if Mr. Pajak could deliver the documents of those corporations. On his cross-examination, Mr. Pajak said he didn't have the records of those corporations as the offices of Dream had been ransacked. Moreover, the documentation makes clear that there were requests of the Pajak defendants made to their then solicitor Mr. Neirinck that went unanswered.

Conclusion

62 The plaintiff is entitled to the appointment of a receiver in the form included at Tab F of his motion Record, volume IV, with the deletion from paragraph 3 (g) the words “”and subject to payments of the Receiver’s associated costs” and the addition in paragraph 11 of the words “subject to any assessment” in the first line after the word “that”.

63 If there are any issues raised regarding privileged documents, they may be addressed at a 9:30 am appointment and, if necessary, by way of a motion.

64 The plaintiff is entitled to his costs of this motion. If costs cannot be agreed, brief written submissions along with a proper cost outline can be made within 10 days and brief written reply submissions can be made within a further 10 days.

Motion granted.

Footnotes

[*] Additional reasons at *Degroote v. DC Entertainment Corp.* (2014), 2014 CarswellOnt 23, 2014 ONSC 63 (Ont. S.C.J. [Commercial List]).

TAB 3

2014 ONSC 5205, 2014 CarswellOnt 12419, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

2014 ONSC 5205
Ontario Superior Court of Justice [Commercial List]

RMB Australia Holdings Ltd. v. Seafield Resources Ltd.

2014 CarswellOnt 12419, 2014 ONSC 5205, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

RMB Australia Holdings Limited, Applicant and Seafield Resources Ltd., Respondent

Newbould J.

Heard: September 9, 2014
Judgment: September 10, 2014
Docket: CV-14-10686-00CL

Counsel: Maria Konyukhova, Yannick Katirai for Applicant
Wael Rostom for KPMG

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Applicant Australian company lent funds to respondent Ontario company under Facility Agreement (FA) — Parties to FA included mining company in Colombia owned by respondent — All amounts under FA became payable upon default — Applicant and respondent entered into general security agreement under which respondent charged all its assets — Parties and mining company entered into share pledge agreement which provided that, in event of default under FA, applicant had right to appoint receiver — In June 2014, respondent had insufficient funds to make interest payment, triggering default — Applicant demanded payment of outstanding amounts under FA, gave notice of intention to enforce security, began enforcing its pledge of shares in mining company, and replaced mining company's board of directors — Mining company's ousted CEO refused to relinquish control and sought creditor protection in Colombia — Applicant applied to appoint receiver over respondent's assets — Application granted — It was just and convenient to appoint receiver — In accordance with FA, respondent's default granted applicant right to seek appointment of receiver — Appointment of receiver was necessary to stabilize corporate governance of mining company, as respondent's wholly-owned subsidiary and its major asset — Failure to obtain additional financing for respondent and mining company might result in significant deterioration in value — Applicant was prepared to advance funds to receiver to fund receivership and mining company's liability, thereby preserving mining company's enterprise value.

Table of Authorities

Cases considered by *Newbould J.*:

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) — considered

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

s. 101 — considered

APPLICATION to appoint receiver over respondent company's assets.

***Newbould J.*:**

1 On September 9, 2014 I granted a receiving order for brief reasons to follow. These are my reasons.

2 The applicant ("RMB") is an Australian company with its head office is in Sydney, New South Wales. RMB is the lender to the respondent ("Seafield") under a Facility Agreement and is a first ranking secured creditor of Seafield.

3 Seafield is an Ontario corporation with its head office in Toronto and is a reporting issuer listed on the Toronto Stock Exchange. It is an exploration and pre-development-stage mining company focused on acquiring, exploring and developing properties for gold mining. Seafield directly or indirectly owns mining properties or interests in Colombia, Mexico and Ontario.

4 Although Seafield was served with the material on this application, neither it nor its counsel appeared to contest the application.

