COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Creative Wealth Media Lending LP 2016 v. Access Road Capital, LLC,* 2023 BCCA 208

Date: 20230519
Docket: CA48984

Between:

Creative Wealth Media Lending LP 2016

Appellant
(Third Party and Secured Creditor)

And

Access Road Capital, LLC

Respondent
(Plaintiff)

And:

Bron Media Corp.

Respondent
(Defendant)

And

Comerica Bank

Respondent
(Third Party and Secured Creditor)

Corrected Judgment: The cover page of the judgment was corrected May 25, 2023.

Before: The Honourable Justice Marchand
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 13, 2023 (*Access Road Capital, LLC v. Bron Media Corp.*, 2023 BCSC 497, Vancouver Docket S221214).

Counsel for the Appellant: R.J. Kaardal, K.C.
H. Cook

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Counsel for the Respondent, Access Road Capital, LLC:	P. Bychawski A. Burns
Counsel for the Respondent, Bron Media:	M. Vonk
Place and Date of Hearing:	Vancouver, British Columbia May 4, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 19, 2023

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Summary:

The appellant/applicant is a secured creditor of the respondent, Bron Media Corp. [“Bron”]. It seeks leave to appeal and a stay of an order made over its objections to appoint an equitable receiver over all of the assets, undertakings and property of Bron. Held: Applications granted. The proposed appeal has some merit, is of significance to the practice and the proceeding and will not unduly hinder the proceedings. Furthermore, if a stay is not granted, the appellant/applicant may suffer irreparable harm and the balance of convenience favours a stay. Granting leave to appeal and a stay are in the interests of justice. The hearing of the appeal is expedited.

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Reasons for Judgment of the Honourable Justice Marchand:

Introduction

[1] On March 13, 2023, the chambers judge allowed the application of Access Road Capital, LLC (“Access”) and ordered that, unless Bron Media Corp. (“Bron”) paid its debt to Access in full by May 1, 2023, a receiver would be appointed on May 8, 2023 over all of the assets, undertakings and property of Bron pursuant to Rule 10-2 of the *Supreme Court Civil Rules* [*SC Rules*] and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The judge’s reasons are indexed at 2023 BCSC 497.

[2] Creative Wealth Media Lending LP 2016 (“CW”), a secured creditor of Bron, now applies for leave to appeal the receivership order and stay its execution under ss. 31 and 33 of the *Court of Appeal Act*, S.B.C., 2021, c. 6 [*Act*] and Rules 13 and 20 of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*CA Rules*]. Access opposes the applications for leave and a stay. Bron takes no position on these applications.

[3] Following the hearing of CW’s application for leave to appeal, I stayed the receivership order until the release of these reasons for judgment.

Background

[4] In May 2020, Access loaned 20 million USD to two subsidiaries of Bron, who defaulted in May 2021. Bron was one of two guarantors for the loan. On October 6, 2022, Access obtained a consent judgment against Bron for

10.9 million USD plus accruing interest. Bron has paid Access only 151,000 USD under the judgment.

[5] Bron has provided Access with financial documentation to assist an examination in aid of execution. However, Access has not conducted such an examination.

[6] No debt instrument, including the loan agreement itself, gave Access a contractual right to have a receiver appointed. On February 9, 2023, Access applied for an order appointing an equitable receiver over all of the assets, undertakings and property of Bron pursuant to Rule 10-2 of the *SC Rules* and s. 39 of the *LEA*.

[7] CW and Comerica Bank are secured creditors of Bron. At the time of Access' receivership application, Bron owed CW and Comerica 30 million USD and 9.4 million USD, respectively. CW and Comerica negotiated contractual rights to have receivers appointed but they considered the appointment of a receiver to be premature. Accordingly, CW and Comerica opposed Access' receivership application.

