Court File No. CV-16-11424-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

EMMANUEL VILLAGE RESIDENCE INC.

Applicant

-and-

ATTORNEY GENERAL OF ONTARIO

Applicant

-and-

1250 WEBER STREET EAST, KITCHENER, ONTARIO OF THE PROCEEDS OF THE SALE THEREOF (IN REM)

Respondent

BOOK OF AUTHORITIES OF THE RECEIVER
(re: Receiver's Responding Factum to Attorney General of Ontario's Motion to Discharge the Receiver returnable February 8, 2017)

February 6, 2017

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Lawyers for BDO Canada Limited,
in its capacity as Court-appointed Receiver

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Tab 1

2011 ABQB 158
Alberta Court of Queen's Bench

Crofton v. H.M.E. Evans & Co.

2011 CarswellAlta 399, 2011 ABQB 158, [2011] A.W.L.D. 1809, 199 A.C.W.S. (3d) 789, 50 Alta. L.R. (5th) 80, 514 A.R. 172, 75 C.B.R. (5th) 281

Cameron Crofton (Plaintiff) and H.M.E. Evans & Company Limited (Defendant)

D.C. Read J.

Heard: March 7, 2011
Judgment: March 10, 2011
Docket: Edmonton 0403-01817

Counsel: Brian W. Summers for Cameron Crofton
James K. McFadyen, Q.C. for Simon Peers and Virginia Hilliard
Kentigern A. Rowan for Price Waterhouse Coopers, Liquidator of H.M.E. Evans & Company
Michael J. McCabe, Q.C. for Price Waterhouse Coopers, trustee in bankruptcy of Federal Mortgage Corporation Ltd.

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Bankruptcy and insolvency

XX Miscellaneous

Headnote

Bankruptcy and insolvency --- Miscellaneous

Removal of liquidator for conflict of interest — Accounting firm was appointed liquidator of corporation — Accounting firm instructed to identify all shareholders of corporation — Accounting firm later appointed trustee in bankruptcy of two bankrupts, which were companies with same principal as corporation — One bankrupt claimed to be shareholder of corporation — Hearing held regarding conflict of interest — Accounting firm not removed as liquidator, but required to appoint another investigator — Obligations of liquidator are similar to those of trustee — Obligations of investigator are set by court order, and investigator required to report to liquidator — Removal as liquidator would bring extra costs on estate — No conflict between liquidating assets and identifying shareholders — However, accounting firm also required to act as forensic investigator, which created potential conflict — Duty as investigator included reporting and advising shareholders — Possibility existed that corporation was creditor, debtor, or both, of bankrupts.

Table of Authorities

Cases considered by *D.C. Read J.*:

Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd. (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — distinguished

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc. (1996), 1996 CarswellQue 369, 1996 CarswellQue 369F, 39 C.B.R. (3d) 253, (sub nom. *Dubois v. Coopérants (Les), Société mutuelle d'assurance-vie (Liquidation)*) 196 N.R. 81, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*) 133 D.L.R. (4th) 643, (sub nom. *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*) [1996] 1 S.C.R. 900 (S.C.C.) — considered

J. McCarthy & Sons Co., Re (1916), 32 D.L.R. 441, 38 O.L.R. 3 (Ont. C.A.) — considered

Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of) (1988), 1988 CarswellOnt 127, (sub nom. *Camco Food Services Ltd., Re*) 67 C.B.R. (N.S.) 1, 63 O.R. (2d) 775, (sub nom. *Tannis Trading Inc. v. Thorne Ernst & Whinney Inc.*) 49 D.L.R. (4th) 128 (Ont. S.C.) — considered

YBM Magnex International Inc., Re (2000), 2000 CarswellAlta 1068, 9 B.L.R. (3d) 296, (sub nom. *YBM Magnex International Inc. (Receivership), Re*) 275 A.R. 352 (Alta. Q.B.) — followed

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9
Pt. 17 — referred to

s. 222 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11
Generally — referred to

HEARING regarding conflict of interest of liquidator in bankruptcy proceedings.

***D.C. Read J.*:**

Summary:

1 An issue of potential or actual conflict arose when an accounting firm, named liquidator of a corporation was also retained as trustee in bankruptcy of two other corporations. The liquidation court order required the accounting firm to seek information from the principal of the two bankrupt corporations respecting transactions between the corporation in liquidation, the principal, and the two bankrupt corporations.

Facts:

2 On June 11, 2010, by court order, Price Waterhouse Coopers ("PWC") was named liquidator of H.M.E. Evans & Company Limited ("Evans Ltd.") pursuant to Part 17 of the *Business Corporations Act*, R.S.A 2000 c. B-9.

3 Evidence before the court at the time the liquidation order was made ("Liquidation Order Hearing") established the following:

a. Evans Ltd. is a family owned corporation. All of the shareholders are descendants of Mr. H.M.E. Evans.

b. Jay Peers, one of the shareholders either directly or through a corporation or corporations controlled by him ("Peers Entities") had managed the affairs of Evans Ltd. for a number of years.

c. Some of the shareholders were represented at the Liquidation Order Hearing. Others were not. The existence of other unknown shareholders could not be ruled out.

d. The represented shareholders expressed concerns at the Liquidation Order Hearing, *inter alia*, about lack of information generally about the affairs of Evans Ltd. under the management of Jay Peers and about various historical transactions made between the Peers Entities and Evans Ltd. From the evidence tendered at the Liquidation Order Hearing, it was clear that some shareholders had been requesting information for some time from the Peers Entities and the information had not been provided.

e. Paragraph 9 of the liquidation required that Jay Peers provide PWC as liquidator and the shareholders of Evans Ltd. with all the information requested in two letters, dated August 25, 2008 and December 9, 2008. Copies of these letters are attached as Schedule A to this judgment.

f. Jay Peers was living on certain lands located in the City of Edmonton and owned by Evans Ltd., known as the Sylvancroft Lands. It was a term of the liquidation order that PWC as liquidator would place the Sylvancroft Lands on the market with a view to selling the lands at fair market value. Any sale was to be approved by all of the shareholders and the Court.

g. One of the Peers Entities, Federal Mortgage Corporation ("FMC") claimed to be an assignee of certain security from HSBC Canada, including a mortgage registered against title to the Sylvancroft Lands.

4 At the Liquidation Order Hearing, I assumed case management of the litigation.

5 A further case management hearing was held on December 10, 2010, at which time a second order was made expanding the terms of the previous liquidation order. Terms of this expanded order included the following:

16. The Liquidator shall investigate such transactions between the Company and Jay Peers or any person or corporation related to Jay Peers that the Liquidator considers appropriate.

17. The furtherance of the investigation to be conducted by the Liquidator, the Corporation, all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders and all other persons acting on its instructions or behalf and all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order shall forthwith advise the Liquidator of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Company, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Liquidator or permit the Liquidator to make, retain and take away copies thereof and grant to the Liquidator unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 17 or in paragraph 18 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Liquidator due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

18. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Liquidator for the purpose of allowing the Liquidator to recover and fully copy all of the information contained therein whether by way of printing the information onto

> paper or making copies of computer disks or such other manner of retrieving and copying the information as the Liquidator in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Liquidator. Further, for the purposes of this paragraph, all Persons shall provide the Liquidator with all such assistance in gaining immediate access to the information in the Records as the Liquidator may in its discretion require including providing the Liquidator with instructions on the use of any computer or other system and providing the Liquidator with any and all access codes, account names and account numbers that may be required to gain access to the information.