5 Seafield wholly owns Minera Seafield S.A.S., a corporation existing under the laws of Colombia with its head office in Medellín, Colombia. Minera owns a number of mining titles and surface rights in Colombia, through which it controls three main mineral exploration and mining development properties. One of the properties is a 124 hectare parcel of land subject to a mineral exploitation contract granted by the Colombian Ministry of Mines (the Miraflores Property).

6 Aside from a small underground mine operated by local artisanal miners, the Columbian properties are non-operational and do not generate revenue for Seafield. Minera relies solely on Seafield for funding to, among other things: (a) continue acquiring mineral property interests; (b) perform the work necessary to discover economically recoverable reserves; (c) conduct technical studies and potentially develop a mining operation; and (d) perform the technical, environmental and social work necessary under Colombian law to maintain the Properties in good standing.

7 On February 21, 2013, Seafield as borrower, Minera as guarantor and RMB as lender and RMB's agent entered into the Facility Agreement. Pursuant to the Facility Agreement, RMB made a $16.5 million secured term credit facility available to Seafield. The Facility Agreement provided that the proceeds of the Loan must be used for: (a) the funding of work programs in accordance with approved budgets to complete a bankable feasibility study for a project to exploit the Miraflores Property and for corporate expenditures; (b) to fund certain agreed corporate working capital expenditures; and (c) to pay certain expenses associated with the preparation, negotiation, completion and implementation of the Facility Agreement and related documents.

8 All amounts under the Facility Agreement become due and payable upon the occurrence of an event of default under the Facility Agreement. Events of default include the inability of Seafield or Minera to pay its debts when they are due.

9 RMB and Seafield entered into a general security agreement under which Seafield charged all of its assets. Minera, Seafield and RMB also entered into a share pledge agreement (the "Share Pledge Agreement") pursuant to which Seafield pledged and granted to RMB a continuing security interest in and first priority lien on the issued and outstanding shares of Minera and any and all new shares in Minera that Seafield or any company related to it may acquire during the term of the Share Pledge Agreement.

10 The Share Pledge Agreement specifies that upon the delivery of a notice of default under the Facility Agreement and during the continuance of the default, RMB has the right to, among other things, (a) exercise any and all voting and/or other consensual rights and powers accruing to any owner of ordinary shares in a Colombian company under Colombian law; (b) receive all dividends in respect of the share collateral; (c) commence legal proceedings to demand compliance with the Share Pledge Agreement; (d) take all measures available to guarantee compliance with the obligations secured by the Share Pledge Agreement under the Facility Agreement or applicable Colombian law; and (e) appoint a receiver.

11 Minera gave a guarantee to RMB of amounts due under the Loan secured by a pledge agreement over the mining titles through which Minera controls its properties, a pledge agreement over its commercial establishment and the Share Pledge Agreement.

12 Seafield has not generated any material revenues during its history, is not currently generating revenues, and requires third-party financing to enable it to pay its obligations as they come due. Notwithstanding its efforts since September 2013 to find sources of such third-party financing, Seafield has been unable to do so.

13 Seafield's financial reporting is made on a consolidated basis and does not describe the financial status of Seafield and Minera separately. As stated in Seafield's unaudited condensed interim consolidated financial statements for the three and six-month periods ended June 30, 2014, as at June 30, 2014, Seafield's current liabilities exceeded its current assets by $14,108,581. As of that date, Seafield had a deficit of $44,722,780, incurred a net loss of $699,179 for the six months ended June 30, 2014 and experienced net negative cash flow of $689,583 for the six months ended June 30, 2014. As of June 30, 2014, Seafield had no non-current liabilities.

14 Seafield's non-current assets are valued at approximately $16,083,777 and include the Miraflores Property, which is booked at a value of $15,244,828. Seafield also owns property and equipment whose carrying value is reported at $808,948, including computer equipment, office equipment and land.

15 In May and June 2014, Seafield informed RMB's agent that it expected to have insufficient funds to make the interest payment of $344,477 due on June 30, 2014, triggering a default under the Facility Agreement. To date, Seafield has not made the interest payment due on June 30, 2014. The next interest payment under the Facility Agreement is due on September 30, 2014.

