

COURT FILE NO.: 07-CL-6979
COURT FILE NO. 07-CL-6913
DATE: 20070824

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE COMPANIES')
CREDITORS ARRANGEMENT ACT, R.S.C.)
1985, c. C-36, AS AMENDED) Arthur O. Jacques and Peter Raytek, for the)
Applicants Stinson Hospitality Inc. and)
Dominion Club of Canada Corporation)
AND IN THE MATTER OF A PLAN OF)
COMPROMISE OR ARRANGEMENT OF)
STINSON HOSPITALITY INC. AND) Patricia Conway and Jeffrey C. Carhart for)
DOMINION CLUB OF CANADA) the Respondents, Ed Mirvish Enterprises)
CORPORATION) Limited and 1 King West Inc.)
BETWEEN:)
ED MIRVISH ENTERPRISES LIMITED and) Patricia Conway and Jeffrey C. Carhart for)
1 KING WEST INC.) the Applicants, Ed Mirvish Enterprises)
Applicants) Limited and 1 King West Inc.)
- and -)
STINSON HOSPITALITY INC. and) Arthur O. Jacques and Peter Raytek, for the)
DOMINION CLUB OF CANADA) Respondents, Stinson Hospitality Inc.,)
CORPORATION and HARRY STINSON) Dominion Club of Canada and Harry)
Respondents) Stinson)
L. Joseph Latham, for the Monitor, Ira)
Smith Trustee & Receiver Inc.)
Mark H. Arnold and Christopher J.)
Jaglowitz, for the Proposed Intervenors,)
Toronto Standard Condominium)
Corporation No. 1703 and Johan Demeester)
HEARD: August 20 and 21, 2007

REASONS FOR DECISION

Pepall J.

Introduction

[1] The proceedings before me relate to a real estate project located at the southwest corner of King and Yonge Streets in Toronto, Ontario. In the late 1990's, the respondent, Harry Stinson, identified the development potential of 5 King Street West, the site of the former Nag's Head Tavern. David Mirvish, through certain of his companies, invested in the proposed development. Over time, the project and the size of the Mirvish investment grew as did the parties' business relationship. That relationship has now deteriorated and the applicants, Ed Mirvish Enterprises Limited ("EME") and 1 King West ("1KWI"), seek a vesting order and a receivership order.

The Development

[2] In October, 2006, Honest Ed's Limited, another Mirvish company, incorporated 1KWI to take title to the property at 1 King West which it purchased from the TD Bank for \$22 million. 1KWI also acquired the shares of 5 King West Inc. from Mr. Stinson and 1KWI and 5 King West were amalgamated effective September 21, 2001. The construction project began. Mr. Mirvish estimates that the total project costs amounted to approximately \$164.7 million, all of which were paid by his company directly or through borrowing by his companies. He states that his equity investment grew to \$50 million.

[3] Ultimately, a 51 storey building emerged with a complex title and organizational structure. It incorporated the former Nag's Head property, the former Dominion Bank building, residential and commercial condominiums, and an area for a club. The lands and title, all of which were originally held by 1KWI, consist of the following:

- a) Toronto Standard Condominium Corporation No. 1703 ("TSCC No. 1703"), which is comprised of 575 residential condominium units and 28 associated units used for such things as services and storage;

- b) Commercial Condominium Corporation No. 1726 which consists of a valet storage unit, a concierge service unit, one office, one retail unit, a 51-story elevator, a telecommunications room and other space within the common elements including the hotel lobby; and
- c) Freehold remainder lands which consist of the rest of the property and include the historic banker's hall space and an area for a private social and business club.

[4] 1KWI sold and transferred approximately 540 residential units to residential condominium owners. 1KWI remains the registered owner of approximately 35 of the units and also holds a long-term lease on suite 302. Mr. Mirvish estimates the value of these holdings to be in excess of \$30 million. In general terms, while 1KWI held title to the property, for his contributions, Mr. Stinson was to be paid a commission and a percentage of the profits from the development.

[5] Part way through the development, Mr. Stinson created a concept whereby the residential condominium units could be rented and pooled to form part of a hotel operation. In addition, he wished to introduce a private club operation into the project. The respondent company, Stinson Hospitality Inc. ("SHI") of which Mr. Stinson is the sole officer, director and shareholder, would run the hotel rental program. The respondent company, Dominion Club of Canada Corporation ("DCC") of which Mr. Stinson is the sole officer and director, would run the private club facility. SHI owns all of the shares of DCC.