6 At the December 10, 2010 hearing, PWC confirmed they had also accepted a retainer as trustees in bankruptcy of FMC and of Peers Foster Kristiansen Inc. ("Peers Foster Inc."). Both corporations are Peers Entities in that they were controlled by Jay Peers or his nominees. In addition, Peers Foster Inc. represents itself as owning 50.94% of the shares of the capital stock of Evans Ltd.

7 By the time of this second hearing it was evident that Peers Foster Inc. had made a claim against Evans Ltd. asserting an unsecured debt for what was described as 'an inter-company loan stemming from historical business dealings of the firm.'

8 A third case management meeting and hearing was held on March 7, 2011. At this hearing, two of the shareholders, Virginia Hilliard and Simon Peers, ("Hilliard/S. Peers") who represented themselves as holding a total of 39.5% of the shares of the capital stock in Evans Ltd., divided equally between them, requested that PWC be removed as liquidator of Evans Ltd., alleging that PWC had an irreconcilable conflict of interest in acting as liquidator of Evans Ltd. and as trustee in bankruptcy of Peers Foster Inc. and FMC.

Issue:

9 Should PWC be removed as liquidator of Evans Ltd. for conflict of interest?

Analysis:

a. Positions of the Parties:

10 Hilliard/S. Peers' principal concern was that PWC's duty to request information from the Peers Entities and specifically to obtain information about and evaluate the claims made by the Peers Entities against Evans Ltd., particularly in respect to the mortgage claimed by FMC and the unsecured claim made by Peers Foster Inc., was incompatible with their role as trustee in bankruptcy of FMC and Peers Foster Inc. Essentially, it was argued that PWC was required to act as a forensic accountant in order to fulfill their duties in this regard. In fulfilling this role, they had a duty to all of the shareholders of Evans Ltd. In Hilliard/S. Peers' view, this role is incompatible with PWC's role as trustee in bankruptcy for FMC and Peers Foster Inc., wherein their role as trustee, their duty was to maximize the value of the assets of these entities for the benefit of their creditors. Hilliard/S. Peers argued that FMC is a fiduciary in both their roles and that one of the primary duties of a fiduciary is to avoid the appearance of possible conflict. Since the appearance of potential conflict was clear, Hilliard/S. Peers argued that PWC should be removed as liquidator.

11 PWC argued that there was no actual conflict of interest. Further they said that because they were a court appointed liquidator and a court appointed trustee in bankruptcy, their duty was as a fiduciary to the interests of all concerned parties, and not individually to any of Evans Ltd., FMC or Peers Foster Inc. Their duty was also to the court. Their obligation was to act with an even hand, and with full candour. They argued that their position disabled them from advocating for any of the parties but instead required them to take information they obtained and disclose all material facts affecting the parties, to the parties and to the court so that the court can make a decision respecting competing claims. As a consequence, they said that their role as forensic accountant in the litigation could never result in a an actual conflict.

12 On behalf of another group of shareholders of Evans Ltd., it was argued that the application should simply be adjourned to permit PWC to do the necessary investigations respecting the Peers Entities on the basis that it is only once this information is obtained that it would be clear whether PWC has an actual or potential conflict in carrying out their various roles.

13 Other Evans Ltd. shareholders took no position on the issue. Some did not attend.

14 Counsel for PWC argue that cost is an important consideration in liquidation proceedings. They point out that expense and delay will result from the appointment of an alternate liquidator. Counsel for Hilliard/S. Peers acknowledge that replacement of the liquidator will entail some cost but argue that if PWC is permitted to continue in its dual roles, then the expense of replacement in the future when, as is likely, the interests of the shareholders of Evans Ltd. and the interests of the creditors of FMC and Peers Foster Inc. are plainly at odds, the costs of replacing PWC as liquidator then will be greater than they are now.

b. Purpose of a Liquidation Order:

15 In *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 (S.C.C.), the Supreme Court of Canada discussed the role of a liquidator under the *Winding-Up Act*, R.S.C., 1985, c. W-11, quoting with approval beginning at paragraph 36 from *J. McCarthy & Sons Co., Re* (1916), 38 O.L.R. 3 (Ont. C.A.), at p. 9, where the Ontario Court of Appeal described the purpose of a liquidation under the then Act as follows:

> The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits.

At paragraph 37, the Supreme Court went on:

> 37 The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act. The mechanism provided consists in requiring the court's leave for proceedings by the creditors [cite omitted] and giving responsibility for the company's affairs to a court-appointed liquidator, who acts as an officer of the court, under its control and in accordance with its directives [cite omitted]. The court and the liquidator must respect and give effect to the creditors' rights as much as possible, taking their nature into account and not disregarding the other interests involved. As Galipeault C.J.Q. stated in *Maranda-Desaulniers v. Peckham* [1953] B.R. 163, at p. 172, the court has a discretionary power in this regard:
>
> > [Translation] In making decisions, a liquidator acting under the Winding-up Act is subject only to the orders of the court (R.S.C., c. 213, s. 35), since the duty of an inspector appointed by court order for the winding-up is merely to assist and advise the liquidator in the winding-up of the company's business (s. 41).
> >
> > In selling the property of a company that is being wound up, the liquidator is subject to the court's control (s. 35), and nothing in the Act itself limits the court's discretion in exercising such control. The liquidator must of course take into account the creditors' interests and wishes, but he is not bound by what the creditors want. It is up to him to determine what actions are most likely to protect the creditors' interests.

16 The role of a liquidator pursuant to a liquidation order is therefore similar in many respects to the role of a receiver or, indeed, a trustee in bankruptcy.

c. Obligations of a Court Appointed Liquidator:

17 As with a trustee in bankruptcy or a receiver, a liquidator is an officer of the court and is expected and presumed to act as such.

18 Section 222 of the *Business Corporations Act*, sets out generally the duties of a liquidator of a corporation. None of these legislative provisions deals with the liquidator's obligations where conflict is alleged.

19 *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.* (1992), 12 C.B.R. (3d) 220 (Ont. Gen. Div.) sets out the obligations of a court-appointed receiver, at 221:

> a. it is a fiduciary as to all interests of concerned parties and as such it is to act as an appointee of the Court in good faith; with candour; disclosing all relevant material facts affecting the parties; avoiding any real or objectively perceived conflicts of interest; and
>
> b. it has a general duty to exercise it obligations with prudence, diligence, due care and skill.

20 Both PWC and Hilliard/C. Peers agreed through their counsel that this test was also the appropriate test for removal of a court appointed liquidator. I concur.

d. Obligations of an investigator:

21 However, the task of an investigator appointed by the court is somewhat different from that of a liquidator carrying out his role as a liquidator. An investigator operates under court order and is bound by the terms of that order and to the court to fulfill the terms of the order and to report to the court. The investigator is also responsible to report to and to advise the liquidator as the representative of the corporation whose affairs he is asked to investigate and to report to and advise the shareholders of that corporation. The investigator has no obligation to the creditors of the corporation, either to report to them or to provide advice. Indeed, the investigator has the obligation to advise the corporation and its shareholders of the merits of advancing or resisting a proprietary claim, respecting the creditors or debtors of the corporation, and this advice may be at odds with the interests of a creditor.

