

# focus

on

## Insolvency Law

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FRASER MILNER CASGRAIN LLP

### LEAVE GRANTED TO PROCEED AGAINST RECEIVER FOR GROSS NEGLIGENCE AND BREACH OF FIDUCIARY DUTY

In *80 Aberdeen Street Ltd. v. Surgeon Carson Associates Inc.*, [2008] O.J. No. 269 (Ont. S.C.J.), 80 Aberdeen Street Ltd. (“Aberdeen”) commenced an action (the “Action”) against the receiver of Aberdeen and the individual who acted as the receiver (collectively the “Receiver”). The Action was framed in gross negligence and breach of fiduciary duty and damages of \$2,000,000. The Action was commenced without obtaining leave of the Court.

The Receiver was discharged by Order of the Court to allow the owner to reacquire title and the right to manage the property for the purpose of getting new financing in order to pay off all creditors as a result of a rise in property value.

The Court found that although the Receiver was discharged leave of the Court was required by Aberdeen prior to commencing its action for the following reasons:

- at the time the Discharge Order was granted no specific leave was sought by Aberdeen to commence an action against the Receiver and no leave was granted;
- the initial appointment order required leave of the Court before commencing an action against the Receiver; and
- even though the receiver had been discharged the Receivership had not been completed, as would normally be the case, in that the Third Report had not been finally approved, including the passing of accounts and other relief requested by the Receiver.

In subsequently granting leave, the Court looked at the nature of the allegations against the Receiver. The Court found that Aberdeen would only have to demonstrate that there is some

foundation for its case and that the Action is not “frivolous and vexatious”, as opposed to the Receivers argument that Aberdeen must demonstrate it has a “strong *prima facie* case”.

In finding Aberdeen must accord to a lower threshold in obtaining leave, the Court relied on the facts that (a) the Receiver never obtained Court approval for its conduct described in its Third Report, and (b) the issues raised in the Action had not otherwise been decided in the Receivership. For these reasons, the Receiver could not rely on *res judicata*, issue *estoppel*, or abuse of process in preventing Aberdeen from asserting its claims as framed in the Action.

It is instructive to note some of the Court’s concluding thoughts, it stating that “if the Receiver had ‘bared its breast’ in its reports to the Court, and if the reports had been finally approved by the Court, without specifically allowing a party to subsequently advance claims, then the situation would be different”.

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