IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Paradigm Mortgage Investment Corp. v. M&G Property Investment Ltd.,* 2016 BCSC 1772

Date: 20160823
Docket: H17658
Registry: Nelson

Between:

Paradigm Mortgage Investment Corporation formerly known as Mission Creek Mortgage Ltd.

Petitioner

And

M&G Property Investment Ltd., Aaron Meyer, Rose Sale, Aaron Meyer Real Estate Holdings Ltd. and John Doe

Respondents

Before: The Honourable Madam Justice Gropper

Oral Reasons for Judgment

In Chambers

For the Petitioner:	No appearance
Counsel for the Respondents Aaron Meyer and Aaron Meyer Real Estate Holdings Ltd.:	K.M. Wellburn
Counsel for the Receiver-Manager Judith Macdonald:	B.D. Levine
For the Respondents M&G Property Investment Ltd., Rose Sale and John Doe:	No appearance
Place and Date of Hearing:	Vancouver, B.C. August 23, 2016
Place and Date of Judgment:	Vancouver, B.C. August 23, 2016

[1] **THE COURT:** There are two applications before me, one by the receiver-manager seeking to pass her accounts, and the other by Aaron Meyer and Aaron Meyer Real Estate Holdings Ltd. (the Meyer respondents) seeking a court order to pay out the proceeds of sale of certain property to that company. The proceeds are currently held in trust by Pushor Mitchell LLP and amount to approximately $100,000.

[2] I will address this by addressing the application by the receiver-manager first. The result then determines the application by Meyer respondents.

Background

[3] Judith Macdonald resides at Redwood Apartments in Fruitvale in British Columbia. She was the manager of the apartment buildings for which she was paid $700 per month and provided with the use of an apartment. During a portion of the time Ms. Macdonald acted as building manager, the apartment complex was owned by M&G Property Investments. That company experienced financial difficulties which led to foreclosure proceedings in 2013.

[4] An order *nisi* was granted by the court on October 16, 2013. At the request of Meyer respondents and the other creditors, Ms. Macdonald was appointed the receiver-manager. She was well located; she was familiar with the property and with the tenants, as well as with the community.

[5] On July 23, 2014, Master Young, as she then was, appointed Ms. Macdonald as receiver-manager of the properties. That order provided, among other things, that all persons having agreements for the supply of services to M&G are not permitted to discontinue services, provided they are paid their normal charges for their services (at para. 10); the receiver will hold monies received in a receivership account until further order of the court (at para. 11); the receiver has a charge for her reasonable fees and disbursements, including reasonable legal fees and disbursements (at para. 16); and the receiver shall pass her accounts, but prior to the passing of her accounts the receiver is entitled to apply reasonable amounts set

out of the funds received to her, reasonable fees and disbursements, including reasonable legal fees and disbursements (at paras. 17 and 18).

[6] Once Ms. Macdonald was designated as a receiver-manager, she hired counsel, Mr. Aartsen in Prince George, to represent her in that position. During the currency of the receivership, the property was listed for sale for $1.9 million. An offer was received on the property for $2.6 million, which was eventually reduced to $2.2 million reflective of certain subjects that had been placed on the offer.

[7] On November 24, 2014, Master Young made a vesting order approving the sale of the apartment properties for $2.2 million and confirming the net purchase price after adjustments would be paid to Pushor Mitchell LLP, the lawyers for the petitioner Paradigm Mortgage Investment Corporation, and shall be disbursed as follows:

a) payment of interest and taxes,

b) real estate commissions,

c) conveyancing costs,

d) to the receiver for her fees and disbursements,

e) to the petitioner for its first mortgage,

f) to the respondent, Rose Sale, for her second mortgage, and

g) the balance to be paid to the applicant, Aaron Meyer Real Estate Holdings, to be applied against the outstanding balance of its third mortgage.

[8] The first and second mortgagee have been paid out in full and the remaining $100,000 in Pushor Mitchell's trust account awaits a determination of this hearing in relation to the reasonable fees for the receiver-manager.

[9] The record demonstrates that the receiver produced interim accounts for the period August 2 to December 12, 2014, showing a bank balance of $28,675.68. She

was paid $700 per month in August 2014, and approximately $1,400 for each month thereafter. The period of the receivership was six months and the total amount which the receiver received through draws from the accounts totalled $10,610.36.

[10] The real estate commissions were also paid in accordance with the vesting order, and other accounts were paid from the monies in trust at Pushor Mitchell.

[11] On June 24, 2015, having not yet received any accounting from the receiver-manager, the Meyer respondents brought an application seeking production of documents from Ms. Macdonald and also asking that she provide a calculation of fees that she was claiming as receiver-manager and an affidavit setting out the fees claimed.