[8] The chambers judge heard Access' application on March 10, 2023. On March 13, 2023, he allowed the application and ordered that, unless Bron paid Access its debt in full by May 1, 2023, a receiver would be appointed on May 8, 2023 over all of the assets, undertakings and property of Bron. reverse

[9] In arriving at his decision, the judge disagreed with Bron that Access ought to have pursued an examination in aid of execution before applying to have a receiver appointed:

> [14] … In my view, however, the examination in aid that was anticipated cannot be considered as a reasonable substitute for a receiver. It offers so much less power for securing eventual access to funds that it cannot be given significant weight in the analysis.
>
> [15] Access has already experienced a long history of defalcations by Bron Media in the nearly two years the loan has been in default, including defaults of the consent settlement order referred to above in para. 2, such that it is not unreasonable for it to be seeking a receiver at this stage as a significant step within its procedural arsenal.

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[10] The leave and stay applications largely turn on the judge's statement and application of the "law relevant to the court appointment of a receiver under the just and convenient analysis in s. 39 of the *LEA*." On the authorities cited by the parties, the judge concluded that the law "[was] not in dispute." He held:

> [17] Bron Media cited *Quest Capital Corp. v. Longpre*, 2012 BCCA 49, at para. 16; and *Clarke v. Braich*, 2021 BCSC 121, at paras. 52-54. Paragraph 16 from *Quest Capital*, quoted below, adopts part of an article by Professor Edinger in the Canadian Bar Review and related comments in a decision of Master Joyce, as quoted by Chief Justice Brenner in another case:
>
>> [16] E. R. Edinger describes the rules governing the appointment of equitable receivers in "*The Appointment of Equitable Receivers: Application of Rules or Exercise of Pure Discretion?*" (1988) 67 Can. B. R. 306 at p. 308 as follows:
>>
>>> ... [F]irst, the asset must be of a kind that is exigible by a common law or legal process; second, there must be some impediment to employment of a legal process; third, there must be some benefit to be obtained by the appointing of an equitable receiver and the appointment must be just and convenient; but fourth, special circumstances established by the judgment creditor may permit the court to disregard the second rule.
>
> To like effect are the comments of Master Joyce in *Pacific West v. Fehr Dri-Wall Ltd.,* 2001 BCSC 354, 4 C.P.C. (5th) 127, as quoted by Chief Justice Brenner in *Down (re) (Trustee of)*, 2002 BCSC 1023, 21 C.P.C. (5th) 230 at para. 9.
>
> [18] Access relied generally on *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32, including, at para. 49 in *Ward Western*, a recitation from *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at 130-132, of 16 non-exhaustive factors to consider in determining justice or convenience. Paragraph 49 from *Ward Western* reads as follows:
>
>> [49] Another reason that the issues the appellants seek to advance are largely irrelevant to this appeal is that they are immaterial to the judge's determination that it was "just and convenient" to appoint a receiver. Before the judge, the respondents argued, relying on *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 at para. 50, and Frank Bennett, *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999), at 130–32, that the following non-exhaustive list of factors governs the question of whether it is "just and convenient," in all of the circumstances, to appoint a receiver:
>>
>>> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

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b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties; and

p) the goal of facilitating the duties of the receiver.

The judge listed these various factors at para. 57 of his reasons.

[Emphasis added.]

[11] The judge did not expressly consider the first, second and fourth "rules" adopted by this Court in the excerpt he cited from *Quest Capital Corp v. Longpre*, 2012 BCCA 49. Rather, he turned directly to consider whether the appointment of a receiver was just and convenient. In concluding that it was, he adopted the following from the written submissions of Access in his analysis at para. 19 of his reasons:

> ***First***, the Consent Judgment acknowledges a debt of approximately US $10.9 million as of May 19, 2022, an amount that has since the date of the

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Consent Judgment grown to approximately US $11.5 million as of February 1, 2023.

Second, Bron Media is in breach of the Consent Judgment entered pursuant to the Settlement Agreement. Bron Media's obligations with respect to Monthly Gross Revenue Payments under the Consent Judgment as of the filing of this Application total approximately US $1.3 million (before costs and expenses including legal fees).

