Court File No. CV-24-00087045-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

H & H HOLDING INC., KHAIRA MOTOR FREIGHT INC. operating as KHAIRA FREIGHT, SUKHJINDER GILL and HARVINDER SINGH also known as HARWINDER SINGH

Respondents

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

BOOK OF AUTHORITIES OF THE APPLICANT, ROYAL BANK OF CANADA

October 2, 2024

FOGLER, RUBINOFF LLP
Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Rachel Moses (LSO# 42081V)
rmoses@foglers.com
Tel: 416-864-7627

Carol Liu (LSO# 84938G)
cliu@foglers.com
Tel: 416-849-4150

Lawyers for the Applicant, Royal Bank of Canada

SERVICE LIST

	NAME	METHOD OF SERVICE
TO:	**H & H HOLDING INC.** 39 Chamberlin Drive Cambridge, ON N1T 1L8	**BY REGULAR MAIL**
AND TO:	**KHAIRA MOTOR FREIGHT INC. o/a KHAIRA FREIGHT** 1339 Industrial Road Cambridge, ON N3H 4W3	**BY REGULAR MAIL**
AND TO:	**HARVINDER SINGH also known as HARWINDER SINGH** 83 Canning Crescent Cambridge, ON N1R 1V8 Email: harvykhaira@gmail.com	**BY EMAIL TO:** harvykhaira@gmail.com
AND TO:	**SUKHJINDER GILL** 39 Chamberlin Drive Cambridge, ON N1T 1L8 Email: gillheera25@yahoo.com	**BY EMAIL TO:** gillheera25@yahoo.com
AND TO:	**JAP JI LAWYERS P.C.** 21 – 7001 Steeles Ave W Toronto, ON M9W 0A2 **Jagdish Singh Bedi** Email: jbedi@japjilaw.com Tel: 416-679-8300 Counsel for H & H Holding Inc.	**BY EMAIL TO:** jbedi@japjilaw.com
AND TO:	**RESTORATION RANCH** 2020 Safari Road Flamborough, ON N1R 5S2	**BY REGULAR MAIL**
AND TO:	**CITY OF HAMILTON** Tax Billings and Collections Administrator 71 Main Street West Hamilton, ON L8P 4Y5 **Attention: Rob Divinski** Email: rob.divinski@hamilton.ca	**BY EMAIL TO:** rob.divinski@hamilton.ca

AND TO:	**AGRICULTURE AND AGRI-FOOD CANADA** **Farm Debt Mediation Service** 2560 Hochelaga Boulevard Quebec, QC G1V 2J3 Email: aafc.fdms-smmea.aac.agr.gc.ca	**BY EMAIL TO:** aafc.fdms-smmea.aac.agr.gc.ca
AND TO:	**MSI SPERGEL INC.** 200 Yorkland Blvd., Suite 1100 Toronto, ON M2J 5C1 **Mukul Manchanda** Email: mmanchanda@spergel.ca Tel: 416-489-4314 Proposed Receiver	**BY EMAIL TO:** mmanchanda@spergel.ca
AND TO:	**HARRISON PENSA LLP** 130 Dufferin Avenue, Suite 1101 London, ON N6A 5R2 **Melinda Vine** Email: mvine@harrisonpensa.com Tel: 519-661-6705 Counsel for the Proposed Receiver, msi Spergel inc.	**BY EMAIL TO:** mvine@harrisonpensa.com
AND TO:	**CANADA REVENUE AGENCY** **c/o Department of Justice** Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, ON M5H 1T1 Email: AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca	**BY EMAIL TO:** AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca
AND TO:	**HIS MAJESTY THE KING IN RIGHT OF ONTARIO, as represented by the Ministry of Finance** Legal Services Branch 33 King Street, 6th Floor Oshawa, ON L1H 8H5 **Attention: Steven Groeneveld** Email: steven.groeneveld@ontario.ca Tel: 905-440-2470 Senior Counsel, Ministry of Finance	**BY EMAIL TO:** steven.groeneveld@ontario.ca
AND TO:	**INSOLVENCY UNIT** Province of Ontario Email: insolvency.unit@ontario.ca	**BY EMAIL TO:** insolvency.unit@ontario.ca

Court File No. CV-24-00087045-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

H & H HOLDING INC., KHAIRA MOTOR FREIGHT INC. operating as KHAIRA FREIGHT, SUKHJINDER GILL and HARVINDER SINGH also known as HARWINDER SINGH

Respondents

INDEX

LIST OF AUTHORITIES

TAB 1

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

Subject: Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm
Headnote
Receivers --- Appointment — Application for appointment — Grounds
Plaintiffs mortgaged construction project of defendants — With permission of plaintiffs, defendants used rent proceeds to finance continued construction — Total claims against project amounted to $250 million and efforts of defendants to sell project were unsuccessful — Major tenant of project disputed obligations under lease — Defendants sued tenant and proceeds of litigation were assigned to plaintiff — Plaintiffs held veto over settlement and were to be kept informed — Defendants did not inform plaintiffs of several settlement meetings — Mortgages matured and plaintiffs demanded payment made — Months later, defendants made no principal payment — Plaintiffs brought motion for appointment of receiver — Motion allowed — Plaintiffs extended great latitude to defendants and were under no obligation to continue doing so — In context of matured loan and continued failure to complete project, receiver should be appointed — Defendants failed to show irreparable harm that was not compensable in damages — Plaintiffs would suffer prejudice if project continued in limbo — Receiver restricted to dealing only with project.

MOTION by plaintiffs for appointment of receiver.

***Farley J.*:**

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a $20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is

in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> **Appointment to Enforce Rights**
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note*: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

ROYAL BANK OF CANADA
Applicant

-and-

H & H HOLDING INC. et al.
Respondents

Court File No. CV-24-00087045-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

**BOOK OF AUTHORITIES OF THE APPLICANT,
ROYAL BANK OF CANADA**

FOGLER, RUBINOFF LLP
Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Rachel Moses (LSO# 42081V)
rmoses@foglers.com
Tel: 416-864-7627

Carol Liu (LSO# 84938G)
cliu@foglers.com
Tel: 416-849-4150

Lawyers for the Applicant, Royal Bank of Canada