16 Discussions took place between RMB's agent and Messrs. Pirie and Prins of Seafield, the then only two directors of Seafield, and several proposals were made on behalf of RMB for financing that were all turned down by Seafield.

17 Seafield's financial position deteriorated through July and August, 2014. On August 15, 2014, Seafield indicated in an e-mail to RMB's agent that its cash position was dwindling and that it barely had enough to make it to the end of September.

18 Budgets provided by Seafield to the RMB suggest that total budgeted expenses for Seafield and Minera for the month of September 2014 are estimated to be approximately $231,500. Total budgeted expenses for the period from September 1, 2014 until December 31, 2014 are estimated to be approximately $920,000.

19 Following RMB's inability to negotiate a consensual resolution with Seafield's board and in light of Seafield's and Minera's dire financial situation, RMB demanded payment of all amounts outstanding under the Facility Agreement and gave notice of its intention to enforce its security by delivering a demand letter and a NITES notice on August 28, 2014.

20 On or about August 29, 2014, in accordance with RMB's rights under the Share Pledge Agreement, an agreement governed by Colombian law, RMB took steps to enforce its pledge of the shares of Minera, which it held and continues to

hold in Australia, and replaced the board with directors of RMB's choosing, all of whom are employees of RMB or its agent.

21 The new Minera board was registered with the Medellin Chamber of Commerce in accordance with Colombian law. However, Minera's corporate minute book was not updated to reflect the appointment of either the new Minera board or the new CEO because Minera's general counsel and former corporate secretary refused to deliver up Minera's minute book.

22 In addition, on September 2, 2014, Minera lodged a written opposition with the Chamber seeking to reverse the appointment of the new Minera board. The evidence on behalf of RMB is that as a result of that action, it is probable that the Chamber will not register the appointment of Minera's new chief executive officer.

23 Late in the evening of September 4, 2014, Seafield issued a press release announcing that Minera had commenced creditor protection proceedings in Colombia. Such proceedings are started by making an application to the Superintendencia de Sociedades, a judicial body with oversight of insolvency proceedings in Colombia. The Superintendencia will review the application to determine whether sufficient grounds exist to justify the granting of creditor protection to Minerva. This review could take as little as three days to complete.

24 Under Colombian law, an application for creditor protection can be lodged with the Superintendencia without the authorization of a corporation's board of directors. On September 5, 2014, the new Minera board passed a resolution withdrawing the application for creditor protection and filed it with the Superintendencia on that same day.

Analysis

25 RMB is a secured creditor of Seafield and is thus entitled to bring an application for the appointment of a receiver under section 243 of the BIA which provides:

> 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.

26 Seafield is in breach of its obligations and has defaulted under the Facility Agreement. In accordance with the Facility Agreement, the occurrence of an Event of Default grants RMB the right to seek the appointment of a receiver.

27 As well, section 101 of the *Courts of Justice Act* permits the appointment of a receiver where it is just and convenient.

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather,

> the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].

30 The applicant submits, and I accept, that in the circumstances of this case, the appointment of a receiver is necessary to stabilize the corporate governance of Minera, as Seafield's wholly-owned subsidiary and its major asset.

31 RMB does not believe that Minera will be able to obtain interim financing during the pendency of creditor protection proceedings, and RMB has concerns that those assets may deteriorate in value due to lack of care and maintenance.

32 Failure to obtain additional financing for Seafield and Minera may result in significant deterioration in the value of Seafield and Minera to the detriment of all of their stakeholders. The evidence of the applicant is that among other things, it appears that the *Consulta Previa*, a mandatory, non-binding public consultation process mandated by Colombian law that involves indigenous communities located in or around natural resource projects, has not been completed. Failure to complete that process in a timely manner could lead to the potential revocation or loss of Minera's title and interests.

33 Moreover, if further funding is not obtained by Minera, it is also likely that employees of Minera will eventually resign. These employees are necessary for, among other things, ongoing care, maintenance and safeguarding of the properties and assets of Minera, facilitating due diligence inquiries by prospective purchasers or financiers, and maintaining favourable relations with the surrounding community.