Third, Bron Media is presently either unable or unwilling to meet its financial obligations to Access Road as they become due under the Consent Judgment.

If Bron Media is ***unable*** to meet its obligations as they become due, then it is insolvent, and the Receivership Order is a just and convenient means of preserving and protecting the Bron Media's property in the interest of all stakeholders including Access Road.

If the Bron Media is ***unwilling*** to meet its financial obligations to Access Road as they become due, then it is willfully breaching this Court's Consent Judgment, and the Receivership Order is a just and convenient remedy for Bron Media's conduct.

Fourth, Bron Media has enjoyed the benefit of substantial accommodations from Access Road including:

> a) a deferral of enforcement proceedings for a period of approximately two years;
>
> b) the granting of three forbearance periods prior to the Settlement Agreement;
>
> c) the granting of a fourth forbearance period upon the reaching of the Settlement Agreement;
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> d) the implementation of a repayment plan as part of the Consent Judgment;
>
> e) two months' notice of Access Road's intention to apply for the Receivership Order; and
>
> f) a five-month period between Bron Media's initial breach of the Consent Judgment and the hearing of this Application.
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> Notwithstanding such accommodations, Bron Media remains in breach of its obligations to Access Road under the Consent Judgment.

Fifth, Bron Media has acknowledged its own and the Bron Borrowers' obligations, as applicable, to cause the Bron Borrowers to liquidate their investment in each Portfolio Company and all other assets under their direct or indirect control in each of the Loan and Security Agreement, the Guarantee, the First Forbearance Agreement, the Second Forbearance Agreement, and the Third Forbearance Agreement. Bron Media has failed to comply with this obligation for more than two years.

Sixth, in each of the First Forbearance Agreement, the Second Forbearance Agreement, and the Third Forbearance Agreement, Bron Media

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> acknowledged that Access Road was entitled to immediately exercise all of its rights and remedies under the Loan Documents (including the Loan and Security Agreement and Guarantee) including by, without limitation, foreclosing on Bron Media's interest as a shareholder of Bron Ventures 1 (Canada) Corp. (one of the two Bron Borrowers), and/or exercising the rights of Bron Media as the shareholder of Bron Ventures 1 (Canada) Corp., and that neither Bron Ventures 1 (Canada) Corp. nor Bron Media have any defences to the exercise of such rights and remedies.
>
> ***Seventh***, while Access Road is not a secured creditor of Bron Media per say, Access Road does hold a security interest in the assets of Bron Media's British Columbia-based subsidiaries including Bron Ventures 1 (Canada) Corp., Bron Studios Inc., and Bron Animation Inc. (among other security that includes charges on the assets of each of the Bron Borrowers in Canada and the United States, as applicable). The appointment of the Receiver over Bron Media will avoid the costs and delays associated with a multiplicity of enforcement proceedings by providing for a centralized enforcement process to be carried out by this Court's officer under this Court's supervision.
>
> [Emphasis in original.]

[12] The receivership order is in the form proposed by Access (except for the date of the appointment of the receiver). To provide the receiver with security for the payment of its fees and disbursements, para. 20 of the order provides the receiver with a “first charge” over all of Bron’s assets, undertakings and property “in priority to all security interests, trusts, liens, charges and encumbrances.” As security for funds borrowed to finance the receivership, para. 23 of the order grants the receiver “a fixed and specific charge… in priority” to all other interests, except for the receiver’s “first charge”.

[13] The order also gives the receiver broad management powers and allows the secured creditors, once the receiver has been appointed, to apply to have their security excluded from the receiver’s priorities.

Leave to Appeal

Law

[14] As the party seeking leave to appeal, CW bears the onus of establishing the conditions for leave to appeal on a balance of probabilities: *V.F. v. E.B.*, 2011 BCCA 238 at para. 22 (Chambers).

