

COURT FILE NO.: 07-CL-6913
COURT FILE NO.: 31-455170
COURT FILE NO.: 31-455171
COURT FILE NO.: 31-455172
COURT FILE NO.: 31-455173
DATE: 2007-09-24

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL COURT)
and
(IN BANKRUPTCY)**

RE: Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc. et al. and In the Matter of the Bankruptcy of Stinson Hospitality Inc., Dominion Club of Canada Corporation, The Suites at 1 King West Inc. and 2076564 Ontario Inc.

BEFORE: Justice Pepall

COUNSEL: Patricia Conway and Jeffrey C. Carhart, for the Moving Parties
Arthur O. Jacques and Peter Raytek, for the Respondents
L. Joseph Latham, for the Receiver
Chris Reed, for the Trustee
Mark Arnold for TSCC Number 1703

ENDORSEMENT

Facts

[1] The moving parties, Ed Mirvish Enterprises Limited and 1 King West Inc., brought a motion on an urgent basis for the annulment of the voluntary assignments in bankruptcy signed by Harry Stinson in his capacity as director of the four companies in receivership, namely Stinson Hospitality Inc., Dominion Club of Canada Corporation, the Suites at 1 King West Inc., and 2076564 Ontario Inc.

[2] The moving parties and the Receiver both submitted that the matter was urgent in that it was necessary to create and maintain stability in the subject project and to avoid confusion in the marketplace and amongst the various stakeholders. One of the arguments relied upon by the moving parties related to the identity of the trustee and the suggestion that he was associated

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with a potential purchaser of the assets of two of the companies in receivership. Counsel on behalf of the Trustee indicated that he was prepared to argue the issue of whether Mr. Stinson as a matter of law was authorized to assign the companies into bankruptcy in the face of the receivership order. I accordingly proceeded to hear argument with respect to that issue. The remainder of the motion would be argued another day if it became necessary.

[3] On August 24, 2007, I appointed Ira Smith Trustee and Receiver Inc. as receiver and manager of the four aforementioned companies (the "Receiver"). It was appointed Receiver

"of all of the Companies' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, whether or not used in the hotel rental management and food and beverage program carried on at the premises known municipally as 1 King West, Toronto, Ontario (collectively, the "Property")."

[4] Amongst other things, paragraph 4 of the order provided that,

"This Court orders that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof ...;

(c) to manage, operate and carry on the hotel management and food and beverage businesses of the Companies (collectively, the "Business") including the power and authority to enter into any agreements or incur any obligations in the ordinary course of such Business, to cease to carry on all or any part of such Business or to perform or cease to perform any contracts of the Companies;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Companies and to exercise all remedies of the Companies in collecting such monies, including, without limitation, to enforce any security held by the Companies in relation to the Business;

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

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Companies in relation to the Business, the Property or the Receiver, and to settle or comprise any such proceedings;

(s) to take any steps reasonably incidental to the exercise of these powers,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Companies, and without interference from any other Person." Persons is defined to include current and former directors and Harry Stinson. Mr. Stinson is the sole director of each of the four Companies.

[5] Paragraph 11 of the Order states,

"This Court orders that no Proceeding against or in respect of any aspect of the Companies, the Business or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Companies (in respect of any aspect of the Business) or the Property are hereby stayed and suspended pending further Order of this Court. For greater certainty, nothing in this order shall prevent the continuation of the proceeding court file number 07-CV-329252PD1."

[6] Paragraph 10 defines Proceeding as "proceeding or enforcement process in any court or tribunal". Paragraph 12 states,

"This Court orders that all rights and remedies against the Companies in relation to the Business, the Receiver or affecting the Property are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Companies to carry on any business which the Companies are not lawfully entitled to carry on, (ii) exempt the Receiver or the Companies from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest or, (iv) prevent the registration of a claim for lien."

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[7] Lastly, paragraph 28 provides, "This Court orders that nothing in this order shall prevent the Receiver from acting as a trustee in bankruptcy of the Companies."

