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Insolvency Law

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FRASER MILNER CASGRAIN LLP

COURT APPOINTS EQUITABLE RECEIVER IN THE ABSENCE OF SECURITY

In *Warren v. Warren* the British Columbia Supreme Court recently appointed an equitable receiver over the assets of a judgment to debtor, notwithstanding that the Plaintiff did not have any security.

The Plaintiff obtained a \$100,000.00 judgment against the Defendant. Previously in the divorce proceedings the Court had issued an order restraining the Defendant from further disposing of any of his assets. The Defendant had previously breached that order by removing approximately \$20,000.00 from his RRSP and \$10,000.00 from a line of credit owned jointly by the Plaintiff and the Defendant.

The Defendant's whereabouts were unknown, but he was believed to be alive. The Defendant had a serious drug addiction and it was possible he was not fit to be brought to examination in aid of execution or to answer a subpoena as a debtor.

The Defendant was the sole shareholder, director and operating mind of a body corporate which owned two pieces of real property valued at approximately \$200,000.00.

In commencing its discussion about the appointment of a receiver in these circumstances, the Court noted that the appointment of an equitable receiver is an unusual remedy, which has its roots in the law of equitable execution used by the English Chancery Courts in cases where the creditor could not seize the debtor's property through execution at law, garnishment or attachment. An equitable receiver, once appointed, could seize, operate or intercept specific property.

The Court also stressed that the appointment of such a receiver is a discretionary remedy, and is not available as of right. The Court then canvassed the case law and found the following principles to be applicable:

1. The Court will appoint an equitable receiver where the judgment creditor seeks, by way of equitable execution, to have an equitable interest sold and the proceeds applied to satisfy its judgment.

2. Special circumstances may be found where the receivership is a "more convenient mode of procuring satisfaction of the judgment than usual process of attachment". Special circumstances may exist where appointing a receiver will prevent someone from making way with property liable to execution.
3. The Plaintiff must show that is "practically very difficult, if not impossible, to obtain any fruit of his judgment" without resort to equitable execution.
4. The fact that normal execution is available to the creditor is not a bar to the appointment of a receiver, if by taking the normal process, some practical problem arises which amounts to special circumstances.
5. The Court must balance the inconvenience facing the creditor in using the usual means of execution with the cost, ultimately born by the debtor, of appointing a receiver.

The Court also noted that if special circumstances exist, the creditor must show that there is some benefit to be gained by the appointment. At this part of the test the Court will consider the following:

- (a) the amount of the debt owed;
- (b) the amount likely to be collected if the receiver is appointed, taking in account the receiver's cost;
- (c) the type of asset that could not be seized through legal execution; and
- (d) the nature of the debtor's interest.

In deciding to appoint an equitable receiver in the circumstances of this case, the Court noted that the Defendant was outside the reach of the usual remedies. He could not be found to be served with a subpoena to deliver up the shares, books or records of the corporation, and it appeared that in his current state, the existing system of rules and punishment were inapplicable to him.

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