22 This distinction is made clear in *Confederation Treasury Services Ltd., Re*, [1995] O.J. No. 3993, 37 C.B.R. (3d) 237 (Ont. Bktcy.) relied upon by PWC. In *Confederation Treasury* the court refused an application by some creditors to remove a trustee in bankruptcy who had previously been involved as forensic investigator for another creditor. However, in making its decision, the court emphasized that the creditors requesting the removal of the trustee were in a different position from the shareholders of Evans Ltd. The court said this at para 28:

> Thus given that Richter is the preference of the petitioning creditor (and of the ALC Committee which appears to represent apparently unchallenged major creditors); it has the advantage of being quite familiar with and knowledgeable of the situation from its prior involvement as forensic investigator; the proprietary claims have been acknowledged as complex and difficult to describe; those advancing proprietary claims have had the advantage of advice from their own forensic investigators; it does not appear on the material before me that Richter has any ongoing relationship with any creditor and particularly not with any creditor or claimant which may have an adverse position to the estate...

e. Test for Removal for Conflict of Interest and Factors to be Considered:

23 In *YBM Magnex International Inc., Re*, [2000] A.J. No. 1118 (Alta. Q.B.), at para 36, Paperny, J. (as she then was) set out the test for removal of a receiver for conflict of interest. She noted that the onus to remove a receiver is heavier than the onus to oppose the appointment in the first place. She quoted with approval from *Tannis Trading Inc. v. Camco Food Services Ltd. (Trustee of)* (1988), 67 C.B.R. (N.S.) 1 (Ont. S.C.), in which the court removed a trustee because there was both the potential for and the appearance of conflict in the circumstances, noting the caution expressed in that decision at paragraph 6:

> In the complex context of insolvency, it is perhaps trite to say that each case will depend on its own facts. It is not, in my view, possible or necessary to attempt to define where the line should be drawn. No hard and fast rule can be laid down. It is a matter of degree. A firm that it the auditor of one or more of the creditors will not ordinarily be precluded from acting as a trustee.

24 At paragraph 39, she provided a helpful summary of the factors typically considered by courts in determining whether to exercise their discretion to remove a receiver for conflict of interest:

> a. the gravity of the conflict or potential conflict;
>
> b. the receiver's qualifications, and the experience and familiarity already gained by the receiver;
>
> c. the prejudice to the estate in removing the receiver, in particular, the knowledge which would be lost and the time and costs which would be incurred in substituting a new receiver and bringing that person up to speed;
>
> d. the receiver's conduct, in particular, whether the receiver: (i) has disclosed the conflict or potential conflict from the outset; (ii) has established measures to reduce the dangers of conflicts or potential conflicts; and (iii) has in any way acted improperly;
>
> e. delay by the applicant in alleging conflict and bringing the motion for removal;
>
> f. tactical reasons for bringing the motion for removal; and
>
> g. the wishes of various stakeholders.

25 I agree with her comments and with the factors she enumerated as setting out the test for removal of a receiver and I conclude that a similar test is appropriate where the consideration is, as here, the removal of a court appointed liquidator.

f. Application of the Test and Factors:

26 After balancing the above listed factors, I have concluded that PWC should not be replaced as liquidator of Evans Ltd. They have already begun and should continue their work to ensure that all of the shareholders of Evans Ltd. are identified. They should also continue to work to liquidate the assets of Evans Ltd. There is no conflict alleged in respect to their work in these capacities and delay and cost to the estate would be incurred were I to order their removal.

27 However, I have concluded that PWC's role as outlined in paragraph 9 of the liquidation order and in paragraphs 16-18 of the second order requires them to act as forensic investigators in carrying out the terms of these orders and not just as liquidator. They therefore, have a dual role and it is their role as forensic investigator that places them in a potential conflict. Their duty as a forensic investigator to investigate, report and advise, is to the court, to the liquidator, and to the shareholders. They have no duty to the creditors of Evans Ltd. As a consequence, their role as forensic investigator is incompatible with their role as trustee of FMC and Peers Foster Inc. Objectively, there is a perception of conflict and the potential for actual conflict.

g. Conclusion:

28 It seems at least possible that there will be litigation to determine whether the Peers Entities' claims against Evans Ltd. are or are not legitimate.

29 Depending on the results of the forensic audit, Evans Ltd. may potentially be a creditor, a debtor, or both of FMC and Peers Foster Inc. They must and will look to the forensic investigator to advise them respecting the merits and the value of any claims they have either as a creditor or a debtor to the bankrupt corporations. The recommendations they give may be adverse in interest to the other creditors of FMC or Peers Foster Inc., or both of them.

30 If Evans Ltd. considers it appropriate to deliver a proof of claim, in respect to FMC or Peers Foster Inc., PWC, acting in their role as trustee of these entities, will be obliged to examine it and to determine whether to allow the proof of claim and, if so, whether to accept the value assessed by the forensic investigator. If PWC were to continue to act as forensic investigator to evaluate Evans Ltd.'s claims against FMC and Peers Foster Inc., I cannot see how the shareholders of Evans Ltd. could be satisfied they can rely upon PWC's evaluation of and advice respecting the validity of these claims, given their competing obligations to the other creditors. This is the clear distinction in this case from that of *Confederation Treasury Services Ltd., Re*. In *Confederation Treasury* Farley, J. pointed out that each of creditors had the advantage of advice from their own forensic investigators, upon which they could rely.

31 Unlike the situation in *Confederation Treasury*, Evans Ltd. would not have the advantage of advice from its own forensic investigator if PWC was permitted to continue to act in that role. If PWC were to offer advice specifically to Evans Ltd., PWC's obligation to be even handed among the creditors of Evans Ltd., PWC and Peers Foster Inc. could not be maintained.

32 I direct therefore that the parties choose a forensic investigator from an accounting firm separate from PWC as forensic investigator in respect to the questions raised in paragraph 9 of the liquidation order and paragraphs 16 to 18 of the second order. Mr. Gerald Smith of the firm of Deloitte Touche was suggested by PWC's counsel, and has already indicated to that counsel that he has no conflicts in acting in this role and would act. Provided that counsel for Hilliard/S. Peers agree and provided there is no objection from other shareholders, which objection must be raised forthwith on release of these reasons if it is to be made, I direct that Mr. Smith be retained as forensic investigator with the duty to report to the shareholders of Evans Ltd. and to the Court and the duty to advise the shareholders of Evans Ltd. respecting the potential claims by and against the Peers Entities.

33 Costs may be spoken to, if necessary, at the next case management meeting.

Schedule A

December 9, 2008

JAMES K. MCFADYEN

DIRECT DIAL: (780) 423-8550

EMAIL: jmcfadyen@parlee.com

OUR FILE #: 64290-1/JKM

via email

Attention: Donald R. Cranston, Q.C.

Bennett Jones LLP

Barristers & Solicitors

1000, 10035 - 105 Street

Edmonton, AB T5J 3T2

Dear Sir:

Re: H.M.E. Evans & Company Ltd

Mr. Garber advised me that it was agreed at the meeting held November 11 that we should provide, in writing, our clients' request for information regarding the affairs of H.M.E. Evans & Company Ltd. ("HME"). The following information and documentation has been requested:

1. Documentation filed at Corporate Registry in May, 2002 indicates that HME was a shareholder of Peers Foster Christianson Inc. ("PFK"). We require particulars of HME shareholdings in PFK and particulars of how and when HME disposed of its interest in PFK.

2. Particulars of all dealings between HME and PFK, or any other Corporation in which Jay Peers or his sons have or had a legal or beneficial interest, including, without limiting the generality of the foregoing, any transfer of assets, monies, or loans;

3. Particulars of the sale of commercial lands in Nisku (Plan 8121752; Lot 2) from HME to PFK on or about June 26, 2003; including documentation that the purchase price represented fair market value and was, in fact, paid by PFK to HME, and, an accounting with respect to the sale of those lands on or about July 23, 2008.