[8] Although it is not identical, the receivership order was based on the standard form template receivership order prepared by the Commercial List Users' Committee of the Ontario Superior of Justice (the "Committee"). All of the paragraphs of the order that are reproduced in this endorsement are contained in the template.¹ Explanatory notes accompany the template. In describing the Receiver's powers which are contained in the within order in paragraph 4, the Committee writes, "The concluding words of paragraph [4] of the standard form template order are designed to clarify that the Receiver is exclusively in control of the debtor's activities. Absent specific authority therefore, the board of directors of the debtor may not engage in litigation in the debtor's name nor take any other steps on behalf of the debtor once the Receiver is appointed." The Committee also notes that the standard order does not contain any specific provision allowing the Receiver to file an assignment in bankruptcy or to consent to the making of a receiving order under the Bankruptcy and Insolvency Act against the debtor. The Committee observes that, "Bankruptcy is a sufficiently material, substantive and final act that if a Receiver is to be empowered to bankrupt the debtor, the matter should be brought to the attention of the Court expressly."

[9] The moving parties and the Receiver take the position that the Receiver is exclusively in control of the debtors' activities. The decision of *Mahood v. High Country Holdings Inc.*² supports their position. Furthermore, to assign the companies into bankruptcy, the consent of the Receiver or leave of the Court is required.

[10] In contrast, the Trustee and the Stinson respondents submit that as director, Mr. Stinson has certain residual powers including the power to voluntarily assign the companies into bankruptcy and that this power was not removed by my earlier order. In this regard, counsel for the Trustee referred to *Bennett on Receiverships*.³ As to the stay, counsel submits that an

¹ With the exception of the last sentence of paragraph 11.

² [1996] B.C.J. No. 2408.

³ 2nd ed. (Toronto: Carswell, 1999).

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assignment in bankruptcy is purely an administrative step and therefore not captured by the language of my order.

Discussion

[11] While the directors of a company in receivership may retain certain residual powers (see *Maple Foods Inc. v. Markland Seafoods Ltd.*⁴ and *Kerr on Receivers and Administrators*⁵), one must look to the underlying purpose and language of the court order to ascertain whether Mr. Stinson retained the right to assign these companies into bankruptcy.

[12] In this case, Mr. Stinson had covenanted to vacate the property and cease operations of the rental management program and the food and beverage program. It is clear from my reasons that stability, financial regularity and accountability in the operations of the premises were needed and that the Receiver could address these requirements. The purpose of the order was to place the Receiver in control of the companies' activities. The language of the order is consistent with this objective. As stated by Thackray J. in *Mahood*, supra, when dealing with a comparable (although not identical) situation:

"There is no remaining management authority vested in Mr. Mahood ... it would be completely ironic and unjust if Mr. Mahood could thwart the Court's intention by replacing the receiver-manager with a trustee in bankruptcy of his own choice. ... To sanction a bankruptcy in these circumstances would be to foster that conduct which the Court sought to enjoin both directly and indirectly in the orders appointing the receiver and setting out the receiver's duties."⁶

[13] I also note that while *Bennett on Receiverships* does state that directors of a debtor corporation in receivership may file an assignment in bankruptcy, no authority is cited for this proposition; the book was published in 1999; and its draft order is different from that proposed by the Commercial List Users' Committee.

[14] That said, it is unnecessary in this case for me to decide the issue of the extent of a

⁴ 2007 Carswell Nfld 83 (N.L.C.A.)

⁵ 17th ed. (London: Sweet & Maxwell, 1997) at p. 369.

⁶ Paragraph 73. Although not detracting from the applicability of the case to Ontario, it should be noted that B.C. has a *Company Act* that addresses the powers of directors and a company in receivership.

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director's powers as it is abundantly clear that Mr. Stinson had no right to unilaterally assign these four companies into bankruptcy in any event. At a minimum, pursuant to paragraph 11 of my order, he was obliged to obtain leave of the Court. In my view, the voluntary assignment of the four companies into bankruptcy was a proceeding that was captured by the stay. In proceeding as he did, Mr. Stinson acted in contravention of the order. The assignments into bankruptcy of the four aforementioned companies are annulled.


Pepall, J.

Released: September 24, 2007

COURT FILE NO.: 07-CL-6979
DATE: 2007-09-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Ed Mirvish Enterprises Limited and 1 King West
Inc.

- and -

Stinson Hospitality Inc., Dominion Club of Canada
Corporation and Harry Stinson

ENDORSEMENT

PEPALL J.

Released: September 24, 2007