[6] The freehold remainder lands and the commercial condominium are important components of the hotel and the residential condominium as they incorporate the main floor lobby, the service areas, many amenities and the service elevator. Pursuant to a purchase agreement dated February 3, 2006, 1KWI sold to DCC and SHI the aforementioned freehold remainder lands, three units in the commercial condominium, and an undivided 4% interest in service units in the residential condominium. DCC took title to the freehold remainder lands and SHI took title to the condominium units. The purchase price was paid by way of vendor take-back mortgages in the amount of \$11.8 million with interest at 8% per annum. \$1.8 million of the purchase price was allocated to the property and \$10 million to debt owed by SHI to 1KWI. Prior to closing, 1KWI directed that the vendor take-back mortgages be made in favour of

Honest Ed's Limited. Other security, including guarantees and pledges of shares, was given as well. All of the security was then assigned to EME.

[7] The mortgages went into default. Various extensions for payment of the indebtedness were given by the applicants. In addition, SHI and DCC provided acknowledgements of their indebtedness. SHI and DCC brought an application for CCAA protection in February, 2007 which was adjourned. The residential condominium corporation, TSCC No. 1703, on which Mr. Stinson sits as a board member, brought an action against IKWI for, amongst other things, construction deficiencies. In April, 2007, the applicants brought an application for the appointment of a receiver of the respondent corporations.

[8] Currently, SHI manages the hotel rental pool. Residential unit owners who wish to place their units in the hotel rental pool enter into rental management agreements with SHI and SHI derives revenue from these management services. DCC provides food and beverage services and manages the underground parking.

Settlement

[9] Campbell J. assisted the parties with a resolution of their dispute. On April 20, 2007, the parties entered into Minutes of Settlement. On April 23, 2007, Campbell J. granted an order that, amongst other things:

- (i) appointed Ira Smith Trustee & Receiver Inc. as Monitor of SHI and DCC pursuant to section 101 of the *Courts of Justice Act*;
- (ii) stayed all proceedings against SHI, DCC and Harry Stinson, absent leave of the Court;
- (iii) prohibited any termination of supplies or contracts absent leave of the Court; and
- (iv) confirmed that the appointment as Monitor did not preclude Ira Smith Trustee & Receiver Inc. from acting in the future as a receiver and manager of the respondents.

[10] Campbell J. also initialled the Minutes of Settlement and noted that the vesting order was as agreed to between the parties in their April 20, 2007 agreement.

[11] The Minutes of Settlement stated that SHI and DCC would consent to the vesting order which would convey to the applicants or their nominee all the property of SHI and DCC charged by the vendor take back mortgages and that the order could be issued and registered after June 30, 2007 if the realty taxes owing in an amount not to exceed \$150,000 and a construction lien not exceeding \$90,000 had not been paid and discharged by June 30, 2007. Similarly, the vesting order could be issued and registered if there was non-payment by Mr. Stinson, SHI and DCC of \$10.4 million to EME by July 31, 2007. In consideration for any conveyance made by the issuance and registration of the vesting order in accordance with the Minutes of Settlement, the applicants would forgive any further claim against Mr. Stinson, SHI, or DCC pursuant to the vendor take back mortgages and related security.

[12] The Minutes of Settlement also provided that between April 20, 2007 and July 31, 2007, the respondents were entitled to stay in possession of the real and personal property for the purposes of managing the rental management and food and beverage programs. Furthermore, if the respondents did not pay the \$10.4 million on or before July 31, 2007, Mr. Stinson would resign from the residential condominium board; he would vacate the property; and SHI, DCC and he would cease operating the rental management program and food and beverage program and would use best efforts to facilitate an orderly transition to a new rental manager and to an operator proposed by EME.

[13] Campbell J. ordered that the Minutes of Settlement and subsequent Monitor reports be sealed. At the commencement of the hearing before me, all parties agreed that the sealing order should be set aside on consent and I so ordered.

Present Disputes

[14] Before me, there were motions or applications brought by the applicants, the respondents, the residential condominium corporation, TSCC No. 1703, and Johan Demeester, the owner of a residential condominium unit who participates in the hotel rental program along with 424 other condominium unit owners.