4. An accounting with respect to the sale proceeds from the sale of the Frasrock Building

5. An accounting of all proceeds realized from the realization of mortgages beneficially owned by HME, as mortgagee, and particulars of any remaining mortgages or other loans made by or on behalf of HME.

6. An accounting with respect to the loans receivable from Superfund, Vertigo Technologies Inc. and Federal Mortgage Corporation Limited as described in the 2001 HME Financial Statements. Also, particulars of the advances to subsidiary and investment in subsidiary referred to in the 2007 Financial Statements.

7. Particulars of the management fees referred to in the in 2007 Financial Statements

8. Particulars of Notes Payable referred to in the 2007 Financial Statements

9. Particulars of the income generated by Jay Peers for the benefit of the shareholders of HME as referenced in your email of November 3, 2008

10. The information requested in our letter to HME dated August 25, 2008, a copy of which is attached.

The foregoing is not an exhaustive listing of the questions our clients have or may have relating to the business of HME and related matters. However, full disclosure of the information requested herein will be of assistance in our clients reviewing the business of HME Evans & Company Ltd.

Yours very truly,

PARLEE McLAWS LLP

JAMES K. MCFADYEN

JKM/sl

encls.

John Henderson, Q. C.

Fraser Milner Casgrain

via email

Don Bishop. Q.C.

Bishop & McKenzie

via email

August 25, 2008

JAMES K. McFADYEN, Q.C.

DIRECT DIAL: (780) 423-8550

EMAIL: jmcfadyen@parlee.com

OUR FILE #: 67409-1 JKM

H.M.E. Evans & Company Limited

11207 - 103 Avenue

Edmonton, AB T5K 2V9

Attention: Rob Peers

Dear Sir:

Re: Simon Peers and Virginia Hilliard

We are the solicitors for Simon Peers and Virginia Hilliard. As you are aware, Jay Peers, personal representative of the Estate of C.L. Melsom, assigned and transferred onto our clients, Class "A" Common Shares in H.M.E. Evans & Company Limited. A copy of the transfers are attached.

We understand that an Annual General Meeting of the Shareholders of H.M.E. Evans & Company Limited has been scheduled for September 4 and 5, 2008.

In accordance with Sections 21 and 23 of *The Business Corporations Act (Alberta)*, we require copies of the following corporate records:

a) Minutes of all Directors' meetings held since May 6, 1 999 and copies of all Resolutions of the Directors since May, 1999;

b) Minutes of all Shareholder meetings held since May, 1999, including the Minutes of the last Annual General Meeting of the Shareholders;

c) Copies of all financial statements prepared by the Corporation's accountant since the last Annual General Meeting of the Shareholders;

d) The reports of the auditors since the last Annual General Meeting of the Shareholders;

e) Particulars of all acts, contracts, by-laws, resolutions, proceedings, decisions and payments made, done and taken by the Directors and Officers of the Corporation since the last Annual General Meeting of the Shareholders.

We will pay your reasonable costs in providing copies of these records. Thank you.

Yours truly,

PARLEE McLAWS LLP

per:

J. K. McFADYEN

JKM/sl

cc: Don Cranston, Q.C.

Bennett Jones

John Henderson, Q.C.

Fraser Milner Casgrain

Order accordingly.

End of Document

Tab 2

2012 ONSC 4900
Ontario Superior Court of Justice

Kraner v. Kraner

2012 CarswellOnt 10876, 2012 ONSC 4900, [2012] W.D.F.L. 5054, [2012] W.D.F.L. 5181, 103 W.C.B. (2d) 405, 220 A.C.W.S. (3d) 349, 96 C.B.R. (5th) 152

Natasha Kraner, Applicant and John Ivan Kraner, Respondent

Wein J.

Heard: August 16, 2012
Judgment: August 29, 2012
Docket: Owen Sound 11-7699M

Counsel: Allen Wilford for Applicant
Peter Cozzi for Respondent
Harry van Bavel for Receiver

Subject: Corporate and Commercial; Family; Property; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.9 Discharge of receiver
VII.9.b Grounds for discharge

Family law

III Division of family property
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Spouses separated and order was issued preventing husband from dissipating his assets, including lodge business (lodge) — Receiver was subsequently appointed over lodge after wife tendered evidence that husband was dissipating his assets — Twelve days later, motions judge found that husband had impeded management of lodge and that receiver appeared to be aligned with wife — Motions judge issued order that prohibited receiver from employing spouses at lodge and that restricted spouses' access to lodge (previous order) — Husband brought motion to have

receiver discharged for cause less than three months later — Motion dismissed — Many of husband's concerns related to alleged breaches of fiduciary duty that occurred before previous order — At this time, however, husband was clearly impeding work of receiver, so it did not lie in him to now complain about steps taken to remedy harm he himself caused — It would not be appropriate to find that wife or her counsel attended lodge in contravention of previous order because evidence was conflicting — It might well be that real solution would be to tear down lodge and have someone start afresh, but that option was not available at this interim stage.

Family law --- Division of family property — Order for division of property — Factors to be considered in determining nature of order — Preservation of operating business — Miscellaneous

Motion to transfer ownership of business prior to division of property — Spouses separated and order was issued preventing husband from dissipating his assets, including lodge business (lodge) — Receiver was subsequently appointed over lodge after wife tendered evidence that husband was dissipating his assets — Foreclosure proceedings were commenced with respect to lodge, allegedly as result of receiver's failure to pay mortgage — Wife took position that formal ownership of lodge should be transferred to her to save it from mortgagee's actions and to put an end to receiver's costs — Wife brought motion to have lodge put in her name — Motion dismissed — Despite husband's actions in dissipating assets, it was not clear at this stage that ownership of lodge should necessarily rest in wife — If lodge was sold, it had to be shown to have been sold to arm's length purchaser, and assets paid into court so that they could be dealt with as part of matrimonial action.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Interim support — Quantum

Interim support of $4,000 per month ordered in absence of full financial disclosure.

Table of Authorities

Cases considered by *Wein J.*:

Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd. (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.) — considered

Statutes considered:

Absconding Debtors Act, R.S.O. 1990, c. A.2
Generally — referred to

MOTION by husband to have court-appointed receiver of his business discharged for cause; MOTION by wife for interim spousal support and to have ownership of business transferred to her.

***Wein J.*:**

1 These motions arise in the context of a family law action in which a Receiver has been appointed by the court to manage the main asset of the parties, the Tobermory Lodge. The parties lived in and managed the lodge for the past several years.

2 John Kraner has not appealed from the order appointing the Receiver, made just three months ago, but moves before this Court for a Declaratory Order that the Receiver be discharged for cause. He also asks for a stay in payments to the Receiver, an accounting, that the Receiver be held in Contempt, and that Natasha Kraner be prohibited from being at the lodge.

3 Natasha Kraner cross applies to have the property and business put in her name, so that she can run the lodge and also so that she can prevent the sale of the property by the mortgage holder, who is said to be a friend of or at least

aligned with her husband. A complicating factor is that the land is owned by John Kraner personally but the business is a numbered company of his, and the past accounts have been intermingled with his personal accounts. Mrs. Kraner also asks for a series of other relief, including payment into court of money transferred by John Kraner to his brother on the same day the matter was last in court, for spousal support, and for various other relief related to the interim management of the lodge and the activities of John Kraner. She also asks that John Kraner be put in custody under the *Absconding Debtors Act*.