[12] Master McDiarmid heard that application on July 8, 2015. He made an order by consent releasing a $50,000 holdback held in trust to Pushor Mitchell for receiver's fees to the holding company, adjourned the relief relating to the provision of the receiver's reports and accounts, and ordered that the receiver provide by July 21, 2015, a calculation of the fees she is claiming as receiver-manager and an affidavit setting out the amount of fees claimed.

[13] The receiver-manager did provide an affidavit, but did not set out a calculation of the fees that she was claiming.

[14] The statement of account of the receiver-manager was provided on May 6, 2016, and says simply “for receivership services rendered during the period 23 July 2014 to 20 January 2015, receivership fees, and $92,278.29.”

[15] Mr. Aartsen, the counsel for the receiver-manager, charged an amount of $14,801.12 at a rate of $300 per hour. Though the order does not specify that the receiver-manager has the power to pay reasonable legal fees and disbursements prior to the passing of accounts, this account has been paid. Since then, Ms. Macdonald has retained Mr. Ben Levine to represent her in respect of the passing of the fees.

Position of the Parties

[16] Ms. Macdonald says that while she is not a professional receiver-manager, she took on the responsibility of the appointment because she was in a unique position to do so and she performed all the responsibilities of that position, including taking on potential liability. She describes her responsibilities as improving the apartment buildings that were subject to deterioration, arranging for the purchasing of appliances, the organization and payment of renovations. She also says that she restored the reputation of the apartment buildings, including relationships with the tenants, the tradespeople and the community at large. She ensured that services to the buildings remained in effect. She says that there were no complaints about her performance and there are none recorded in the material.

[17] Ms. Macdonald stresses as the most significant fact in support of her statement of account that the property was sold for $300,000 over the listing price. Ms. Macdonald says that her duties regarding the sale included making the property attractive and available for inspection, meeting with potential purchasers, and ensuring that the building's reputation among tradespeople and the community was restored to the level to make it attractive for purchase.

[18] Ms. Macdonald kept no hourly records. She says that about 55 hours per week was the average amount of time she spent as a receiver-manager for the six-month period. As her fair remuneration as a receiver-manager, Ms. Macdonald seeks a percentage of the sale proceeds, relying on the sales price being $300,000 greater than the listing price. She describes her fee as $85,000 or 3.86 percent of the sale or 28 percent of the $300,000 premium. I have already referred to her statement of May 2016.

[19] The Meyer respondents point out that Ms. Macdonald is not an accountant and is not actually qualified to be a receiver-manager, as she is not a trustee in bankruptcy as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and Rule 10-2 of the *Supreme Court Civil Rules*, although her appointment was agreed to by the parties involved.

[20] The Meyer respondents say that her duties as a receiver-manager were minimal compared to the duties normally performed by a receiver-manager in a receivership foreclosure matter. They say that Ms. Macdonald's duties were like the duties she performed as building manager and not more. They dispute her contention that the building was deteriorating and that Ms. Macdonald, in her capacity as receiver-manager, was required to restore the building to its previous state. In fact, the Meyer respondents say that work to improve the apartment buildings commenced prior to the foreclosure proceeding. They also point out that Paradigm, the petitioner in this matter, had the conduct of sale and the property was sold by a realtor. Those efforts were not borne by the receiver-manager. They point out that Ms. Macdonald was not responsible for the sale or the amount of the purchase price. They argue that the work that was performed by Ms. Macdonald during the six-month period cannot be compared to that performed by accountants in large accounting firms dealing with significant assets.

[21] The Meyer respondents say that Ms. Macdonald was paid, after August 2014, approximately $1,400 to $1,500 per month, which is twice what she received as building manager, amounting to approximately $10,000, and that this is fair and reasonable for her fees.

[22] The Meyer respondents are not discounting the services that Ms. Macdonald performed, but say that she has not met the onus of showing that claiming a percentage of the sale is fair and reasonable.

Legal Principles

[23] In respect to the principles that apply, I refer to the *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, which addresses the basis of determining reasonable fees and disbursements of a receiver-manager. It incorporates the factors set out in *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.) that ought to be considered in determining the receiver's compensation.

[24] Beginning at paragraph 32, the Court refers to an earlier decision: *Re Bakemates International Inc*. (2002), 164 O.A.C. 84 where the Court described the

purpose of passing a receiver's accounts and discussed the applicable procedure. Borins J.A. in *Bakemates* stated that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable, and this includes the compensation claimed on behalf of its counsel.

[25] At paragraph 37 of *Bakemates*, Borins J.A. observed that the accounts must disclose the total charges for each of the categories of the services rendered. In addition*:*

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[26] At paragraph 33, the Court refers to the factors in *Belyea* and lists them as follows:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

Discussion

[27] I note, first of all, that there is no hourly breakdown of the services rendered, and the statement of account which was provided in May of 2016 does not meet the requirements set out in *Bakemates* that it be in a form easily understood by those affected in the receivership. It has been explained, however, through counsel's submissions at this hearing, and that is that it reflects a percentage of the sales price of the apartment buildings as a whole or a percentage of the $300,000 premium, as it is described, being the difference between the listing price and the selling price.

