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COURT REFUSES INSURER'S APPLICATION TO TERMINATE POLICY DUE TO THE RECEIVERSHIP OF THE INSURED

In Re: Village Green Lifestyle Community Corp. (2007) CarswellOnt. 654 (Ont. S.C.J.) an insurer provided commercial general liability and property loss insurance to a retirement community situated on 164 acres, containing a retirement home, conference centre, health retreat, medical lab, golf course, rental apartments and outdoor recreation grounds. As a result of the receivership of the debtor the insurer applied for leave to terminate the insurance policy and refund to the estate the balance of the pre-paid premium.

The Order appointing the receiver stayed parties contracting with the debtor from terminating their agreements. It was agreed that this Order was applicable to the insurer, however, the Order also contained a "comeback" clause, which permitted applications to the Court for modification of the receivership Order. The insurer applied accordingly.

The policy was for a term of one year and was set to expire on July 1, 2007. The entire premium for this period had been paid. The insurer was prepared to refund the balance owing for the remainder of the term, if the policy were terminated.

The policy itself allowed the insurer to cancel the policy on 15 days written notice. At the application for leave of the Court to do so, the insurer relied on the contract, and its business practice that it did not insure, renew, or maintain insurance policies for any insured that is in receivership or a bankruptcy.

In response, the receiver tested the market and found that while it could obtain replacement insurance, the premium was

approximately 5 times what it was paying to the existing insurer. Furthermore, the receiver did not have access to the necessary funds to obtain replacement insurance at this cost.

The insurer argued that it should be entitled to terminate the policy for reasons beyond its contractual right to do so, such as the fact that the receivership triggered a change in the assessment of risk, and that alternative specialty markets existed which provided the type of insurance in question.

The receiver countered by arguing that the circumstances had not changed with its appointment, as the change in management did not alter the risk to the insurer. In fact, the receiver argued, the risk borne by the insurer decreased with the appointment of the receiver, as the receiver had substantially improved the operating condition of the facility and had worked with government agencies to achieve compliance with the legal and regulatory requirements.

In commencing its analysis the Court found that the contract allowed the insurer to unilaterally terminate the contract, and there was no evidence that the insurer had not complied with the requirements of its contract.

The Court then likened the stay of proceedings resulting from a receivership to the stay of proceedings resulting from CCAA protection, and found that such stays were imposed to allow a stabilization period for the protection of the estate.

The Court also found that it had a large and flexible inherent jurisdiction under section 47(2)(c) of the BIA which allows the Court to "direct an interim receiver... to ... take such other action as the Court considers advisable". The Court also found that the current application required it to exercise its discretion,

which in turn required the Court to balance the prejudice to the parties of each potential result.

The Court found that this balance favoured the receiver, as it had no viable alternative to replace the current policy, and the facility could not be operated without insurance coverage. The Court also found that there was no change in the risk to the insurer notwithstanding the receivership.

As a result, the Court refused to lift the stay to permit the insurer to terminate its insurance policy, notwithstanding the contractual language allowing the insurer to do just that.

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