4 The Receiver has moved for the passing of the first two Statements of Account, but all parties agree that those motions must be deferred until after the current issues are resolved. The Receiver takes the position that the motion to remove the receiver should be dismissed with costs.

History of the Proceedings

5 On July 8th, 2011, Natasha Kraner brought an *ex parte* application to restrain her husband from dissipating any property in his name or under his control, including the Tobermory Lodge. The order was granted on a short term basis pending service on John Kraner. On the return date, John Kraner appeared but Natasha Kraner did not. The non-dissipation order was continued to July 29, at which time both parties had counsel, and a consent order was made preventing John Kraner from dissipating his assets including the Tobermory Lodge. However, he was permitted to list the lodge for sale and was permitted to accept a *bona fide* third party offer to purchase it. That Order continues in effect.

6 Disclosure orders followed in November of 2011.

7 In the following months, a family law action was commenced and issues relating to financial disclosure were pursued.

8 However, by May 3rd, 2012, Natasha Kraner brought evidence to suggest that contrary to the court order Mr. Kraner was dissipating assets. These related to the payment of $150,000.00 in full satisfaction of a loan alleged to be $200,000.00, the transfer of $440,000.00 to his brother on July 8th, 2011, allegedly prior to his receiving notice of the non-dissipation order, and conducting ongoing significant cash business at the Tobermory Lodge without accounting for it. It was ordered that the $150,000.00 be paid back into court and that Mr. Kraner appear at the adjournment date.

9 On May 16, the court decided to appoint a Receiver based on transfers made by John Kraner, including the $440,000.00 and the $150,000.00. Justice Corbett concluded that Mr. Kraner was prepared to lie to damage Mrs. Kraner's financial interest. The court also noted that he had failed to report cash revenues. The court concluded that irreparable harm might occur if John Kraner remained in charge of the business and although receivership costs would be high relative to the means of the business, it would not be appropriate to accept John Kraner's undertakings to run the business appropriately. While he did not evict John Kraner from the property at that time, he appointed a Receiver.

10 Subsequently, on May 28th, on a continuance of the motion, affidavit evidence was received concerning the events at the lodge on the Victoria Day long weekend. On that weekend, counsel for Mrs. Kraner and his relatives assisted, because of exigent circumstances, in the running of the lodge in the absence of the ability to obtain other employees on short notice.

11 Justice Corbett found that John Kraner had impeded the management and business of the lodge, such that the Receiver was now justified in asking that he be barred from the property. On the other hand, he also noted that the Receiver appeared to be aligned with Mrs. Kraner because he had relied on her to train new management and had relied on her counsel and his relatives and friends to assist in running the lodge on short notice on the long weekend. The court then concluded that it would not be reasonable for the Receiver to employ either of the parties at the lodge notwithstanding that new management would be costly.

12 The Court ordered that "the Receiver may in his discretion communicate with or meet with either Mr. Kraner or Ms. Kraner" for the purpose of receiving information about the lodge, that neither party would be paid for doing so,

and that neither party could remain at the lodge overnight or for more than four hours in any 24 hour period. They were to be accompanied at all times by the Receiver or its agent.

13 The court also ruled that Mr. Kraner had been acting in a manner contrary to the interest of the lodge for the purpose of frustrating or impeding the receivership. He was required to return equipment he had taken including computer equipment and files. Because of his disruptive actions he was required to leave the property during the Receivership.

14 It is significant to note that the events that took place on and before the Victoria Day weekend formed a significant underpinning to the reasons given on May 28th. Much of the current argument is based on those same facts.

15 Now, less than three months later, Mr. Kraner has applied to have the Receiver discharged for cause and for a stay of payments. By contrast, Mrs. Kraner applies again to be allowed to run the lodge at this stage.

16 It is obvious that both John Kraner and Natasha Kraner are unhappy with the Receivership, and wish to have the property run by each of them, without the other. Contempt actions have also been brought, including a request that the Receiver be held in contempt.

Current Facts of the Case

17 Both parties are now required to be out of the lodge, away from its day to day management, and have had to resile from interfering with the business of the lodge. John Kraner takes the position that the Receiver is biased in favour of Natasha Kraner, and has spent excessive amounts of money since taking over the management of the lodge, such that the receiver ought now to be removed. John Kraner relies extensively on the events leading up to and over the Victoria Day weekend.

18 Subsequently, through the month of June, difficulties were encountered by the Receiver with respect to the management of the lodge by Drajan Vojnoeic. He was removed by the Receiver on June 25th. As well, an employee, Emina Danovic, was unable or unwilling to keep up with the work of the lodge such that other local people had to be obtained. John Kraner now suggests that the new manager, Mr. Schnurr, is a friend and aligned with counsel for Natasha Kraner, but she alleges that Dragan and Emina were in effect spies for John Kraner.

19 In issue is the extent of the expenditures made by the Receiver. Both Mr. and Mrs. Kraner have expressed concerns about the amount of money that the Receiver has spent on repairs and operations, now totalling at least $176,000.00. Revenues during that time period are reportedly only $58,000.00. However, it is clear that extensive repairs were required because Mr. Kraner had permitted the lodge to become run down, and, at least it is argued by Mrs. Kraner, may have sabotaged the plumbing and electrical lines. Work orders required immediate attention, and structural deficiencies had to be fixed.

20 Overlaid on top of all of this is the fact that foreclosure proceedings have been brought against Mr. Kraner and the numbered company, allegedly as a result of the Receiver's failure to pay the mortgage, although the holder of the mortgage has agreed to stay the proceedings at this time. There is a suggestion that the holder of the mortgage may not be acting at arm's length from John Kraner.

21 By contrast, Mrs. Kraner argues that Mr. Kraner took large cash receipts from the lodge, and encouraged cash payments by charging no tax. She suggests he has concealed "millions of dollars in cash" to defeat her claim for equalization. She notes that he spent little to no money doing regular maintenance since the year 2008, such that the swimming pool did not work, decks and railings were rotten and dangerous, the Health Department had closed the kitchen, the roof leaked in some areas, and water testing had not been done. Mrs. Kraner suggests that her only hope to obtain any equalization payment is to have the title vested in her name so she can live there and run the business with minimum expense.

22 Ancillary claims relate to the car turned over to her by John Kraner: she alleges he will not turn over the second key and told her she would have a serious accident. The overall equalization claim by Natasha Kraner is complex and relates to the transfer of money dating back to the 1990's when the couple were involved in running other lodges.

23 On behalf of the Receiver, it is noted that the assets of John Kraner are intermingled with the assets of Tobermory Lodge, "2027707". The Receiver confirms the ongoing repair and health issues that were required to be funded in order for the business of the lodge to operate during the 2012.

Issues and Law

1. Removal of Receiver

24 The general obligations of a receiver are well known, as set out in *Canada Trustco Mortgage Co. v. York-Trillium Development Group Ltd.* (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.) at para. 2:

> (a) it is a fiduciary as to all interests of concerned parties and as such it is to act as an appointee of the Court in good faith; with candour; disclosing all relevant material facts affecting the parties; avoiding any real or objectively perceived conflicts of interest; and
>
> (b) it has a general duty to exercise its obligations with prudence, diligence, due care and skill.