[28] Referring to the factors in *Belyea:*

a) The nature, extent and value of the assets: The value, as we know, is in the area of $2.2 million, accepting that the purchase price is reflective of a true value of the properties;

b) The complications and difficulties encountered: There was a complication in respect of how Ms. Macdonald's name was spelled that prevented her from accessing certain accounts. That was rectified and there are no other complications that have been addressed;

c) The degree of assist**a**nce provided by the debtor: I have heard evidence of the assistance that was provided by the creditors in this case, which can often be the subject of the work performed by the receiver-manager; that is, conducting the sale, hiring a real estate agent and pursuing the negotiations in respect of the sale. It is not asserted by the receiver-manager that she played any role in either of those activities;

d) The time spent: As we know, there is an approximation of 55 hours per week;

e) The receiver's knowledge, experience, and skill: The receiver-manager acknowledges her lack of experience and skill as a receiver-manager, but emphasizes that the parties urged her to take the appointment, agreed to her appointment, and that for the purposes of this receivership, she had the necessary qualifications;

f) The diligence and thoroughness displayed: Again, there is no question raised about the diligence or thoroughness of the receiver-manager in respect of the work that she performed;

g) The responsibilities assumed: Again, insofar as the receiver-manager's efforts, there have not been any complaints; however, the responsibilities were about the same as those she had as a building manager;

h) The results of the receiver's efforts as related to the sale of the property, is in significant dispute. I will once again summarize Ms. Macdonald's evidence: she restored relationships with the tenants, with the community, and tradespeople, she managed renovations, ordered appliances and arranged for their delivery, she arranged for inspections of the property by appraisers and others involved in the sale of the property, and she stresses that her meetings with the purchasers, where she provided information to them, were central in the decision of the purchasers to purchase the building and for the price that they offered. This is the basis for her claim for remuneration as a percentage of the sale price, or of the "enhanced" sale price, over the listing price;

i) Costs of comparable services when performed in a prudent and economical manner: I do not have evidence about the specific services that were performed by the receiver-manager, except in the general sense that I have described, and as I have stated, no hourly breakdown of the services performed.

[29] I consider the receiver-manager's services here compared to the costs of comparable services performed in the other cases that have been provided. The receiver-manager provided the case of *Bank of Montreal v. Nican Trading Company* (1990), 43 B.C.L.R. (2d) 315 (C.A.). In that case, the accountants were required to provide financial reports involved in the advertising, liquidation, valuation of the asset, addressing several complications, all of which took a significant expertise, and time records were provided. The other cases cited demonstrate the performance of significant, complex and ongoing accounting advice and implementation.

[30] It is unhelpful to compare the services performed by Ms. Macdonald in this six-month period to that which is performed by the receiver-managers in the cases that have been provided to me.

[31] I am not discounting the services that were provided by Ms. Macdonald, but I find that she has not met the onus of showing that claiming a percentage of the sale price is fair and reasonable in the circumstances.

[32] I note that Mr. Aartsen was paid already. There is some issue between the parties about whether he should have been and whether his account was appropriate, indeed whether he was the appropriate counsel to have been retained to represent the receiver-manager. Because there is no clawback claimed by the Meyer respondents, I do not need to make any finding in that regard.

[33] I find that because the receiver-manager has not met the onus of showing that a percentage of the sale is a fair and reasonable basis for determining her remuneration, that the amount that has been paid to the receiver-manager in the amount of $10,000 is reasonable and fair compensation. Her counsel says this is the same as setting her remuneration at zero. I disagree, it is not zero, it is $10,000, and there simply is no other basis upon which to assess the nature of the services provided, the time that was put into it in order to find that some other amount is reasonable.

[34] There remains the matter of Mr. Levine's fees that have been rendered in respect of the passing of the accounts. The position of the Meyer respondents is that because the amount claimed as compensation for the receiver-manager is so egregious that there should be no costs payable to the receiver-manager for the passing of accounts today. I find that that is a rather unfair approach. The receiver-manager should be entitled to her costs; otherwise she will end up losing money for having taken on this position.

[35] I order that the receiver-manager is entitled to costs of this proceeding at a higher scale than Scale B, Scale C. I am not in a position to assess the costs, because the Court of Appeal has been very clear that that is the purview of the registrar. I order that there be a reference to the registrar in respect of costs.

[36] MS. WELLBURN: My Lady, if I could just address -- I think you can give directions to the registrar, so one of the issues is --

[37] THE COURT: Certainly.

