Court File Number: CV-20-00651299-00CL

**Superior Court of Justice**
Commercial List

# FILE/DIRECTION/ORDER

**2615333 Ontario Inc.**

Applicant

AND

**Central Park Ajax Developments Phase 1 Inc., 9654488 Canada Inc., 9654461 Canada Inc., 9654372 Canada Inc., 9617680 Canada Inc. and 9654445 Canada Inc.**

Respondents

Case Management ☐ Yes ☐ No by Judge: _____

| Counsel | Telephone No: | Email/Facsimile No: |
|---|---|---|
| Rebecca Kennedy and Alexander Soutter for RSM Canada Inc., in its capacity as Court-appointed Receiver | | |
| Wendy Greenspoon-Soer for Applicant | | |
| Mervyn Abramowitz for respondents | | |
| Edmund Lamek for Ajax Master Holding Inc. | | |
| John R. Hart for The Corporation of the Town of Ajax | | |

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

**Date Heard: May 26, 2021**

[1] On April 15, 2021, I made an Order (the "Appointment Order") pursuant to section 243(1) of the *BIA* and section 101 of the *Courts of Justice Act* appointing RSM Canada Limited as receiver (the "Receiver") of certain properties (collectively, the "Property").

[2] In April 26, 2021, the respondents served a Notice of Appeal in respect of the Appointment Order.

[3] The Receiver and the applicant jointly bring this motion for (a) a declaration confirming the Receiver's authority to take such steps as necessary, in its sole and absolute discretion, to preserve and protect the Property notwithstanding the pendency of the appeal, with such steps to be secured by the Receiver's Borrowings Charge (as defined in the Appointment Order); (b) alternatively, an order varying the Appointment Order to provide for provisional execution such that the Receiver can take such steps as it considers necessary to preserve and protect the Property, notwithstanding any appeal, with such steps to be secured by the Receiver's Borrowings Charge; and (c) an order approving the First Report of the Receiver dated May 14, 2021 and the activities of the Receiver described therein.

[4] The respondents oppose the motion on two grounds. First, they submit that a judge of the Superior Court of Justice lacks jurisdiction to hear this motion and grant the relief sought. Second, if it is held that the Court has jurisdiction, the respondents oppose the measures proposed by the moving parties on the basis that they are not conservatory and necessary.

[5] Section 193 of the BIA provides that unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: (a) if the point at issue involves future right; (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceeding; (c) if the property involved in the appeal exceeds in value ten thousand dollars; (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $500; and (e) in any other case by leave of a judge of the Court of Appeal.

[6] In their Notice of Appeal, the respondents state that the appeal is being brought under subsections 193 (a) to (c) of the BIA. As a result, the respondents contend that their appeal has been properly brought and leave of a judge of the Court of Appeal is not required.

[7] Section 195 of the BIA provides:

> Except to the extent that an order or judgment appeal from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appeal from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[8] The moving parties submit that the Receiver has the power and authority to take necessary conservatory measures to preserve and protect the Property notwithstanding the appeal of the Appointment Order and that a judge of the Superior Court of Justice has jurisdiction to make an order confirming such authority.

[9] The moving parties first submit that when appointed, the Receiver had a duty to take possession of the Property and to care for it in a commercially reasonable manner, an obligation that, they contend, is ongoing. In support of this submission, the moving parties rely upon section 247(b) of the BIA which provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner. I disagree that this provision authorizes a receiver to deal generally with the property of the insolvent person or the bankrupt, even in a commercially reasonable manner, notwithstanding an appeal whereby all proceedings under the appointment order are stayed. For example, it may be commercially reasonable for a receiver to sell property that is subject to a receivership order in a declining market but, where the appointment order is stayed pending appeal, the receiver is not permitted to do so without an order lifting or varying the stay. The broad interpretation of s. 247(b) that the moving parties advance would, if followed, conflict with the stay of proceedings provided for by s. 195 of the BIA.

[10] The moving parties submit that the appeal of an order appointing a receiver does not serve to void the order, and a receiver can take conservatory measures in relation to property in its possession notwithstanding any appeal. The moving parties contend that it is the receiver's duty to do so, irrespective of whether the order appointing the receiver is stayed pending appeal, and that a superior court judge has jurisdiction to confirm the receiver's authority to take such measures.