25 It is not disputed that there is a heavy onus on a party asking to remove a Receiver. The court must consider the added cost involved in replacing a Receiver with another Receiver, and must assess the foundation for the alleged claim for *mala fides*. In normal circumstances, a Receiver will not be removed short of proof that the Receiver is engaged in blatant intentional action contrary to the interest of one or more parties. There is no doubt that the Receiver owes the duty to exercise its responsibilities in a careful manner considering the circumstances, but at the same time the court ought not to be assessing the actions taken by the Receiver in the context of the perfect light of hindsight.

26 Many of the initial concerns set out by John Kraner relate to alleged breaches of fiduciary duty that occurred on or before the last motion, including the alleged alignment between the Receiver and the applicant or counsel for the applicant and what was alleged to be an adversarial role towards Mr. Kraner when he was living at the property. At this time however he was clearly impeding the work of the Receiver, so it does not lie in him to now complain about steps taken to remedy harm he himself caused.

27 With respect to the other concerns relating to the duty to account, it is clear that the passing of the accounts will be dealt with in September, and all parties agreed to the adjournment to that date.

28 Finally, the evidence is conflicting with respect to the attendance of counsel for Mrs. Kraner or Mrs. Kraner herself at the lodge in contravention of the order, and at this stage, on a motion, it would not be appropriate to find that any such breach occurred.

29 The Receiver in this case was placed in the extremely difficult position of determining what expenditures were appropriate in order to keep the lodge open over the summer months. It is apparent that the lodge was not in ready condition for the season and that some expenditures in excess of what would normally be required had to be made. It may well be that the real solution would be to tear down the property and have someone start afresh, as Mr. Kraner suggests, but that option at least at this interim stage is not available to the parties, because of the manner in which they have acted towards each other in these proceedings, requiring the appointment of a Receiver.

30 The request to remove the Receiver at this stage is denied. The respondent's request to be permitted back into the lodge to operate it is also denied: his own actions have resulted in his removal from that position.

2. Contempt

31 John Kraner also requests that Natasha Kraner be found in contempt of court order by reason of having stayed at the lodge for in excess of the four hour period permitted by the court order of May 28th. As was noted in that order and the subsequent order relating to the costs, in which John Kraner's evidence was found to be "patently false", it is entirely inappropriate to base a contempt order on affidavit material filed on his behalf or by him.

3. Sale of the Property

32 With respect to the request to remove the designation of the property as the matrimonial home, that request is also declined. If the property is sold, any proceeds must be paid into court, so that the assets of Mr. Kraner cannot be further dissipated.

4. Transfer of the Property to Natasha Kraner

33 Natasha Kraner requests that the formal ownership of the property be transferred to her to save the property from the mortgage holders' actions and to put an end to the Receiver's costs. To a large degree this request is simply a repetition of a request made in the proceedings in May. Despite John Kraner's obvious actions, already commented on by Justice Corbett, in paying out a loan at a 25% discount and transferring $440,000.00 to his brother, it is not clear at this stage that ownership of the property should necessarily rest in Natasha Kraner. As noted above, if the property sold, which may well be a good thing, it must be shown to have been sold to an arm's length purchaser, and the assets of the proceedings paid into court so that they can be dealt with as part of the matrimonial action.

5. Spousal Support

34 It is difficult at this stage to assess the quantum of spousal support payable and it is not although it appears entirely probable that Natasha Kraner will receive support, in the absence of full and proper financial disclosure, it is difficult to make even an interim order. Natasha Kraner's view of her husband's dealings over the past several years may suggest to her that he has "millions" stashed away, but another view suggests that it has all been something of a shell game where money has been transferred from one asset to another. These are matters for trial.

35 Nonetheless, it is not inappropriate that some spousal support be paid. Mrs. Kraner received only $20,000.00 by way of an interim order up to March of 2012. The family income overall is likely to be much reduced once Revenue Canada becomes involved in the financial fallout of the disclosure of the cash income admitted to have been taken from the property by John Kraner. In the interim, only modest support, of $4,000.00 a month, on a without prejudice basis, is appropriate. This is aligned with the amount previously agreed to and so can be deemed minimally appropriate.

36 Accordingly, there will be an order for the payment of $4,000.00 a month on an interim basis from John Kraner to Natasha Kraner commencing April 1st, 2012, with the $20,000.00 of arrears to be paid by September 15th, and payments for September forward to be paid on the first of each month commencing September the 1st.

6. Disclosure Orders

37 It is appropriate that a deadline for disclosure be set. John Kraner is required to disclose all his assets and investments, including those of all of his companies and investments wherever held, and including from the date of the sale of the Shakespeare Inn. This disclosure must be completed by September 30th 2012. He is also to comply with the undertaking given at his examination, as soon as possible, and no later than September 30th 2012.

7. The Lexus Car Key

38 In the context of John Kraner's actions in this matter, including his transfer out of funds in probable disregard of court orders, and including the previously stated misconduct such as swearing to patently false evidence respecting financial performance and breaching the non-dissipation, and including his alleged threat to Natasha Kraner, it seems

likely that he has kept one of the Lexus car keys. He is to return it to Natasha by September 8, 2012, failing which he will make a payment of $2,000.00 to pay for electronic changes necessary to rekey the vehicle.

8. Other Relief Requested

39 The various requests by Natasha Kraner, that all costs of the receivership be paid by John Kraner, that he reimburse the wages of certain employees, and that he be placed in custody under the *Absconding Debtor Act*, are not appropriately dealt with prior to trial.

9. Early Trial

40 If this matter cannot be settled by way of an appropriate lump sum for equalization and support, then an early trial is mandated, to end the interim issues that will almost inevitably arise again between these parties.

10. Costs

41 It is always to be anticipated that experienced counsel will be able to resolve the issue of costs. If Counsel are unable to do so in this case, however, I will receive costs submissions to a maximum of 5 pages each, within 10 days for the Receiver and within 10 days thereafter for each of the other parties.

Order accordingly.

End of Document

Tab 3

1993 CarswellBC 125
British Columbia Supreme Court

Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.

1993 CarswellBC 125, [1993] B.C.W.L.D. 1317, 79 B.C.L.R. (2d) 169

METROPOLITAN TRUST COMPANY OF CANADA and SEABOARD LIFE INSURANCE COMPANY v. DANCORP DEVELOPMENTS LTD., EDWARD PATRICK McDANIEL, CASCADE WINDOWS LTD., REALTECH REALTY CORPORATION, CASCADE GLASS INC., NINE STAR CONSTRUCTION LTD. and DEGELDER CONSTRUCTION CO. LTD.

Master Patterson [in Chambers]

Heard: March 16, 1993
Judgment: April 28, 1993
Docket: Doc. Vancouver H910280

Counsel: *J. Hall*, for petitioners.
T.W. Pearkes, for respondent Dancorp Developments Ltd.
J. White, for respondent Degelder Construction Co. Ltd.

Subject: Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Debtors and creditors

VII Receivers
VII.9 Discharge of receiver
VII.9.b Grounds for discharge

Real property

VII Mortgages
VII.4 Payment and discharge of mortgage
VII.4.o Miscellaneous

Headnote

Mortgages --- Payment and discharge of mortgage — General

Receivers --- Discharge of receiver — Grounds for discharge

Mortgages — Discharge — Mortgagor in default under mortgages of condominium project by permitting lien claims to be filed — Unit sales completed with court approval generating sufficient funds to retire mortgages — Mortgagor not entitled to discharges while in default and mortgagee in jeopardy in respect of lien claimants.

1993 CarswellBC 125, [1993] B.C.W.L.D. 1317, 79 B.C.L.R. (2d) 169

Receivers — Discharge and removal — Mortgagor of condominium project seeking discharge of mortgagee's receiver — Application premature where units remaining unsold and other matters remaining to be dealt with by receiver.