[15] The relief requested is as follows:

The applicants, IKWI and EME, seek:

- (a) a lifting of the stay imposed by Campbell J. *nunc pro tunc* to permit the delivery of a notice of motion and a motion record and to permit the filing of a counterclaim against Harry Stinson in an action brought by the TSCC No. 1703 against IKWI;
- (b) an order in the terms of the draft form of vesting order approved by the Court on April 23, 2007;
- (c) the appointment of Ira Smith Trustee & Receiver Inc. as Receiver of certain property (excluding the property that is subject to the vesting order) relating to the hotel rental management and food and beverage program as set forth in a draft order; and
- (d) the discharge of the Monitor.

The respondents SHI, DCC, and Mr. Stinson seek:

- (a) the resumption of SHI's and DCC's application pursuant to the *Companies' Creditors Arrangement Act*;
- (b) a dismissal of the receivership and vesting order request by the applicants;
- (c) alternatively, a continuation of the stays imposed by Campbell J's order of April 23, 2007; and
- (d) a declaration that an enforceable extension agreement was entered into by the parties extending the default dates contained in the Minutes of Settlement to an effective date of no earlier than October 31, 2007.

TSCC No. 1703 and Mr. Demeester seek:

- (e) leave to be added as parties to the applicants' proceeding; and
- (f) an order dismissing or alternatively adjourning the applicants' motion for a receivership order.

Discussion

[16] As set forth in their notice of motion, the respondents submit that there had been an oral agreement entered into on July 6, 2007 between Mr. Stinson as sole officer and director of SHI and DCC and Mr. Mirvish, president, director and shareholder of EME, officer of IKWI and

director of Honest Ed's Limited, King West Developments Inc. and K One Holdings Inc., in the presence of Mr. Mirvish's chartered accountant, Mr. Hank Kates, which extended the due date for the payment of \$10.4 million from July 31, 2007 to a date no earlier than October 31, 2007. In consideration of this extension, SHI and/or DCC were to deliver to EME three post-dated cheques dated August 1, September 1 and October 1, 2007 each in the amount of \$70,000.00.

[17] Mr. Stinson's evidence on the alleged July 6, 2007 agreement is found in his affidavit of August 14, 2007. He states that Mr. Mirvish, Mr. Kates and he discussed an interim arrangement and that "an extension was mandatory under the MOS defined period of July 31, 2007. We agreed unanimously that this new period would be for a minimum of ninety days. Furthermore, I agreed that SHI would forward \$70,000 post-dated monthly cheques as *inter alia* an extension payment to EME...."

[18] Mr. Mirvish states that the three men met on July 6, 2007 at Mr. Stinson's request. Mr. Stinson indicated that he would not likely be able to pay Mr. Mirvish on July 31, 2007 and had a proposal. Mr. Mirvish responded that he and Mr. Kates would consider the proposal. The three men discussed that if the proposal were to go forward, interest on the amount owing would have to be paid. Mr. Mirvish and Mr. Kates then left on the basis that they would consider the proposal and advise Mr. Stinson whether they would agreed to an extension of the time to pay.

[19] On July 7, 2007, Mr. Mirvish's father entered the hospital where Mr. Mirvish spent most of his time until his father died on July 11, 2007. The interment took place on July 13, 2007 and Mr. Mirvish sat Shiva through July 17, 2007. During that time, he did not go to the office. He did speak with Camillo Casciato, EME's director of finance, who advised that he had received some cheques from Mr. Stinson. They were each in the amount of \$74,400.00. Mr. Mirvish states that he told Mr. Casciato to return the cheques as he had not agreed to the extension. On July 23, 2007, Mr. Stinson received a note from Mr. Casciato dated July 12, 2007 and postmarked July 16, 2007. The note stated:

"Harry, I have been advised that I should not accept these cheques at this time because it would imply David's agreement to give you the extension which he has not done at this time. If David does agree in the future, you can send them back to me."

[20] In the meantime, Mr. Mirvish states that he spoke to others, including his counsel, and determined not to agree to any extension. He advised Mr. Kates of his decision and asked that he ensure that Mr. Stinson knew. Mr. Mirvish reiterated this when he returned to the office on July 18, 2007. On July 18, 2007, Mr. Stinson sent an e-mail to Mr. Mirvish's assistant. He wrote:

"My question for David would be...I am wondering if he is still proceeding as we discussed a few weeks ago? We have sent over 3 post-dated cheques as requested and we are working with the suite owners and the lenders regarding financing (as quickly as possible given the challenges of summer scheduling and the "herd of cats" nature of the 402 condo owners in the rental pool.) Yet, we are receiving ongoing aggressive letters from Miller Thomson that might indicate a disinterest in the compromise that I thought we had arranged. It would be helpful to have a sense of David's intentions."