[38] MS. WELLBURN: -- whether hiring a counsel, because you recall after Master McDiarmid made the order a year ago, it was agreed that everything was going to happen in Vancouver.

[39] THE COURT: Yes.

[40] MS. WELLBURN: And Ms. Macdonald changed counsel to counsel in Prince George, which is not in Nelson and not in Vancouver, obviously, so I wonder if you could direct that there be no travel expenses permitted? Because obviously there's many, many Vancouver counsel who are insolvency lawyers.

[41] THE COURT: I think that is within the purview of the registrar to determine whether the travel expenses are reasonably claimed, given Mr. Aartsen's agreement that the matters will be heard in Vancouver. That is certainly something that I did not mention, but it is part of the record, and the submission in respect of whether the travel fees are reasonable is one that is, in my view, within the ambit of the registrar in assessing the costs.

[42] MS. WELLBURN: Thank you, My Lady, then the next issue is the two hearings, the aborted hearings before Master Tokarek and Mr. Justice Skolrood. They both said, well, the judge who eventually hears the application would determine the costs of those. --

[43] THE COURT: The first one was scheduled during the judges' conference.

[44] MS. WELLBURN: The judges' conference and the --

[45] THE COURT: So no judge was available and the second --

[46] MS. WELLBURN: Which Mr. Levine knew. I have an affidavit, so he knew that there was no judge available. He didn't tell me that, and so we appeared and Master Tokarek said, "Well, you need a judge and there's nobody here."

[47] THE COURT: I will hear you on this.

[SUBMISSIONS]

[48] THE COURT: I am going to order that all of the proceeds be paid out from the accounts, but for $15,000, and that will be held back in relation to Mr. Levine's costs, whenever they are assessed.

[49] MS. WELLBURN: And so that is $15,000 including Pushor Mitchell and the balance of the -- the receiver has about 7,000 --

[50] THE COURT: Pushor Mitchell can hold back the $15,000 they have the trust account, and everything else can be paid out.

[51] MS. WELLBURN: So the receiver would pay out the money that she has got in the account to Mr. Meyer's holding company?

[52] THE COURT: Yes.

[53] MS. WELLBURN: Thank you. Thank you, My Lady.

[54] THE COURT: But the $15,000 is held back pending the registrar's determination of Mr. Levine's legal fees, and in relation to the costs, it is mainly travel costs because -- is that correct?

[55] MS. WELLBURN: Well, and there's going to be -- Appendix C, there will be a cost for an attendance on both -- well, I'm not sure if the second day was actually an attend -- well, we did attend and Mr. Justice Skolrood adjourned the hearing. The preparation and attendance.

[56] THE COURT: All right, I am going to allow Mr. Levine's costs in relation to the matter before both Master Tokarek and Judge Skolrood, the reason being that

the judges' conference does not necessarily mean that there will not be a judge available, and as there was some confusion as to who ought to hear it -- but that the receiver-manager is entitled to those costs.

[57] MS. WELLBURN: All right, but the registrar is going to decide whether any of the travel is?

[58] THE COURT: The registrar will decide whether any of the travel is appropriate. Whether or not the cost of transportation is a reasonable expense, given your point that the hearing was going to be in Vancouver, is something that the registrar, if he or she does not have the implicit authority to consider, I will direct that the registrar consider whether, in all of the circumstances, the amounts claimed for travel costs are reasonable --

[59] MS. WELLBURN: -- could you please direct that the hearing be in Vancouver? We always have trouble because it's a Nelson file. I think Mr. Levine will want it to be, and we've agreed previously that everything be heard in Vancouver, so I am assuming that it would be referred to the registrar in Vancouver.

[60] MR. LEVINE: Well, to try and disallow my travel costs.

[61] THE COURT: I have not disallowed them.

[62] MR. LEVINE: No, no, but if that -- if that's going to be the position of Mr. Meyer, then perhaps we should have it heard in Prince George.

[63] THE COURT: Well, there is no attachment to this file to Prince George, except for you.

[64] MS. WELLBURN: I think it's more --

[65] THE COURT: It is either Nelson or here.

[66] MS. WELLBURN: I assume it's more expensive to go from Prince George to Nelson than to here, but I could be wrong.

[67] THE COURT: It is here or Nelson and that, it seems to me, is a cost that is unnecessary. I know you are in Prince George but the file is not related to Prince George, so there is no basis upon which determining it should be in Prince George.

[68] MR. LEVINE: It wasn't related to Vancouver, except that Ms. Wellburn was here, but in any event --

[69] THE COURT: Well, Mr. Aartsen agreed to that, so --

[70] MR. LEVINE: Yes, that's fine, so we can do it in Vancouver.

[71] THE COURT: All right, thank you.

"Gropper J."