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Shareholder Wars: A Receiver Is Not the Remedy

Milborne v Kepinski, a recent motion decision from the Commercial List, confirms that the RJR MacDonald test applies where the appointment of an interim receiver is sought on an interim basis. The decision re-iterates that the overarching objective of an interim receiver is to preserve and realize on a debtor's assets for the creditors' benefit. The extraordinary remedy is unlikely to be granted in the context of an intractable business dispute between shareholders, where control over the asset is sought solely for the purposes of gaining control over the business.

Background

The parties, Mr. Milborne and Mr. Kepinski, were the shareholders of several land development companies. At the time of the motion, two significant development projects were pending in Niagara Falls. Mr. Milborne and Mr. Kepinski disagreed on how the projects should be developed, who should contribute what amounts, and what is owed by each to the other. One thing became clear—the parties could no longer work together.

Mr. Milborne commenced the underlying action against Mr. Kepinksi and his companies, asserting oppression under s. 248 of the OBCA, breach of contract, breach of fiduciary duty, conversion, and unjust enrichment. Justice Penny characterized Mr. Milborne's "chief complaint" as Mr. Kepinski's failure to contribute his share of the capital to advance the projects.

In the midst of their dispute, several secured lenders on properties owned by the parties were poised to take enforcement action on loans that were in default or had come due. Mr. Milborne moved on an urgent basis for the court appointment of an interim receiver over Mr. Kepinski's shares in the companies which owned the development projects.

The Motion Decision

There were two issues on the motion: (1) the appropriate test to be applied to the appointment sought; and (2) whether the applicable test was met.

Justice Penny found the applicable test is comparable to the RJR MacDonald test for interlocutory injunctive relief, and that

the appointment of a receiver over Mr. Kepinski's shares was not appropriate on the record before him.

The first issue turned on whether the receivership order sought was characterized as final or interlocutory. Mr. Milborne argued that while the relief sought (in both the claim and the notice of motion) was for the appointment of an interim receiver pending the trial, the relief was final in nature given he was seeking an order granting authority to the receiver to take permanent control of Mr. Kepinski's shares. He argued that the less onerous "just and convenient" test should be applied. Justice Penny rejected this argument and found that the appointment of an interim receiver was precisely what the notice of motion requested, and this was not a case where the appointment of the receiver would bring an end to the proceedings.

Justice Penny further held that where the appointment of the receiver is in the form of execution before judgment akin to a Mareva—in this case, depriving Mr. Kepinski of the benefits of his share ownership, including his right to vote and to collect dividends—the merits test is elevated to the higher threshold of a strong prima facie case, rather than merely establishing there is a serious issue to be tried.

Justice Penny found that the prima facie threshold applied, but that the requested relief was not supported on either standard. The overarching objective of the appointment of a receiver is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors. Justice Penny found that was not Mr. Milborne's objective in this case. Rather, Mr. Milborne was seeking to appoint a receiver over shares he had no legal or beneficial interest in, to effect control and eliminate interference from Mr. Kepinski in the development projects.

Further, Justice Penny found there was no evidence that Mr. Milborne would suffer irreparable harm if the receivership order was not granted as the evidence demonstrated the dispute was simply "all about money" (and could therefore be compensated in damages).

Similarly, the balance of convenience did not favour granting an appointment in the context of a business dispute where the shareholders could simply no longer work together. Justice Penny remarked that if the elimination of a warring shareholder's right to disagree with the plans of another warring shareholder could be achieved by simply appointing a receiver over that shareholder's shares, it is hard to imagine a case involving a shareholder dispute in which this remedy would not be sought.

The appointment of an interim receiver is an extraordinary remedy—it is not a tool to simply leverage control over one's business partner.

Takeaways

- The applicable test for a receivership order turns on whether the receivership order sought is final or interlocutory.
- It remains difficult for moving parties to establish the requisite elements of the RJR MacDonald test, and appoint an interim receiver, when the evidentiary record demonstrates it is a business dispute between warring shareholders, and that the "dispute is all about money".
- There may not be any scenario where a party is entitled to appoint a receiver over an asset where the moving party has no legal or beneficial interest in the asset (as it will be more difficult to establish there is a serious question to be tried / that there is a strong prima facie case).