The respondent developer granted two mortgages to the petitioners to secure the amount of approximately $19 million for a two-phase condominium project. When problems arose, the petitioners appointed a receiver under the mortgages. By that time, 38 builder's lien claimants had filed claims for a total of $5.5 million. A number of the lien claimants started actions, claiming priority over the petitioners. After some units of the completed project were sold with the court's approval, the petitioners received some $6.6 million. The respondent claimed that that amount was sufficient to discharge the mortgages and it applied for an order requiring the petitioners to grant discharges, as well as for an order removing the receiver.

Held:

Applications dismissed.

The respondent was not entitled under the mortgages to receive a discharge while in default. In allowing the liens to be filed, the respondent was in default. Until the question of priority claimed by the lien claimants was decided, the petitioners were in jeopardy to the extent of $5.5 million, which they would be entitled to recover from the respondent. Accordingly, the respondent was not entitled to discharges. It was premature to seek to have the receiver discharged. There were still suites to be sold and other matters to be dealt with by the receiver.

Table of Authorities

Statutes considered:

Land Title Act, R.S.B.C. 1979, c. 219

s. 223*considered*

Personal Property Security Act, S.B.C. 1989, c. 36

s. 65*referred to*

s. 66*considered*

Application by mortgagor for order requiring mortgagee to grant mortgage discharges and for order removing receiver appointed under mortgages.

***Master Patterson*:**

Relief Sought

1 The respondent Dancorp Developments Ltd. (hereinafter referred to as "Dancorp") applies for an order that two mortgages granted in favour of the petitioners Metropolitan Trust Company of Canada and Seaboard Life Insurance Company be discharged, and for an order removing BDO Dunwoody Ward Mallette Inc. (hereinafter referred to as "Dunwoody") as receiver-manager of the mortgaged lands and premises. Dancorp also applies for an order that Dunwoody provide monthly summaries of its accounts and that Dunwoody have its accounts passed and remuneration fixed by reference to the registrar.

History of the Proceedings

2 Dancorp was the developer of a two-phase highrise condominium project in Coquitlam. Dancorp granted two mortgages to the petitioners on May 26, 1989 and February 2, 1990; the purpose of these mortgages was to finance construction of the project. Dancorp entered into a construction contract with Degelder Construction Co. Ltd. (hereinafter referred to as "Degelder") on May 25, 1989 and by the terms of the first mortgage assigned the benefit of that construction contract to the petitioners. The total amount secured by the two mortgages in favour of the petitioners was approximately $19 million.

3 By December 1990, difficulties had begun to occur and as a consequence the petitioners appointed Dunwoody receiver of the mortgaged lands and premises on December 27, 1990 and receiver-manager on January 2, 1991. The appointment was made by instrument pursuant to the provisions of the two mortgages. No court order has been made confirming these appointments. Dunwoody was not and has never been receiver or receiver-manager of Dancorp.

4 By the time of the appointment of Dunwoody as receiver-manager, or shortly after, there were 38 claims of builder's lien filed against the mortgaged lands and premises. The claims of builder's lien include a claim by Degelder for $3.7 million and by numerous sub-trades for an additional $1.8 million. Most of the builder's lien claimants who have commenced action have claimed priority over the petitioners on the basis of the allegation that the petitioners were owners in possession.

5 The role of Dunwoody as receiver-manager was to supervise completion of the project, which has been done except for some warranty problems, and to supervise sale of the finished units. Nearly all of the units have been sold to individual purchasers, all sales were approved by court order (see for example the order of Master Kirkpatrick (as she then was) dated May 8, 1991). The only assets remaining unsold are the manager's suite and a number of parking stalls, and these are currently leased.

6 The various court orders approving the sales of the units directed that the net proceeds of sale of each unit, after adjustments and commission, were to be paid into the trust account of Messrs. Owen Bird, solicitors for the petitioners. The purpose of holding the funds in trust was to retain these funds pending determination of priorities among the various parties claiming these funds, particularly whether the builder's lien claims took priority over the petitioners' mortgages.

7 In January 1992 the petitioners obtained an order from Master Doolan directing payment to the petitioners of the sum of $3,798,532 upon posting a letter of credit in the same amount with the registrar of this court. A term of that order was that there was to be no disposition of the letter of credit or any funds derived from it without further order. In January 1993 a similar order was obtained for a further sum of $2,838,899.66. The purpose stated by the petitioners for posting the let ters of credit was to provide security for the builder's lien claims and at the same time stop interest from accruing on the mortgages. The funds held in trust by Owen Bird in an interest-bearing account were not earning interest at as great a rate as the mortgage interest rate and as a consequence there was a continual erosion of the funds.

8 Dancorp was given notice of each of the applications relating to the letters of credit, but did not appear or oppose either application. There is now a difference of opinion between counsel concerning the circumstances surrounding these orders. Counsel for the petitioners say that these applications were made partially at the suggestion of Dancorp. Counsel for Dancorp says that Dancorp never consented to the applications. By letter dated February 24, 1992 (Ex. "C" to the affidavit of Edward P. McDaniel sworn March 15, 1993) former counsel for Dancorp writes to counsel for the petitioners as follows:

9 With respect to the $3.8 million that you currently hold in your trust account and are about to swap for letters for credit, we have discussed this with our client and our client's view is that they would prefer the funds to simply be held in your trust account at interest rather than being converted into letters of credit.

10 I note that the letter quoted above was written after the order was made by Master Doolan on January 21, 1992 and only states a preference. Clearly, Dancorp did not oppose the applications and, in my view, acquiesced in the orders being made to post the letters of credit.

Mortgage Discharge

11 The petitioners admit that the payment to them of some $6.6 million pursuant to the two court orders is a sufficient amount to retire the two mortgages in full. Dancorp argues that the mortgages have been paid and consequently it is entitled to discharges in registrable form. The petitioners have apparently refused to provide those discharges because there is a contingent liability to the builder's lien claimants of approximately $5.5 million. Depending on the outcome of the builder's lien actions, the petitioners may be called upon to pay up to the full amount claimed, and, if that were so, there would be a substantial shortfall to the petitioners unless there was additional security. The petitioners argue further that it is not possible to say whether the mortgages have been paid in full until there is a final accounting of all receipts and disbursements including the costs of the receiver-manager. Without such a final accounting, the plaintiffs cannot be assured that the principal together with interest "and all other costs" owing pursuant to the mortgages have been paid in full. Until that day comes, the petitioners say there is no obligation to provide registrable discharges.

12 In addition to arguing that the mortgages have been paid in full, Dancorp has raised a number of other broadly based arguments:

13 (a) that the ability of Dancorp to carry on business is impaired by the fact that the mortgage is not released, therefore not allowing Dancorp to use any remaining equity in the project;

14 (b) there is no provision in either mortgage which allows the petitioners to enter into contingent liabilities and hold the mortgages as security for them;

15 (c) the petitioners had other options to deal with the liens when filed besides appointing a receiver-manager, i.e. pay them and add that amount to the mortgage, or accelerate the balance owing and foreclose; and

16 (d) without going into any detail, Dancorp argues that the continued existence of the mortgages on title may be either a slander of title or a clog on the equity of redemption.