[21] Mr. Mirvish subsequently wrote to Mr. Stinson that day: "You and I have an agreement with the courts about 1 King and I intend to ask the courts to enforce the terms of that agreement. I hope that you will be able to meet that agreement." Mr. Stinson responded by e-mail dated July 24, 2007. He noted that they had discussed an interim arrangement on July 6, 2007 and that he had agreed to provide three cheques. He goes on to request Mr. Mirvish's consideration of a reduced period (60 days instead of 90 days) on the terms as discussed. He closed the e-mail by stating that progress was being made with the financing but that the process had been extended "by our misunderstanding of the July 6 discussions." On July 25, 2007, Mr. Stinson again wrote stating, "David, may I offer a thought that might reinforce the value of the extension period." On July 26, 2007, Mr. Mirvish wrote to Mr. Stinson stating that the Minutes of Settlement provided for payment on or before July 31, 2007 and that this was the date Mr. Stinson chose, Mr. Mirvish agreed to, and which the courts sanctioned. He had not agreed to any alteration and intended to enforce his rights if the Minutes of Settlement were not carried out. On July 26, 2007, Mr. Stinson wrote to Mr. Kates asking what he might expect.

[22] At no time in any of the e-mails, does Mr. Stinson definitively state that an agreement had been reached on July 6, 2007. Mr. Kates states that at no time had Mr. Stinson taken that position with him and he first learned of this position when Mr. Stinson's lawyer indicated on August 8, 2007, that he was seeking an adjournment of the applicants' August 10, 2007 hearing date.

[23] I am unable to conclude that there was any binding agreement that varied the parties' written agreement of April 20, 2007. Firstly, some of the essential elements of a contract have not been established. These include acceptance by Mr. Mirvish and the applicant companies, *consensus ad idem*, and certainty. Furthermore, the request for consideration of a time period reduced from 90 days to 60 days reflects the lack of agreement and the fact that the terms of the proposed agreement had not been settled.

[24] I reject the respondents' request for a declaration that an enforceable extension agreement was entered into. In the Minutes of Settlement, Mr. Stinson's covenanted to vacate the property and for SHI, DCC, and him to cease operating the rental management program and food and beverage program and to use their best efforts to facilitate an orderly transition to a new rental manager and to an operator proposed by EME. I have concluded from all of the evidence that not only was this the parties' agreement but that this is also a desirable outcome. While I recognize that Mr. Stinson has taken his vision and participated in the development of a property that has contributed in a significant way to the core of Toronto's downtown, I am persuaded that he and the respondents should no longer be engaged in the rental management and food and beverage programs at the project. In this regard, I am particularly mindful of many of the observations made by the Monitor about the respondents. The Monitor is, of course, an officer of the court. It is not an advocate. It assists the court in its supervisory role and provides independent commentary on the activities of the respondents.

[25] In this case, the Monitor filed a first report on June 6, a supplementary report on June 22, a second report on August 9 and a second supplementary report on August 16, 2007. On August 21, 2007, at 4:50 p.m. on the second and last day of argument, and in reply argument, Mr. Jacques for the respondents wished to introduce an affidavit of Mr. Stinson addressing some of the Monitor's commentary. The affidavit had not been shared with opposing counsel and counsel for the Monitor beforehand and both of them had completed their submissions. In my view, litigation should not be conducted in this manner. It is manifestly unfair and I did not permit this request. In any event, there had been ample opportunity to address the contents of the reports.

[26] While the respondent companies are insolvent and meet certain of the tests that are necessary to qualify for protection under the CCAA, a reading of the Monitor's reports does not inspire confidence in Mr. Stinson's ability to carry on the rental and food and beverage businesses in a forthright or commercially reasonable manner and in a way that is characterized by financial integrity. The applicants are the controlling creditors. In my view, there is no reasonable possibility of a successful plan. The respondents' motion requesting protection under the CCAA must be dismissed. Lastly, the respondents' submissions relating to economic duress have no substance and are rejected.