34 RMB has lost confidence in the board of directors of Seafield. The details of the negotiations and the threats made by the Seafield directors, namely Messrs. Pirie and Prins, would appear to justify the loss of confidence by RMB in Seafield. RMB is not prepared to fund Seafield on the terms being demanded by Seafield's board and without changes to Seafield's governance structure.

35 Notwithstanding that RMB has replaced Minera's board and CEO in accordance with its rights in connection with the Loan and Colombian law, Minera's CEO has refused to relinquish control of Minera or its books and records, including its corporate minute book, stalling RMB's efforts to take corporate control of Minera and creating a deadlock in its corporate governance. Moreover, Minera's CEO, without authorization from the new board of directors, has commenced creditor protection proceedings in Colombia which RMB believes may be detrimental to the value of Minera's assets and all of its and Seafield's stakeholders.

36 RMB is prepared to advance funds to the receiver for purposes of funding the receivership and Minera's liability through inter-company loans. The receiver will be entitled to exercise all shareholder rights that Seafield has. The receiver will be able to flow funds that it has borrowed from RMB to Minera to enable Minera to meet its obligations as they come due, thereby preserving enterprise value.

37 In these circumstances, I find that it is just and convenient for KPMG to be appointed the receiver of the assets of Seafield.

Application granted.

2014 ONSC 5205, 2014 CarswellOnt 12419, 18 C.B.R. (6th) 300, 244 A.C.W.S. (3d) 841

End of Document

TAB 4

2008 CarswellOnt 6257
Ontario Superior Court of Justice [Commercial List]

Tool-Plas Systems Inc., Re .

2008 CarswellOnt 6257

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Proposed Receiver, RSM Richter
R. van Kessel for EDC and Comerica
C. Staples for BDC
M. Weinczok for Roynat

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.1 General principles
VII.1.c Miscellaneous

Headnote

Debtors and creditors --- Receivers — General principles — Miscellaneous principles

Table of Authorities

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

***Morawetz J.*:**

1 Tool-Plas Systems Inc. (the "Company") brings this application to place itself into receivership under s. 101 of the CJA.

2 Mr. Bish submits that the relief is necessary, in that the Company has no ability to carry on business as usual. It has no

funding to continue operations. He also submits that there is a real risk of value dissipation. His submissions are based on the evidence set out in the affidavit of Mr. Claeys and reference was also made to the Richter Motion Record.

3 Section 101 of the CJA provides that the requested order can be made if the Court finds that it is just *or* convenient to do so. In the circumstances of this case I am satisfied that it is both just and convenient to make the receivership order. In making this order I am taking into account that the Company has disclosed that the purpose of the receivership is to implement an immediate sale transaction if same is approved by the Court. I have also taken into account the urgency of the matter, which is described in the Richter materials.

4 Mr. Szucs made submissions with respect to the status of his claim. In my view, these submissions are best addressed on the sale approval motion.

5 Order to go in the form presented.

End of Document

TAB 5

2011 ONSC 6292, 2011 CarswellOnt 12770, 209 A.C.W.S. (3d) 555, 85 C.B.R. (5th) 214

2011 ONSC 6292
Ontario Superior Court of Justice [Commercial List]

Graceway Canada Co., Re

2011 CarswellOnt 12770, 2011 ONSC 6292, 209 A.C.W.S. (3d) 555, 85 C.B.R. (5th) 214

In the Matter of the Receivership of Graceway Canada Company (Applicant)

And In the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43, as Amended

Morawetz J.

Heard: October 4, 2011
Oral reasons: October 4, 2011
Docket: CV-11-9411CL

Proceedings: additional reasons at *Graceway Canada Co., Re* (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687 (Ont. S.C.J. [Commercial List])

Counsel: F. Myers, L.J. Latham for Applicant
L. Brost, for Bank of America, Administrative Agent for First Lien Lenders
J. Swartz for RSM Richter Inc.