[11] In support of this submission, the moving parties rely on *Royal Bank v. Saskatoon Sound City Ltd*. (1989), 77 CBR (NS) 127 (Sask. C.A.). In *Saskatoon Sound*, a bankruptcy order was made against the debtor who appealed from that decision. No leave to appeal was necessary. The petitioning creditor applied for an order lifting the stay of execution of the receiving order which was provided for by the *Saskatchewan Rules of the Court of Appeal*.[1] Bayda C.J. S., at paras. 12-13, addressed the scope of the stay imposed by the *Rules* in relation to a bankruptcy order:

> What is the scope of the stay imposed by Appeal Rule 15(1) in relation to a receiving order? It is, of course, only the execution of the receiving order which is stayed. The adjudication of bankruptcy inherent in the making of a receiving order is not affected. The status of bankruptcy prevails. It follows from that that the vesting in the trustee of title to the bankrupt's property is not affected. The corollary of that is that the bankrupt has no right to deal with the property in any way except perhaps for the purpose of preserving or conserving it. [Emphasis in original]
>
> The execution of a receiving order contemplates the exercise by the trustee of the duties and powers vested in him under the Act. If the execution of the receiving order is stayed, it is logical that the exercise of

[1] When this decision was released, s. 195 of the *Bankruptcy Act* provided for a stay of all proceedings under an order or judgment appealed from where a judge has granted leave to appeal. Because the appeal was as of right, the stay provided for in s. 195 did not apply.

> those duties and powers is stayed. (In this I include the power to require the bankrupt to appear for an examination - a matter specifically raised in argument.) If before the notice of appeal is served the trustee has exercised certain powers and duties, he need not undo what he has already done. He cannot, however, take any further steps in carrying out the duties he has commenced. Nor can he commence carrying out any other duties. There is one exception: the trustee has the duty and power to take conservatory measures in relation to the property in his possession irrespective of the stay.

[12] Bayda C.J.S. considered the circumstances of the case and made an order partially lifting the stay.

[13] *Saskatoon Sound* is authority for the proposition that a trustee in bankruptcy has the duty and power to take conservatory measures in relation to the property vested in the trustee irrespective of a stay of proceedings pending an appeal of the bankruptcy order. In *Saskatoon Sound*, the application was made to a judge of the Saskatchewan Court of Appeal, not a superior court judge, to lift the stay of proceedings imposed in relation to a bankruptcy order by the applicable rules of the appeal court. This decision is not, in my view, authority for the proposition that a superior court judge has jurisdiction to confirm that a receiver is authorized to take conservatory measures where there is a stay of proceedings under s. 195 of the BIA.

[14] *Saskatoon Sound* was considered by a judge of the Queen's Bench for Saskatchewan in *Royal Bank of Canada v. Paulsen & Excavating Ltd*., 2012 SKQB 267. In *Paulsen*, the receiver was appointed by court order and the debtor appealed, creating a stay of the receivership order. The receiver sought approval of its fees and disbursements, including for activities during the stay period which, the receiver argued, were the result of complying with its duty to conserve the assets of the debtor.

[15] The application judge held, at para. 14, that the receiver, like a trustee in bankruptcy, has the duty and power to take conservatory measures over the property of the debtor in spite of the stay of proceedings in effect pursuant to the *Court of Appeal Rules*. In support of this conclusion, the application judge quoted the passages from *Saskatoon Sound*, at paras. 14-15, that I have quoted above. The application judge held that the receiver was entitled to its fees and disbursements for activities associated with conserving the property subject to the receivership that were taken during the stay period.

[16] I do not regard decision in *Paulsen* as authority for the moving parties' submission on the question of jurisdiction before me, that is, whether a superior court judge has jurisdiction to make an order confirming a receiver's authority to take conservatory measures in relation to property subject to the receivership when a stay of proceedings is in effect pursuant to s. 195 of the BIA. In *Paulsen*, the application judge was not called on to decide this question.

[17] The language of s. 195 of the BIA is clear that unless the exception for "provisional execution" applies, "all proceedings under an order appealed from shall be stayed until the appeal is disposed of", unless the Court of Appeal or a judge thereof orders otherwise. If a receiver considers it to be necessary to take conservatory actions in relation to the property subject to a receivership order while a stay is in effect and wishes to seek prior judicial confirmation of its authority to do so, the proper procedure, in my view, is for the receiver to seek such confirmation from the Court of

Appeal or a judge thereof who has jurisdiction to grant an order varying or cancelling the stay for such reason as may be deemed proper.

