

QBG 859 of 2016 – JCS

Charles Niessner and Madelyn Niessner v Timothy Cimmer, Keeley Lake Lodge (1989) Ltd., Benjamin Partyka, Thomas McKenzie, Wes Bousquet, and Weskar Holdings Ltd.

Grant J. Scharfstein, Q.C. for the plaintiffs (respondents), Charles Niessner and Madelyn Niessner

E.F. Anthony Merchant, Q.C. for the defendant (applicant), Timothy Cimmer

FIAT - February 25, 2021 - GABRIELSON J.

Introduction

[1] There are two applications currently before the Court. The first is an application by Charles Niessner and Madelyn Niessner, collectively [Niessners] dated December 31, 2020, for the following orders:

- (a) an order that the employment agreement entered into between Timothy Cimmer and Albert Loke, dated December 30, 2020, constitutes a collateral attack on my fiat dated October 26, 2020, the fiat of Schwann J.A. dated December 23, 2020, and my fiat date December 29, 2020; and
- (b) an order that the employment agreement entered into between Timothy Cimmer and Albert Loke on or about December 30, 2020, is unenforceable on the basis of illegality and an abuse of process;
- (c) an order that Charlene Lariviere or another person deemed appropriate by the Court be appointed as interim manager of the Keeley Lake Lodge (1989) Ltd. [Lodge].

[2] The second is an application by Timothy Cimmer [Cimmer] dated January 6, 2021, for the following orders:

- (a) an order removing Pamela Dietrich as the cabin attendant or otherwise as an employee of Keeley Lake Lodge (1989) Ltd.; and
- (b) an order appointing Thomas McKenzie as the receiver-manager of Keeley Lake Lodge (1989) Ltd.

Background

[3] The background facts are set out in my fiats issued on this file on May 5, 2017; February 27, 2019; October 26, 2020, and December 29, 2020.

[4] Following the issuance of my fiat of December 29, 2020, the Niessners brought an application without notice, returnable December 31, 2020, seeking the appointment of Charlene Lariviere as interim manager of the Lodge on an emergency basis because as of January 1, 2021, there would be no manager of the Lodge.

[5] At the hearing held on December 31, 2020, and after hearing counsel for both parties, I reiterated that neither Albert Locke or Pamela Dietrich would be appointed as interim managers for the reasons given in my fiat of October 26, 2020. I appointed Charlene Lariviere as interim manager of the Lodge until further court order so as to preserve the *status quo*. I scheduled a hearing for the Niessners' application for January 8, 2021.

[6] When the Cimmer application was filed on January 6, 2021, returnable on January 8, 2021, both the Niessner motion and the Cimmer motion were adjourned to January 29, 2021. On January 29, both matters were further adjourned to February 24, 2021.

Positions of the Parties

(a) Position of the Niessners

[7] The Court has jurisdiction to appoint an interim manager pursuant to s. 65 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01. The cases of *Dewan v Burdet*, 2011 ONSC 5749; *Sussex Group Ltd. (Re)*, 2002 CarswellOnt 6299 (Ont Sup Ct), and *H&H Holdings Ltd. v Ng*, 2017 SKQB 295 at paras 27 and 28, support the appointment of an interim manager. Charlene Lariviere is qualified and willing to be the interim manager.

(b) Position of Cimmer

[8] Section 65 of *The Queen's Bench Act, 1998* only allows the appointment of a receiver. However, the Court has common-law authority to appoint a receiver-manager as set out in *Brantford v Grand River Navigation Co.*, 1860 CarswellOnt 27, 8 Gr 246 (UCCH), at paras 8-12. Receiver-managers have the necessary qualifications to fulfill their duties, and Thomas McKenzie has such

qualifications: *Quaite v Avorado Resort Ltd.*, 2009 BCSC 43. Individuals with only managerial experience have also been appointed: *Paradigm Mortgage Investment Corp. v M&G Property Investment Ltd.*, 2016 BCSC 1772. Thomas McKenzie has the qualifications necessary to be appointed interim manager, whereas Charlene Lariviere does not.

Analysis

[9] I am satisfied that the Court has inherent jurisdiction to appoint an interim manager of the Lodge in order to preserve the *status quo* pending a determination of the proper owners of Keeley Lake Lodge (1989) Ltd. In the case of *International Harvester Credit Corp. of Canada v Baschuk* (1985), 44 Sask R 228 (CA), the Court stated at paragraph 3:

[3] It is accepted that neither Rule 15(1) nor Rule 15(2) has application to this situation, but I am not convinced that a chamber judge does not have authority to grant such an order on the basis of an inherent jurisdiction in the court in situations where the need is apparent. In this respect, I refer to the decision of *Re Blackwoods Beverages Limited et al.* (1956), 18 W.W.R. (N.S.) 481, where Culliton, J.A., (as he then was), made the following comment at 486:

“In considering the application to quash the order of February 1, the court is exercising its inherent jurisdiction. In the exercise of that jurisdiction the court has not only the right but the duty to preserve the rights of the parties as nearly as possible in statu quo (sic) until the merits can be fully tried. In granting the interim stay and continuing the same until the final disposition of the original application, the court is doing that which it has a right to do and, under the facts disclosed herein, a duty to do. I think it is abundantly clear, that to hold otherwise, would be a surrender by the court of its rights and jurisdiction and could only result in confusion and uncertainty in every application of this nature, a result most undesirable and detrimental to all bona fide litigants.”

...

[10] Furthermore, the parties agree that s. 65 of *The Queen's Bench Act, 1998* could also be applied to find such jurisdiction.

[11] For the reasons given in my fiats of October 26, 2020, and December 29, 2020, neither of Albert Locke or Pamela Dietrich are acceptable for the position of interim manager of the Lodge. Furthermore, I was advised that Pamela Dietrich is no longer employed at the Lodge so that the application to remove her as cabin attendant at the Lodge is moot.

[12] I am satisfied that both Charlene Lariviere and Thomas McKenzie have the qualifications to be interim co-managers of the Lodge. As I have said in previous fiats on this file, the *status quo* is to be maintained until the proper ownership of the Lodge has been determined by the Court. Accordingly, I will appoint both Charlene Lariviere and Thomas McKenzie as interim co-managers. The parties have agreed to the terms of their appointment as set out in their draft orders, with the exception of their fees and who is to pay such fees. I order that their fees shall be paid by the Lodge provided that their combined fee for services shall not exceed \$7,000.00 per month, and if it does, each party will contribute 50 percent of any excess over \$7,000.00 per month.

[13] The parties shall have leave to apply further to the court if the form of the order appointing them as interim co-managers cannot be agreed upon.

[14] Costs of the applications will be in the cause.



J.
N.G. Gabrielson