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings

Headnote

Bankruptcy and insolvency --- Receivers — Appointment
Indirect parent of applicant corporation filed for bankruptcy in Delaware — Corporation was solvent and had ability to pay day-to-day obligations — Bidding procedure would be involved in American bankruptcy proceedings — Corporation brought application for order appointing receiver and stay of proceedings — Application granted — Receiver was appointed — Appointment of receiver was just and convenient — Requirements of s. 101 of Courts of Justice Act were satisfied.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Indirect parent of applicant corporation filed for bankruptcy in Delaware — Corporation was solvent and had ability to pay day-to-day obligations — Bidding procedure would be involved in American bankruptcy proceedings — Corporation brought application for order appointing receiver and stay of proceedings — Application granted — Stay of proceedings was granted — Stay of proceedings was primarily directed towards ensuring status quo in American bankruptcy proceedings — Considering corporation had ability to pay normal obligations, stay was appropriate.

2011 ONSC 6292, 2011 CarswellOnt 12770, 209 A.C.W.S. (3d) 555, 85 C.B.R. (5th) 214

Table of Authorities

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

APPLICATION by subsidiary corporation for order appointing receiver and stay of proceedings.

***Morawetz J.*:**

1 The indirect parent of the Applicant, Graceway Pharmaceuticals and its affiliates (the "U.S. Debtors") filed under Chapter 11 in Delaware.

2 The Applicant seeks an order appointing RSM Richter Inc. a receiver under s. 101 of the *Courts of Justice Act*. The purpose of the order is to provide a court-supervised process to oversee the sales process for the assets of the Applicant and to coordinate with the Chapter 11 proceedings of the U.S. Debtors. Counsel submits that a receivership order will assist in protecting the interests of the Applicant in respect of the allocation of sale proceeds among the U.S. Debtors' estates and the Applicant, receiving the proceeds of sale for subsequent distribution, and overseeing other issues that may arise during the joint stalking horse process.

3 Although the Applicant appears to be solvent — a stay of proceedings is requested. It is anticipated that normal day-to-day obligations will be honoured and the proposed order does permit the Applicant to make such payments. The stay is primarily directed towards ensuring a *status quo* in the Chapter 11 proceedings and, in particular, at parties having strategic interests in the U.S. Chapter 11 process.

4 In these circumstances, and considering that the Applicant does have the ability to pay day-to-day obligations, I am satisfied that the stay is appropriate.

5 A bidding procedure will be involved in the Chapter 11 proceedings. To the extent that the interests of the Applicant are part of the sale process, it could be that relief may be sought from this Court. If a request for such relief is anticipated, the Applicant and the Receiver will be expected to ensure that the *Soundair* principles are respected. In this respect, the Receiver should be prepared to file a meaningful report. To the extent that the Applicant or the Receiver requires further directions, they can certainly seek directions as provided for in the comeback clause.

6 A DIP Loan is being provided by the Applicant to the U.S. Debtors. The balance sheet and the cash flow information would suggest that creditors of the Applicant will not be prejudiced by the DIP Loan.

7 It appears to be well secured. I have received and considered the comprehensive factum provided by counsel to the Applicant. I have also reviewed the affidavit of Mr. Moccia and the pre-filing report of the Receiver. I am satisfied that, in these circumstances, the appointment of a receiver is both just and convenient. The requirements of s. 101 of the CJA have been satisfied.

8 RSM Richter is appointed Receiver.

9 The form of proposed order includes a Cross-Border Insolvency Protocol. It is my understanding that the issue of approving the protocol is scheduled to come before the U.S. Bankruptcy Court later this month.

10 I am prepared to approve the Protocol at this time, recognizing however, that the Protocol is not effective until such

time that it has been approved by the U.S. Court. I also recognize that the Chapter 11 proceedings are expected to be far more significant in scope than these proceedings. In this respect, I would expect that if cross-border communications are desirable in these proceedings, this decision will likely be driven by the U.S. Court in the Chapter 11 proceedings. This Court will accommodate any requests of the U.S. Court for communication, if so required.

11 Receivership Order granted and signed in the form provided.

Application granted.

