

COURT FILE NO.: 01-CL-004192
DATE: 20031104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

BUCKINGHAM SECURITIES
CORPORATION

Respondent

)
)
) Heath Whiteley
) *for Latimer Securities Inc.*
)
)
)
) Lisa Carne
) *for BDO Dunwoody, Receiver*
) *of Buckingham Securities Corp.*
)
) **ORAL REASONS GIVEN ON MOTION**
) **HEARD: October 30, 2003**

ORAL REASONS

[1] The issue of the priority of Latimer's security interest in securities pledged with it by Buckingham vis-a-vis the security interest of the Receiver's charge on the property of Buckingham was raised in the original cross-motion of Latimer and I am not prepared to determine the issues based on the timing of bringing the matter back on before the court today.

[2] As indicated, it is, in my view, clear that the Receiver was appointed to preserve and realize on the assets of Buckingham for the benefit of all interested parties and accordingly, falls within the second exception in the Kowal case. It is also clear that the Receivership Order creates a first charge as security for the Receiver's fees and disbursements on all the Property of Buckingham, including the securities pledged to Latimer, in priority to any other charge on the Property.

[3] I think it is beyond question that the Receiver was acting in furtherance of its fiduciary duty to the creditors of Buckingham and in furtherance of its duty as an officer of the court in contesting and litigating the claim of Latimer to a security interest in the securities pledged with it. I cannot conclude that it was in any way unreasonable for the Receiver not to settle this issue and to proceed to litigation, even though it was not successful. The issues in the litigation were complex and somewhat novel and the outcome was by no means certain. I fail to see how in

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pursuing the litigation the Receiver was acting outside its mandate so as to somehow lose the protection of its first charge on the Property as security for its fees and disbursements.

[4] I am also of the view that such fees and disbursements having been incurred, they should be allocated along with all the other expenses of the Receiver *pro rata* among the assets forming the Property so that the assets over which Latimer has security would only bear its *pro rata* portion of the fees and expenses of the litigation. To the extent that Latimer wishes to challenge the reasonableness of the fees and disbursements being incurred by the Receiver on the litigation or the quantum of such fees and disbursements, it should do so on the assessment of the Receiver's accounts.

[5] Accordingly, the motion for an order declaring that the security interest held by Latimer is in priority to the Receiver of Buckingham and permitting Latimer to sell sufficient of its collateral to recover its indebtedness is dismissed. Costs in the amount of \$2,000, all in, payable by Latimer to the estate.



Ground J.

Released: November 4, 2003

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