[18] The moving parties submit, in the alternative, that I have inherent jurisdiction as a judge of the Ontario Superior Court of Justice to make an order varying the Appointment Order to order "provisional execution" notwithstanding any appeal therefrom.

[19] In support of this submission, the moving parties rely upon *Century Services Inc. v. Brooklin Concrete Products Inc*. (2005), 10 CBR (5th) 169. In *Century Services*, Campbell J. considered whether it was proper to include in the formal order to give effect to a vesting order the words "subject to provisional execution notwithstanding any appeal". No appeal had been brought when Campbell J. addressed this issue. Campbell J. considered whether the concept of "provisional execution", which is recognized in the law of Québec, is a recognized legal concept in Ontario law, and he expressed his view, at para. 5, that "the concept is within the inherent jurisdiction of this Court and should be exercised sparingly and with caution, given the normal operation of a notice of appeal".

[20] The moving parties also rely on *Confederation Trust Company of Canada v. Beachfront Developments Inc. and Beachfront Realty Inc*., 2010 ONSC 4833. In *Confederation Trust*, Newbould J. made a receivership order. Before the formal order was taken out, a party who had opposed the motion delivered a notice of appeal. The applicant moved for an order under s. 195 of the BIA that the order to be taken out provide that it is subject to "provisional execution" notwithstanding any appeal. The appealing party opposed this motion on the ground that, given the appeal, the applicant should move before a judge of the Court of Appeal to vary or cancel the stay of proceedings. Newbould J. held that in the circumstances, where the receiver needed to act promptly to protect the value of the asset under receivership, it was appropriate for him the exercise his jurisdiction under s. 195 of the BIA to provide for "provisional execution" in the order and to permit the receiver to carry out activities that qualified as provisional execution notwithstanding the stay pending appeal.

[21] In both *Century Services* and *Confederation Trust*, the request to include language that the order be subject to "provisional execution" was made before the formal order had been taken out and before the judge was *functus officio*. Neither Campbell J. nor Newbould J. was required to decide whether he had jurisdiction to vary an issued and entered order while a stay of proceedings was in effect.

[22] The moving parties submit that I have jurisdiction under rule 59.06(2)(a) of the *Rules of Civil Procedure* to vary the Appointment Order on the ground of facts arising or discovered after the order was made. The moving parties submit that the Receiver discovered following its appointment that the Property was not vacant land but consists of a parking lot and at least seven commercial units in a strip mall, and that some of the units are tenanted and some are vacant. The Receiver reports that it discovered upon attending at the Property the presence of the units, and that the vacant units were dilapidated and showed signs of damage, infested with mould, not properly secured and they appeared to have been accessed by unknown persons, possibly from a nearby homeless shelter.

[23] The moving parties also submit that I have such jurisdiction under the terms of the Appointment Order itself, which provides that any interested party may apply to vary or amend the order on

not less than seven days notice to the Receiver and to any other party likely to be affected by the order sought.

[24] I agree with the statement made by Campbell J. in *Century Services* that the Court's jurisdiction to provide for "provisional execution" in a receivership order that is subject to an appeal and authorize a receiver to take actions by way of provisional execution that it would otherwise be unable to take because of the stay under s. 195 of the BIA should be exercised sparingly and with caution.

[25] On the evidence before me in the First Report of the Receiver, I am not satisfied that the measures that the Receiver wishes to take to receive, preserve, and protect the Property while the stay is in effect including obtaining adequate insurance, securing vacant units, addressing health and safety risks at the Property, collecting rent from commercial tenants, and making satisfactory arrangements for funding to pay the costs of such and other measures should be authorized, while a stay is in effect, through an amendment to the Appointment Order to provide for "provisional execution". The proper procedure for the moving parties to seek judicial approval for the actions the Receiver proposes to take is through a motion to a judge of the Court of Appeal with jurisdiction to lift or vary the stay of proceedings under s. 195 of the BIA.

[26] I decline to exercise jurisdiction to vary the Appointment Order as requested.

[27] For these reasons, the moving parties' motion is dismissed.

[28] If the parties are unable to agree on costs, the responding parties may make written submissions (not exceeding 3 pages, excluding costs outline) within 10 days. The moving parties may make responding written submissions (also not exceeding 3 pages, excluding costs outline) within 10 days thereafter. No reply submissions without leave.

Digitally signed by
Mr. Justice Cavanagh

Cavanagh J.

May 27, 2021