COURT FILE NO.: 07-CL6913 and 08-CL-7368
DATE: 20091222

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: ED MIRVISH ENTERPRISES LIMITED and 1 KING WEST INC.

Applicants

STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA CORPORATION and HARRY STINSON

Respondents

BEFORE: Justice Newbould

COUNSEL: J. Robert Verdun - Self-represented

Jessica Kimmel and *Lauren Butti*, for the Ira Smith Trustee and Receiver Inc., and Goodmans LLP

DATE HEARD: December 10, 2009

E N D O R S E M E N T

[1] This is a motion by Mr. Verdun for leave to bring an action for alleged gross negligence and willful misconduct against Ira Smith Trustee and Receiver Inc. (the "Receiver"), and its counsel Goodmans LLP ("Goodmans").

[2] This motion arises out of the receivership of four debtor companies in connection with the development at 1 King Street West, Toronto. On September 25, 2009, the Receiver was discharged. The discharge order of Pepall J. provided that the Receiver and its counsel Goodmans were released and discharged from all liabilities in connection with their conduct, involvement or duties with respect to the four debtor companies or in any way in connection with these proceedings, save and except for gross negligence or willful misconduct. In her endorsement released September 25, 2009, Pepall J. stated:

> It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged.

> In such circumstances, a receiver should be liable for its actions. That said, post discharge, a claimant should still be required to obtain leave of the Court to institute and continue proceedings against a former receiver. When addressing the request for such leave, the Court will consider, amongst other things, prior Court approval of the conduct of the receiver, the claims bar process, if any, and its outcome, and whether as a condition of proceeding with litigation, it is appropriate for the claimant to post full indemnity security for costs by letter of credit or otherwise. In my view, absent a strong prima facie case, the latter should be the norm, such a regime strikes me as an appropriate balance between the desirability of providing appropriate protection to the Court's former officer and the need to address instances of gross negligence and willful misconduct.

[3] During the receivership there was a claims bar process. Because of problems that the Receiver and its counsel had with Mr. Verdun, which were referred to in the endorsement of Pepall J. dated September 25, 2009 and also in the fourteenth Report of the Receiver, the claims bar process provided for a call for claims against both the Receiver and its counsel regarding their conduct since the original proceedings in this matter, including any claims for intentional or unintentional torts. All claims were to be barred on January 23, 2009 unless a claim had been made before then. The claims now sought to be made by Mr. Verdun were not made by him under the claims bar process. He did make a claim for $25,654.02 for lost income and expenses in respect of his unit at 1 King West on the basis that he claimed the Receiver was liable for lost income as a result of the stay contained in the receivership order which prevented him from removing his unit from the rental pool. That claim was disallowed by the Receiver and Mr. Verdun did not appeal that. Thus that claim is barred.

[4] Apart from the claims bar process, orders were made throughout the receivership by Pepall J. approving the thirteen reports made by the Receiver to the court to the date of the Receiver's discharge and the actions and activities of the Receiver contained in those reports.

[5] Mr. Verdun now seeks to commence a claim against the Receiver and Goodmans for a number of claims on behalf of the residential condominium corporation ("TSCC 1703"). During the receivership from April 2007 until January 2008, Mr. Verdun was president of TSCC 1703. He remains a member of the board of directors. He has no right to be commencing any action on behalf of TSCC 1703. TSCC 1703 has not applied for leave to commence any action.

[6] Mr. Verdun also seeks to commence a claim on behalf of "unsecured creditors". He has not named these unsecured creditors or named any entity or person against whom they are creditors. He has no right to be suing on behalf of other persons and he has not established in any way that he is an unsecured creditor of either the Receiver or Goodmans.

[7] Mr. Verdun also seeks to claim on behalf of individual suite owners for losses incurred by them in participating in the hotel rental pool during the receivership. He has no right to be suing on behalf of any other suite owner. This claim is asserted as a result of the dismissal by Pepall J. on October 24, 2007 of a motion by TSCC 1703 and one unit holder on behalf of all unit holders to vacate the stay provisions of the receivership order to allow the unit holders to

freely leave the rental pool. Mr. Verdun made a claim with respect to these losses in the claims bar process in the receivership and it was disallowed. He has no right now to be commencing another claim for that. In any event, there is no evidence that the Receiver or Goodmans did anything wrong that led to the order of Pepall J. refusing the motion to allow the unit holders to leave the rental pool.

[8] Mr. Verdun has also seeks to claim for lost market value caused by the receivership payable to all owners of suites based on $25,000 for each of 540 units. He cannot sue on behalf of anyone else other than himself. This claim appears to be based on an assertion that the receivership order should not have been granted in the first place.

[9] Mr. Verdun also seeks to claim for what he says are the fees and disbursements paid to the Receiver and the fees and disbursements paid to Goodmans from the income streams of Stinson Hospitality Inc. et al. during the receivership. He has not claimed to have paid these amounts himself and he has no right to be making any such claim on behalf of anyone else.

[10] During the course of argument, Mr. Verdun indicated that a primary concern is that TSCC 1703 ended up paying for hotel operational assets which it purchased from the Receiver and he contends that TSCC 1703 should not have had to acquire those assets. He said that his damages would be his share of the $13.9 million paid for those assets, his share to be measured by his percentage that his unit bears to all of the units of TSCC 1703. This claim would not be one for him to make but for TSCC 1703 to make, which it has not sought to do.

[11] There are other problems with the claims sought to be made by Mr. Verdun.

[12] Much of the complaints of Mr.Verdun relate to the residential condominium corporation TSCC 1703 and the commercial condominium corporation TSCC 1726. Neither of these condominium corporations were the subject of the receivership. While his complaints in his affidavit are somewhat rambling, they in large part boil down to allegations that matters were not brought to the court's attention by the Receiver or its counsel which resulted in court orders that Mr. Verdun does not think were correct. He says there should never have been a receiving order in the first place as the security was invalid and that there should not have been a sale of assets to TSCC 1703 as the assets should not have been the subject of any sale.

