Unofficial Transcript of the Endorsement of Justice Hoy – May 17, 2010

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

JAMES HAGGERTY HARRIS

Applicant

- and -

BELMONT DYNAMIC GROWTH FUND,
An Ontario limited partnership

Respondent

The Receiver seeks approval of a Claims Determination Order and its Second and Second Supplementary Reports.

National Bank of Canada, Omniscope, Mr. Nead and Royal Bank of Canada support the order sought.

Harcourt Investment Consulting AG seeks a modification of the Claims Determination Order sought which would permit Harcourt to be fully involved in the claims determination process, and have standing at the claims determination hearings. Mr. Martin Harcourt's affidavit says this will permit Harcourt to assist the court or protect Harcourt's own interests.

The Receiver is the receiver of the assets of Belmont Fund – an investment fund structured as a limited partnership. Harcourt is a 50% shareholder of the general partner. Omniscope is the other 50% shareholder. The shareholders arrived at an impasse and there is litigation between them. The general partner has a .001% economic interest in the limited partnership.

The principal assets of the Belmont Fund are forward contracts, the values of which vary directly with the market value and return of the Belmont Dynamic Segregated Portfolio (the "SP"). Harcourt is also the investment advisor to the SP. The SP is being liquidated outside of the purview of the court process. The Belmont Fund has no direct interest in the SP. Vontobel, Harcourt's controlling shareholder, provided seed capital to the SP. It has claims against the SP which I understand are near resolution and which will affect the value of the Belmont Fund.

RBC represents the limited partners of the Belmont Fund, who have a 99.999% economic interest therein. RBC sought the appointment of the Receiver when the shareholder dispute at the general partner made it impossible for the general partner to act.

Harcourt argues that it has knowledge relevant to the claims to be resolved and should therefore have standing. It also points to its indirect (50% of .001%) economic interest in proceeds ultimately available for distribution. It submits that Canada (Attorney General) v Cardinal Insurance [1991] O.J. No. 2128 and Trempe v Reybrock provide authority for the degree of involvement it seeks.

The Receiver and the parties which support the Receiver, submit that the modification sought by Harcourt is unnecessary, and would be a dangerous precedent. Harcourt is at liberty to provide all relevant information to the Receiver. If appropriate and necessary, the Receiver may call upon Harcourt personnel as witnesses. Harcourt will receive notice of the claims approval hearings and have access, in advance thereto, to the records created in relation thereto.

The Receiver is concerned that involving Harcourt in the process would result in a 'chill' on negotiations and make it more difficult for the Receiver to maintain its neutrality, given the adversarial positions of Omniscope and Harcourt and the fact that one of the disputed claims is in relation to a matter Omniscope and Harcourt are not ad idem on.

Counsel for the Receiver submits that the process for which it seeks approval essentially provides to Harcourt what was provided to the moving parties in Cardinal. Only the issue of standing remains and that issue, it submits, should be left to the judge hearing/determining each of the disputed claims.

Harcourt counters that it is inefficient for it to have to bring a standing motion in respect of each of the four disputed claims.

Harcourt's real interest seems to relate to only 2 of the four claims. I suspect that, at most, it would ultimately seek standing only in relation to 2 claims. Consistent with CL practice, the same judge would normally be assigned to hear all of the disputed claims. Even if Harcourt seeks standing in relation to 4 claims, given that this matter is or the CL, I do not think it would in fact result in great inefficiency.

A receiver was appointed because litigation between the two 50% shareholders had brought the general partner to an impasse, and a receiver was necessary to protect the interests of the 99.999% economic stakeholders. It would in my view be dangerous to at this stage make one of the 50% shareholders an equal participant in the claims determination process.

I am confident that the Receiver will have careful regard to all the information Harcourt is in a position to provide to it – as indeed it will to information gleaned from others. I am also confident that should that not be the case, Harcourt will draw such fact to the courts attention. The Receiver has a duty not just to the court, but to all parties interested in Belmont Fund's assets, property and undertaking.

The order and process for which the Receiver seeks approval provides, as counsel for the Receiver submits, the substance of what was provided for in Cardinal, except as to standing, which I have addressed above. In making this observation, I should not be seen as accepting the approach in Cardinal as applicable to Ontario receivership proceedings. I am simply responding to Harcourt's argument, at its "best".

Order therefore to issue in form sought by the Receiver.

As requested, I note that National Bank may seek a determination that its claim is outside the scope of the claims determination order. (It may argue that its claim is instead against SP).