[27] Turning then to the relief requested by TSCC No. 1703 and Mr. Demeester, they are permitted to intervene in the application of 1KWI and EME. The hotel program is being managed on behalf of 424 of the residential condominium unit owners, one of whom is Mr. Demeester. Counsel for the applicants did not take issue with the right of the proposed intervenors to respond to the receivership motion but challenged their entitlement to respond to the request for a vesting order. The proceedings cannot be segregated in that manner and I permitted the proposed intervenors to make submissions in response to the applicants' motion as a whole and have granted their intervention motion.

[28] There are three principal components to the applicants' motion: the request for a lifting of the stay imposed by Campbell J.; the vesting order; and thirdly, the appointment of a receiver.

[29] Firstly, the request for the lifting of the stay to bring this motion is granted *nunc pro tunc*. I am adjourning the request for the lifting of the stay with respect to the counterclaim against Mr. Stinson as this issue was not argued in any meaningful manner. If the applicants wish to proceed with such a motion, they are to arrange for a date for a hearing before me with the Commercial List office.

[30] Secondly, turning to the vesting order, there is no evidence before me that would suggest that the TSCC No. 1703 or Mr. Demeester have any legal interest in this issue and I reject their arguments in that regard. I also did not permit them to file a photocopy of some affidavit filed in some municipal board proceeding. In my view, it was irrelevant, was proffered too late, and was given no context.

[31] As to the vesting order, before granting the order request, I need to be satisfied that any creditors who may have a claim to the assets that are subject to the proposed vesting order have received notice of the request for this order. In my view, this issue needs to be addressed more fully. Therefore, I am not granting the vesting order at this time but as noted below, the request may be renewed.

[32] The third element of the applicants' request for relief is the proposed receivership. In considering this issue, I am particularly mindful of the interests of the approximately 575 condominium unit owners, approximately 424 of whom participate in the hotel rental management pool. The dilemma facing the numerous stakeholders and the court is that SHI and DCC are insolvent. In the absence of payment of the sum of \$10.4 million, those companies and Mr. Stinson agreed to cease operating the rental management program and the food and beverage program and Mr. Stinson agreed to vacate the property. Full effect cannot be given to the vesting order at this time given the issue of notice to interested parties. Substantial indebtedness is owed by the respondents to the applicants. The Monitor reports that the finances of the corporate respondents which continue to be unaudited are unreliable and numerous creditors are not getting paid. I have already discussed the lack of confidence associated with Mr. Stinson continuing the operations of the business of SHI and DCC, quite apart from his and his companies' agreement to cease operating the rental management program and food and beverage program in the face of default. Although not raised by counsel, an issue may emerge with respect to funding of the receivership but the Monitor's counsel advised that this has been addressed by the Monitor. There is clear antagonism amongst the parties and fear of the applicants and the costs of a receivership by TSCC No. 1703 and Mr. Demeester.

[33] That said, some stability must be introduced into this state of affairs on an urgent basis. In all of these circumstances, I have concluded that as an interim measure, a receiver and manager of the assets, undertaking and property of SHI and DCC (the "Receiver") should be appointed pursuant to section 101 of the *Courts of Justice Act* and that this is just and convenient. I recognize that the relief granted is not identical to that which the applicants requested and that the receivership currently encompasses the property addressed in the vesting order. In my view, however, the requested relief by the applicants was not entirely workable in the circumstances

that presented themselves and the description of the property to be placed in receivership was rather ill defined. The relief granted is consistent with that requested in the main application, court file number 07-CL-6913. Ira Smith Trustee & Receiver Inc. consented to act and is appointed as Receiver. There is an immediate need for some financial regularity and accountability in the operation of these premises and a court appointed officer can address these requirements. The parties should be reminded that, as a court appointed officer, the Receiver acts in the interests of all stakeholders under the supervision of the court. The Receiver will bring transparency and accountability to the process and the project.

[34] As a matter of priority, the Receiver is to proceed to propose the appointment of a rental manager and hotel operator for approval by the Court. As indicated in court, the Receiver may include Mr. O'Brien in this process. In this regard, it is expected that the Receiver will consult with stakeholders, including the intervenors and the applicants. In addition, the Receiver will address the issue of the vesting order and appropriate notice to be given.

[35] Using the Commercial List model order and these Reasons, counsel are to attempt to settle the terms of the order and are to attend before me at 2:00 p.m., August 27, 2007 to address any outstanding issues relating to the order. The order I am granting is also to include the usual stays and the "come back" clause which permits any interested party to apply to the Court to vary or amend the order on 7 day's notice.


Pepall J.

Released: August 24, 2007

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Respondents

REASONS FOR DECISION

Pepall J.

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