

# focus

on

## Insolvency Law

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### COURT PRESERVES RIGHT TO SUE RECEIVER IN RESPECT OF COURT APPROVED TRANSACTION

1117387 Ontario Inc., by court order in October 2003, was placed under receivership for defaulting on payment of a mortgage. In October 2008, the Court was asked to approve the receiver's third report and the proposed sale of the mortgaged lands. A complicating factor was that the mortgaged lands were subject to environmental contamination as a result of a neighbouring oil and gas facility. Further complicating the matter was that the receiver's proposal was for the sale of the lands to that same oil and gas facility, and final settlement of the pre-receivership contamination claims for, total compensation of \$200,000.00.

The mortgagee, National Trust Co., was in support of the receiver's proposal, but the debtor and the guarantor were opposed. They argued the sale price was too low, that the debt to National Trust would not be covered, and that the deficiency that was to result was due to the misadministration of the property by the receiver. The debtor and guarantor also argued that the settlement with the oil and gas company was insufficient, or that at least they should be permitted to continue action against the oil and gas company as well as the receiver following the Court's ruling.

The Court considered the case of *Crown Trust Co. v. Rosenberg* (1986), 39 D.L.R. (4th) 526 (Ont. H.C.) and adopted the following premise (from 548):

The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The Court was concerned with determining if the receiver adopted a reasonable and prudent process in arriving at the determined sale and settlement amounts. The Court considered the facts of the case and determined it would be duplicitous and unnecessary for the Court to effectively interfere with the chosen business mechanisms of the receiver. The Court considered both the sale price and the settlement amount to have been determined by reasonable means and therefore to be approved notwithstanding the dispute of the debtor and guarantor.

The Court, in considering the debtor's request for leave to bring further action against the receiver and the oil and gas company, found the rule to be that a party should not generally be denied the option to bring an action against a receiver except where the action would be without foundation, frivolous, or vexatious. On the evidence, the Court was satisfied that, although the applicant may have difficulty succeeding, there was a potential basis for a claim and damages. It was not in the Court's purview to look beyond whether the claim would be foundationless, frivolous, or vexatious.

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