TAB 6

Court File No. 31-1890162

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

THE HONOURABLE	)	WEDNESDAY, THE 30TH DAY
	)	
JUSTICE Spence	)	OF JULY, 2014

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HERBAL MAGIC INC., A CORPORATION WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

(Applicant)

ORDER

(Appointment of Interim Receiver and Distribution of Monies)

THIS MOTION, made by Herbal Magic Inc. ("**Herbal Magic**"), for an order appointing PricewaterhouseCoopers Inc. ("**PwC**") as interim receiver pursuant to the *Bankruptcy and Insolvency Act (Canada)* (the "**BIA**") and distributing certain proceeds from the sale of the assets of Herbal Magic pursuant to the Asset Purchase Agreement ("**APA**") dated as of July 11, 2014 between Herbal Magic and the Purchaser (defined below) (the "**Sale Proceeds**") and other monies of Herbal Magic, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Stephen Brown sworn July 15, 2014 and the Exhibits thereto, the First Report of PricewaterhouseCoopers Inc. in its capacity as proposal trustee (the "**Proposal Trustee**") dated July 18, 2014 and the Appendices thereto (the "**First Report**"), the Second Report of the Proposal Trustee dated July 24, 2014 (the "**Second Report**"), a Supplement to the Second Report dated July 29, 2014 and on hearing the submissions of counsel for Herbal Magic, the Proposal Trustee, The Toronto-Dominion Bank, as administrative agent for a syndicate of senior lenders ("**TD Bank**"), 8942595 Canada Inc.

(the "**Purchaser**"), no one appearing for any other person on the service list, although properly served as appears from the affidavit of service, filed,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Motion Record herein and the Second Report is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT OF INTERIM RECEIVER

2. **THIS COURT ORDERS** that that effective upon delivery of the Proposal Trustee's certificate to the Purchaser substantially in the form attached as Schedule "A" to the Order of Mr. Justice Brown dated July 25, 2014, PwC is hereby appointed, without security, as interim receiver pursuant to sections 47 and 47.1 of the BIA (the "**Interim Receiver**"), for the sole purpose of holding the Sale Proceeds and other monies of Herbal Magic (collectively, "**Monies**") and paying or distributing such Monies in accordance with this Order.

3. **THIS COURT ORDERS** notwithstanding any assignment in bankruptcy, including a deemed assignment made with respect to Herbal Magic, the Monies and Participation Agreement (defined below) shall not form part of the property of the bankrupt and shall not pass to or vest in a trustee in bankruptcy of Herbal Magic (the "**Trustee**"), except to the extent delivered by the Interim Receiver to the Trustee pursuant to paragraphs 11 and 12 hereof.

4. **THIS COURT ORDERS** that the Interim Receiver is authorized to establish a bank account or accounts for the purpose of depositing the Monies and is further authorized to pay disbursements or make distributions from such account or accounts in accordance with this Order.

5. **THIS COURT ORDERS** that the appointment of PwC as Interim Receiver shall expire on November 28, 2014 unless extended by further order of this Court.

6. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal shall be commenced or continued against the Interim Receiver except with the written consent of the Interim Receiver or with leave of this Court.

7. **THIS COURT ORDERS** that the Interim Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part.

8. **THIS COURT ORDERS** that notwithstanding its appointment as Interim Receiver, PwC may continue to act in its capacity as Proposal Trustee in these proceedings, and may act as a trustee in bankruptcy of Herbal Magic or as an interim receiver or receiver of any of its assets.

DISBURSEMENTS AND DISTRIBUTIONS

9. **THIS COURT ORDERS** that the Interim Receiver is authorized to disburse from time to time (i) such Monies as are required to be disbursed in accordance with the APA, (ii) such Monies as are required to pay its fees and disbursements (including legal costs) as Interim Receiver, and (iii) such other Monies as the Agent may consent to in writing.

10. **THIS COURT ORDERS** that, subject to paragraph 12 of this Order, on August 29, 2014 or promptly thereafter the Interim Receiver is authorized and directed to distribute to the Agent (or as the Agent may direct) all Monies then remaining in the hands of the Interim Receiver, less a reserve in the amount of $100,000 (the "**Reserve**").