17 There are two sections in the mortgages which set out the mortgagee's contractual rights to a registrable discharge on payment of the mortgage. They are as follows:

> **38 The Mortgagor:**
>
> (b) agrees that any portion of the Principal Sum may, in the sole discretion of the Mortgagee as aforesaid, be advanced or re-advanced in one or more sums at any future date or dates and the amount of such advances or re-advances when so made shall be secured by this Mortgage and be repayable with interest as aforesaid and this Mortgage shall be deemed to be taken as security for the ultimate balance of the monies advanced and pursuant to Section 24 of the Property Law Act, S.B.C. this Mortgage is made to secure a current or running account. Accordingly, it shall not be deemed to have been redeemed only that:
>
> (i) advances made under the Mortgage are repaid, or
>
> (ii) the account of the Mortgagor with the Mortgagee ceases to be in debit,
>
> and this Mortgage remains effective as security for further advances and retains the priority given by the said Section 24 until the Mortgagee has delivered a registrable discharge of this Mortgage to the Mortgagor; but, *if the Mortgagor is not indebted nor in default under this Mortgage, the Mortgagee shall*, on the Mortgagor's request and at the Mortgagor's expense, *execute and deliver* to the Mortgagor *a registrable discharge* of this Mortgage.

> In this paragraph the words "further advance" includes a first advance ...
>
> 57. The Mortgagee shall have a reasonable time after payment of the Principal Sum in full together with interest to the actual date of payment *and all other costs*, if any, then owing hereunder within which to prepare and execute a discharge of the Mortgage; and interest as aforesaid shall continue to run and accrue until actual payment in full has been received by the Mortgagee; and all legal and other expenses for the preparation and execution of such discharge shall be borne by the Mortgagor. (emphasis added)

18 The statutory authority for the court to order a discharge of mortgage is set out in s. 223 of the *Land Title Act*, R.S.B.C. 1979, c. 219:

> 223. (1) Where a mortgagee, without just cause, refuses or neglects to give the mortgagor or owner of the equity of redemption, herein referred to as the "owner", a discharge of the mortgage, notwithstanding the tender or attempted tender of all money due and owing by the owner to the mortgagee, the owner may make an application to the Supreme Court in the same manner as provided in section 222, and the court has all the power conferred on that court by section 222.

19 The argument advanced by Dancorp, that since all the money has been paid a discharge should be forthcoming, ignores both the facts and the language of para. 38 of the mortgage. Clearly, until the question of the priority claimed by the lien claimants is established, the petitioners are in jeopardy to the extent of $5.5 million. It is quite possible, if the lien claimants are successful, that the petitioners will have to re-advance an amount up to the amount secured by the letters of credit. According to the terms of the mortgage, the petitioners would be entitled to recover any such sum from Dancorp and are consequently entitled to maintain their security. Therefore, the petitioners have just cause to refuse the discharge and s. 223 of the *Land Title Act* does not assist Dancorp.

20 An additional argument is that para. 38 of the mortgage provides that if the "mortgagor is not indebted *nor in default*" under the mortgages, then the petitioners are to provide discharges. From the wording of the mortgage, it is clear that even if Dancorp is not indebted to the petitioners, if it is still in default, no discharge need be given. In my view, Dancorp is clearly in default under the mortgage by allowing claims of lien to be filed against the mortgaged lands and premises for which there is a claim of priority over the petitioners' mortgage (see para. 27 of the mortgages).

21 The other arguments were not strenuously advanced and do not, in my view, assist Dancorp. There is no receiver-manager appointed for the company and nothing to prevent it carrying on business in the usual way. The remaining arguments ignore the practical reality of the court order directing payment of funds to the petitioners, which stops interest running and would be for the benefit of Dancorp as well as the builder's lien claimants. The posting of the letters of credit directed by the court order are a necessary adjunct to this in order to preserve funds for the lien claimants in the event their priority is established. It is noteworthy that neither of those orders have been appealed by Dancorp.

22 For these reasons, it is my view that Dancorp is not entitled to a discharge of the petitioners' mortgage over any remaining property secured by them. This aspect of Dancorp's motion should therefore be dismissed.

Discharge of the Receiver-manager

23 Dancorp seeks an order that Dunwoody be discharged and a direction that there be a reference to the registrar of the court to pass the accounts and establish remuneration of the receiver-manager. Dancorp argues that the job for which the receiver-manager was appointed has been completed, and that to continue the receivership unnecessarily will only add to the costs. Dancorp argues also that para. 31 of the mortgages establishes the rules for a receiver-manager and that Dunwoody has failed to follow those rules, particularly in failing to account to Dancorp on a monthly basis as required by s. 65 of the *Personal Property Security Act*, S.B.C. 1989, c. 36.

24 The petitioners argue that it is premature to discharge the receiver-manager because the job is not yet complete. Not all suites have been sold, nor all the parking stalls dealt with, the receiver-manager is still dealing with warranty problems and with sales tax refunds. It is obvious also that there will be funds generated from sales, rentals and other sources which will exceed the amount required to retire the mortgages, and the petitioners argue that these funds should be held by Dunwoody pending resolution of all claims between the petitioners and Dancorp, and between the petitioners and Degelder and the various sub-trades.

25 Counsel for Dancorp argued that the builder's lien claimants have no status in this action, but some are parties to this action and they support the position taken by counsel for Degelder that the receiver-manager should not be discharged until all the priorities are sorted out.

26 One additional factor to be considered is that Dancorp has sued the petitioners and the receiver-manager for damages arising out of alleged improper conduct on the part of the receiver-manager, amongst other things. It is not clear to me whether this is a separate action, or by way of a counterclaim in the builder's lien action commenced by Degelder (New Westminster Registry No. A910895).

27 Section 66 of the *Personal Property Security Act* gives the court the power to "remove, replace or discharge a receiver, whether appointed by a court or in accordance with a security agreement." These powers are in addition to any other powers the court may have. However, these powers are discretionary and should only be used when there is a good reason to do so. There is no doubt that the activities of the receiver-manager are winding down and soon all that will be left will be the receipt of rents for certain unsold portions of the development. The management of the complex should have been taken over by the strata council by this time. Nevertheless, it is my view that Dunwoody should not be discharged until the final activity is complete. That includes resolving warranty issues, obtaining tax refunds, the sale of the manager's unit to the strata corporation and the disposition of the unsold parking units. In addition, it would be most appropriate for there to be someone other than Dancorp to collect rents and hold funds until all the various priorities have been sorted out.

28 Also, in my view, it would be inappropriate for there to be a reference to the registrar for a passing of accounts and fixing remuneration, as this would necessarily involve a review of the conduct of the receiver-manager when that is before the courts in another action. For these reasons, the application to discharge Dunwoody as receiver-manager and for an order directing the passing of accounts and fixing remuneration is dismissed.

Monthly Accounts

29 The final application is that Dunwoody provide monthly summaries of accounts to Dancorp as required by s. 65 of the *Personal Property Security Act*. This application is not opposed. Dancorp is entitled to monthly summaries of the accounts of the receiver-manager from December 1990 to the present time.

Summary

30 In summary, all of the applications made by Dancorp are dismissed with the exception of the application for provision of the monthly summaries of accounts and that was not opposed.

Application dismissed.

EMMANUEL VILLAGE RESIDENCE INC.	-and- **ATTORNEY GENERAL OF ONTARIO**	-and- **1250 WEBER STREET EAST, KITCHENER, ONTARIO OR THE PROCEEDS OF THE SALE THEREOF (IN REM)**
Applicant	Applicant	Respondent

Court File No.: CV-16-11424-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF THE RECEIVER
(re: Receiver's Responding Factum to Attorney General of Ontario's Motion to Discharge the Receiver returnable February 8, 2017)

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