[13] However, Mr. Verdun's affidavit of October 3, 2007 that he filed with the Court referred to many of the pieces of information which he asserts ought to have been provided by the Receiver to the Court. In his e-mail of October 10, 2007 to other suite owners, he stated that Justice Pepall had confirmed in court that she had read his affidavit. Moreover, there was nothing preventing Mr. Verdun or TSCC 1703 from bringing any fact to the attention of the Court that they thought relevant.

[14] Regarding Mr. Verdun's complaint that the Receiver ought to have realized that it had nothing of substance to sell and that TSCC 1703 ought not to have been required to purchase the assets that it did, Mr. Verdun's e-mail of October 24, 2007 to the Receiver indicates that he was of the same view back then, well before the bar claims process was in place. Moreover, on May 9, 2008, Mr. Gardiner of Gardiner Miller Arnold LLP, solicitors at that time for TSCC 1703,

wrote to TSCC 1726 and the Receiver, who was not the Receiver for TSCC 1726, indicating problems with the status of TSCC 1726. Mr. Verdun said in argument that he did not realize that TSCC 1726 had not been set up properly. That statement is belied by the letter from Mr. Gardiner. At the time of the letter Mr. Verdun was president of TSCC 1703 on whose behalf the letter was sent.

[15] Mr. Verdun complains about the mortgage security under which the Receiver was appointed. He asserts that there is an issue as to whether or not the security was the result of a fraudulent conveyance and that nothing was done about that at the time by the Receiver or its counsel. This complaint is contrary to the facts and in any event the issue was known to Mr. Verdun before the claims bar date. The relevant facts are contained in the Receiver's fourteenth Report at section 2.9 and 2.10. In substance, the issue of security being invalid was raised by the Receiver including the concern that there was a potential preference. A motion was authorized for Segura to bring a motion to lift the stay in order to advance a rectification application, which motion was brought. The Receiver was made a party to that motion at the direction of Pepall J. After documentary production and examinations of several witnesses, a case conference was held before Campbell J. and a settlement of the issue was arrived at subject to court approval. The Receiver reported on the proposed settlement in its ninth Report and the motion to approve the settlement was served on Mr. Verdun who took no steps to oppose the order. The order approving the settlement was made on December 11, 2008, the date when the claims bar process was ordered to take place.

[16] In late January 2009 after the orders had been made recognizing the validity and the quantum of the security, Mr. Verdun stated he intended to move for a lift of the stay of proceedings for leave to file a statement of claim challenging the quantum of the security. A timetable was set by Pepall J. and the parties were ordered to attend a case conference before Campbell J. Mr. Verdun had retained counsel for his motion. Following the settlement conference held with Campbell J. the Receiver was advised in writing by Mr. Verdun's counsel that Mr. Verdun was abandoning his motion. Costs were ordered by Pepall J. on May 29, 2009 against Mr.Verdun for the costs of the abandoned motion.

[17] Mr. Verdun was well aware of the issues of the security. If he was dissatisfied with the actions of the Receiver or its counsel and wanted to make a claim against them, he should have done so in the claims bar procedure. He did not.

[18] Mr. Verdun also complained about a furniture, fixtures, and equipment reserve, which he says the Receiver accessed improperly. The Receiver's fourteenth Report at page 15 deals with this issue. Funding of this reserve was the responsibility of Stinson Hospitality Inc., one of the debtors over which the Receiver was appointed. After its appointment, the Receiver funded the reserve. The Receiver eventually brought a motion to confirm that it could utilize funds in the reserve to meet obligations of the estates. The motion was heavily contested by TSCC 1703, supported by Mr. Verdun who was its president, and the matter was ultimately settled.

[19] I have not referred to every allegation of fact made by Mr. Verdun. They do not all fall into neat compartments. However, I am satisfied that Mr. Verdun has not established that there

were any facts giving rise to his complaints that he now wishes to make the subject of an action of which he was not aware at the time of the claims bar process.

[20] The actions of the Receiver were approved by court order at various stages. Orders were made, both before the date of the initial receivership order and thereafter. What Mr. Verdun seeks to do essentially amounts to a collateral attack on one or more of those orders. There is no basis for making such a collateral attack. It would be an abuse of process for him to be permitted to do so.

[21] In any event, Mr. Verdun has not established at all a prima facie case, let alone a strong prima facie case, of negligence or intentional misconduct against the Receiver. There is nothing in the record before me at all that could be considered to amount to any such conduct.

[22] With respect to Goodmans, their duty was to the Receiver. There is no evidence of any kind that Goodmans owed any duty to Mr. Verdun and no evidence that they engaged in any intentional wrong doing towards him, or any wrong doing for that matter. Moreover, any claim that Mr. Verdun may have had against Goodmans was barred by the claims bar process. Mr. Verdun has no cogent evidence of information relating to Goodmans coming to light before or after the claims bar process that could be considered negligence or willful misconduct.

[23] In all of the circumstances, the motion by Mr. Verdun for leave to commence an action against the Receiver and Goodmans is dismissed. The Receiver and Goodmans are entitled to their costs. In light of the allegations made against the Receiver and Goodmans in their professional capacity, including allegations of fraud, they are entitled to their costs on a substantial indemnity basis. They may make submissions as to the quantum of costs within 15 days from the release of these reasons and Mr. Verdun will have 15 days to respond. Costs submissions by both parties are to be no longer than five pages double spaced. The submissions of the Receiver and Goodmans should attach an outline of costs in accordance with the Rules.

NEWBOULD J.

DATE: December 22, 2009