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[15] This Court grants leave to appeal when doing so is in the interests of justice having regard to:

1. whether the point on appeal is of significance to the practice;
2. whether the point raised is of significance to the action itself;
3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
4. whether the appeal will unduly hinder the progress of the action

(*Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) at para. 3*; Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers); *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers)).

Analysis

Significance to the practice

[16] I agree with CW that the proposed appeal is of significance to the practice.

[17] First, the judge indicated that the law relevant to the appointment of an equitable receiver was not in dispute. In support of his conclusion, he cited excerpts from *Quest Capital* and *Ward Western Holdings Corp. v. Brosseuk*, 2022 BCCA 32. He then turned to examine whether the appointment of an equitable receiver was “just and convenient”.

[18] The judge’s approach was supported by *Ward Western*. However, unlike this case, the appointment of the receiver in *Ward Western* was not made in favour of an unsecured creditor over the objection of two secured creditors.

[19] The open question is whether the “rules” adopted by this Court in *Quest Capital* required the judge to (1) determine whether there was some impediment to Access employing a legal collection process and, if not, (2) whether Access had established special circumstances to permit the court to disregard the absence of a

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legal impediment before (3) determining whether appointing a receiver was just and convenient.

[20] Neither party cited an authority to the judge or to me that clearly establishes the correct approach to the appointment of an equitable receiver at the instance of an unsecured judgment creditor over the objection of two secured creditors owed substantially more than the unsecured judgment creditor. Perhaps the approach in *Ward Western* establishes the universally applicable approach to the appointment of a general receiver under s. 32 of the *LEA*. On the other hand, perhaps the "rules" in *Quest Capital* should play a role in the context of cases such as this one. In my view, clarity on the question will be of some benefit to the practice.

Significance to the proceeding

[21] The proposed appeal is significant to the proceeding. The outcome will affect Bron's ability to continue as a going concern. If a stay is granted, the amounts payable under the consent judgment will grow but Bron will have a further opportunity to meet its financial obligations to all stakeholders, including its secured creditors. If a stay is not granted, the receiver is likely to liquidate Bron's assets in the hopes of satisfying amounts owing to all of Bron's creditors, secured and unsecured.

Merits of the proposed appeal

[22] The question here is whether CW has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court: *J. (A.L.) v. M. (S.J.)*, 1994 CanLII 264, 46 B.C.A.C. 158 (B.C.C.A.) at para. 10. The merits threshold is relatively low: *Bartram (Guardian ad litem of) v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Chambers).

[23] The judge's receivership order was discretionary and is therefore entitled to deference on appeal. To establish a meritorious appeal, CW must identify an error in principle in the judge's exercise of discretion: *Key-West Asphalt Products Ltd. v. CMI Roadbuilding Inc.*, 2022 BCCA 444 at para. 48.

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[24] In my view, CW has an arguable case that the judge erred in principle by considering what was just and convenient without first turning his mind to the “rules” referred to in *Quest Capital*.

[25] Even so, Access argues that the appeal lacks merit because the outcome will be the same in any event. Access says it was open for the judge to find that there was a legal impediment to its collection efforts or, in the alternative, that special circumstances justified appointing a receiver absent a legal impediment.

[26] While Access’ argument has some merit, if the judge erred in principle it is arguable that the outcome will not be the same. This is because: (1) Access has not utilized reasonably available legal avenues to realize on the consent judgment; (2) the secured creditors have more at stake, have priority over Bron’s assets and have reason to believe that Bron can right its financial ship if given sufficient time; (3) there is no evidence that Bron has sufficient assets to satisfy its secured creditors, never mind its unsecured creditors; and (4) it is rare for a receiver to be indemnified by the assets of secured creditors: *Integris Credit Union v. Mercedes-Benz Financial Services Canada Corporation*, 2016 BCCA 231 at paras. 38–39.

[27] In my view, CW satisfies the merits threshold.