11. **THIS COURT ORDERS** that the Reserve shall be held by the Interim Receiver for a further period not to exceed 90 days after August 29, 2014, and that the Interim Receiver is authorized to disburse all or any portion of the Reserve for the sole purpose of satisfying employee-related claims having priority over the secured claims of the Agent, or such other employee-related claims as the Agent may consent to in writing. The Interim Receiver shall pay the balance of the Reserve to the Agent on the earlier of (i) the expiry of the 90 day period referred to in this paragraph, or (ii) when the Trustee has advised the Interim Receiver that it is satisfied, acting reasonably, that all employee-related claims (if any) having priority over the secured claims of the Agent have been paid.

12. **THIS COURT ORDERS** that if on or before August 28, 2014 a creditor of Herbal Magic serves and files a motion record in this Court asserting a claim (a "**Priority Claim**") to the Monies in priority to the secured claims of the Agent, the amount to be distributed to the Agent pursuant to paragraph 10 of this Order shall be reduced by the amount of the Priority Claim (the "**Priority Claim Amount**"). The funds representing the Priority Claim Amount shall be held by the Interim Receiver until such time as the Priority Claim has been finally determined or settled, or such earlier time as may be agreed by the Interim Receiver and Agent, at which time, the Interim Receiver is authorized to pay to the Agent and/or the Trustee and/or the holder of a Priority Claim that is finally determined or settled, as the case may be, the amount as so determined or agreed.

13. **THIS COURT ORDERS** that all Priority Claims shall be and are hereby forever extinguished and barred unless and to the extent that they are asserted in accordance with paragraph 12 of this Order on or before August 28, 2014.

14. **THIS COURT ORDERS** that no Priority Claim may be asserted against the Reserve, and that no Priority Claim shall constitute a valid claim against the Reserve.

15. **THIS COURT ORDERS** that the Interim Receiver may at any time seek the direction of the Court with respect to any matter governed by this Order.

16. **THIS COURT ORDERS** that where any payment or distribution is to be made to the Agent in accordance with this Order, the Interim Receiver may deduct from such payment or distribution an amount sufficient to pay the Interim Receiver's fees and disbursements (including legal costs) then outstanding or that the Interim Receiver reasonably anticipates will be incurred during the remainder of its appointment. If the Agent objects to the amount of the Interim Receiver's fees and disbursements (including legal costs), the Interim Receiver shall seek this Court's approval of the fees and disbursements to which the Agent has objected.

PARTICIPATION AGREEMENT

17. **THIS COURT ORDERS AND DIRECTS** the assignment of the Participation Agreement between Herbal Magic, the Purchaser and Cameron Capital Partners, IV L.P. (the

"**Participation Agreement**") from Herbal Magic to the Agent effective as of August 29, 2014, and that such assignment is valid and binding upon all of the counterparties to the Participation Agreement.

18. **THIS COURT ORDERS** that the Interim Receiver is authorized to take such additional steps or execute such additional documents on behalf of Herbal Magic as may be necessary or desirable to effect the assignment from Herbal Magic to the Agent of the Participation Agreement.

DIRECTION REGARDING MATERIAL ADVERSE CHANGE REPORT

19. **THIS COURT ORDERS** that neither the Proposal Trustee nor the Interim Receiver shall be required to prepare, file or send a material adverse change report pursuant to section 50.4(7) of the BIA as a result of the making of this Order or the closing of the sale transaction contemplated in the APA.

July 30/14
Order to go
in this form

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HERBAL MAGIC INC., A CORPORATION WITH A HEAD OFFICE IN THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO

Court File No. 31-1890162

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

ORDER
(Re Appointment of Interim Receiver and Distribution of Monies)

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Lawyers for the Applicant

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF GREEN EARTH STORES LTD AND GREEN EARTH ENVIRONMENTAL PRODUCTS

Estate/Court File No.: 31-2481648
Estate/Court File No.: 31-2481649

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE MOVING PARTY (RETURNABLE JUNE 13, 2019)

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