Impact on the progress of the action

[28] The proposed appeal will very obviously delay the receivership proceeding, increase the amounts payable under the consent judgment in favour of Access and potentially reduce the recoveries to all stakeholders, including Access and CW. However, in my view, the hindrance of the receivership proceedings will not be “undue”. The interest accruing is modest in comparison to the current amounts owed to secured and unsecured creditors and any downside risks can be minimized by ordering that the hearing of the appeal be expedited.

Conclusion on Leave

[29] Since the proposed appeal has some merit, raises questions that are significant to the practice and proceeding and will not unduly hinder the progress of

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the proceeding, the proposed appeal is in the interests of justice.

[30] Accordingly, I grant CW leave to appeal the receivership order.

Stay Application

Law

[31] To obtain a stay, CW must satisfy the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 at 334, 337, 340–342:

(1) Is there a serious question to be tried?

(2) Will the applicant suffer irreparable harm if the stay is refused?

(3) Does the balance of convenience favour granting the stay?

[32] The overarching consideration is whether granting the stay is in the interests of justice: *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 289 at para. 6 (Chambers).

Analysis

Serious question

[33] The merits threshold is low, and "[a] prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald* at 338. A judge must be satisfied the issues raised on appeal are neither frivolous nor vexatious. The appropriate question is whether there is a serious question to be tried, not whether the applicant can establish a strong *prima facie* case: *RJR-MacDonald* at 335.

[34] I have already determined that CW has an arguable case on an issue of importance to the practice. In my view, the appeal meets the low merits threshold for granting a stay.

Irreparable harm

[35] "Irreparable" harm refers to harm that "either cannot be quantified in monetary

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terms or cannot be cured, usually because one party cannot collect damages from the other". In assessing irreparable harm, I must consider whether denying the stay could "so adversely affect the applicant's own interest that the harm could not be remedied" if the appeal is allowed: *RJR-MacDonald* at 341.

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[36] Access submits that CW would not face irreparable harm if the stay is not granted because CW, which Access characterizes as an insider of Bron, has not adduced any concrete evidence of prejudice that would arise to it if the receivership order is not stayed. I disagree.

[37] Irreparable harm can be established if, in substance, an appeal would become moot if a stay is not granted: *Chandler v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 120 at para. 18; *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.*, 2022 BCCA 261 at para. 38. Here, the proposed appeal would become moot if leave were granted but the Court declined to stay the receivership order because the receiver's appointment would become effective on the release of these reasons. As Access acknowledges, the receiver would have the authority to liquidate Bron. Consequently, the purpose of the appeal to maintain Bron as a going concern may be lost.

[38] Further, given Bron's inability to satisfy the consent judgment, if Bron is liquidated, CW faces a material prospect of non-recovery, which also constitutes irreparable harm for the purposes of a stay: *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2015 BCCA 6 at para. 8.

[39] I am satisfied that CW faces irreparable harm if a stay is not granted.

Balance of convenience

[40] In my view, the balance of convenience favours granting a stay for the following reasons:

- if a stay is granted, Access may take alternate steps to enforce its judgment;

- if Access is unable to collect on the consent judgment, interest will continue to accrue on the judgment debt at approximately $200,000 per month;
- although Access faces a real risk of non-recovery, Bron's ongoing efforts to raise capital may be successful and may allow Bron to pay the consent judgment in full;
- although both Access and CW face the prospect of non-recovery, CW's exposure is far greater; and
- the risk to Access can be minimized by expediting the hearing of the appeal.

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Conclusion on Stay

[41] As all of the *RJR-MacDonald* factors favour granting a stay, I have concluded that doing so is in the interests of justice.

Disposition

[42] For the reasons provided, I grant CW leave to appeal the receivership order and I stay the order until the hearing of the appeal. If the division hearing the appeal reserves judgment, it can decide whether to extend the stay further.

[43] Also, to minimize any potential adverse impacts on Access, I order that the hearing of CW's appeal be expedited and refer the appeal to the Registrar to give effect to this order by fixing dates. I note that summer hearing dates are now available.

[44] I thank counsel for their helpful submissions.

"The Honourable Justice Marchand"