

VESTING ORDERS IN AND OUTSIDE OF AN INSOLVENCY

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PART I: INTRODUCTION

Vesting orders are powerful tools in the lawyer's toolkit. All lawyers should be aware of what they are and what they can do. In appropriate circumstances, they can be used to force the transfer of property against the will of an individual. In other cases, they can be used to fill in the gap where a person with legal or beneficial title to property is unable to transfer title to a purchaser or another beneficiary. Vesting orders can be employed in a variety of circumstances, ranging from civil cases to spousal support cases to receiverships and restructurings, and recently, courts have shown a greater willingness to use these orders in different contexts to ensure that justice is done.

This paper will explore the nature of vesting orders – what they are, and from whence they come. We will examine vesting orders and their uses in situations ranging from civil disputes regarding interests in real and personal property, to family law property and support disputes, to insolvency and restructuring cases, all leading to their transfer of property from one party to another, and even disputes in respect of mining claims.

And while it is the case that the assigned topic is vesting orders, in and outside of an insolvency, the reality is that the majority of vesting orders these days are granted within the context of insolvency proceedings. As this seminar was intended for business and real estate lawyers, and

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not family law or mining law lawyers, this paper will therefore focus on vesting orders in insolvency proceedings. However, the principles of vesting orders, having developed over time, are applicable to other contexts, and lawyers who practise in other areas ought to be alive to the possibility that a vesting order may assist their client in those other circumstances.

PART II: VESTING ORDERS AND THE COURT'S POWER TO GRANT THEM

Simply put, a vesting order is a court order that passes legal title in lieu of a legal conveyance.² It is an equitable remedy, and is, therefore, by its nature, discretionary, and results from a finding by a court that fairness demands that the court act in a way to transfer property from one party to another. Typically, this occurs once the court has determined that one party is entitled to ownership of specific property, another party has legal or beneficial title to that property, and it is appropriate that title to the property be transferred to the entitled party by way of court order.³

As vesting orders have their roots in the law of equity, the key to obtaining a vesting order lies in persuading the court that fairness and justice require the court to grant the order, or put another way, that the failure to grant a vesting order will not be sufficient to ensure a fair or just result.

In *Chippewas of Sarnia Band v. Canada*, the Court of Appeal for Ontario noted that, historically, the power to grant vesting orders was rooted in the power of the Chancery courts to grant *in personam* orders that directed parties to deal with property in accordance with the court's judgment. Those judgments were then enforced using the court's contempt powers, followed by imprisonment or sequestration. Eventually, the courts were granted statutory power to make

² *Regal Constellation Hotel Ltd., Re*, 2004 CanLII 206 (ON CA) ("Regal")

³ See e.g. *Macourtice Developments Inc. v. Clarington (Municipality)*, 2006 CanLII 29991 (ON SC) at para. 26, where Belobaba J. made an order for specific performance, but declined to make a vesting order, preferring instead that the parties themselves execute the transfer.

vesting orders that “supplemented the contempt power by allowing the Court to effect the change of title directly”.⁴

Such orders may be appropriate in a variety of circumstances. In the insolvency context, a court-appointed receiver may be in possession and control of property, and may wish to sell that property to a proposed purchaser. However, as the receiver is not the registered owner of the property, it may need to obtain an order from the court permitting the transfer of the property to the new purchaser, and noting the transferee as the new legal owner of the property. In so doing, the receiver will also wish to effect the transfer of the property free and clear of any encumbrances and claims. A vesting order is the appropriate remedy, and, the receiver will need to satisfy the court that this is the case.

In other contexts, a court may grant a vesting order where it has determined that a transfer of title is appropriate but, due to the nature of the legal proceeding, it is unlikely that an actual conveyance of title can be effected on a consensual basis. This situation may arise in contentious family law disputes over property, or in civil disputes where the plaintiff is claiming specific performance, or where a party’s beneficial ownership interest in property is disputed. In the case of *Lynch v. Segal*, several unsatisfied support orders led the Court of Appeal to grant a vesting order transferring property to a spouse to effect the sale of the property and satisfy the prior court orders. In that case, the Court of Appeal noted that “a vesting order – in the family law context, at least – is in the nature of an enforcement order”.⁵ A similar observation may be made in the context of a claim for specific performance, where the granting of the relief sought may not be

⁴ *Chippewas of Sarnia Band v. Canada (Attorney General)*, 2000 CanLII 16991 (ONCA), para. 281

⁵ *Lynch v. Segal*, 2006 CanLII 42240 (ONCA) (“Lynch”) at para. 32.

sufficient to effect the transfer, such that a vesting order may also be appropriate or even necessary.

PART III: THE COURT'S AUTHORITY TO GRANT A VESTING ORDER

The court's power to grant vesting orders is found in s. 100 of the *Courts of Justice Act*, which states:

A court may by order vest in any person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.⁶

It is important to note that s. 100 of the *Courts of Justice Act* does not provide the court with a freestanding right to transfer property or vest title in another, simply because the court considers that result equitable or appropriate. Rather, the section merely provides the court with a mechanism by which it may vest an interest in property to which a person is otherwise already entitled. Indeed, as the Court of Appeal for Ontario noted in *Trick v. Trick*, in citing the words of the section, a court cannot vest title to property in a party unless the court also possesses the "authority to order that the property be disposed of, encumbered or conveyed".⁷

In certain cases, the authority to grant a vesting order may arise from a court's finding that, based on unjust enrichment or other principles of equity, it is appropriate to impose a constructive trust, whereby one party holds certain property (or some interest therein) in trust for another. That in

⁶ *Courts of Justice Act*, RSO 1990, c C.43 at s. 100

⁷ *Trick v. Trick* 2006 CanLII 22926 (ON CA), (2006), 81 O.R. (3d) 241 at para. 19; *McLean v. Danicic*, 2009 CanLII 28892 (ON SC) ("Danicic")

turn may lead to the granting of a vesting order whereby the court transfers the property in question from the constructive trustee to the other party.⁸

In the insolvency context, the authority of the court to grant a vesting order may come from a prior court order in which the court ordered the appointment of a receiver to take control of certain property. The authority to grant a vesting order may also be found in a security agreement, where a debtor grants to a secured creditor the right to sell assets in the event of the debtor's default.

Similarly, the authority to vest assets may be granted by a particular statute. Under the *Bankruptcy and Insolvency Act* ("BIA"), a trustee in bankruptcy is granted the power to effect the transfer of property. Sections 9 and 34 of the *Family Law Act* also authorize the court to order the vesting of property in a spouse or dependent, whether absolutely, for life or for a term of years.⁹ Similarly, the *Trustee Act*, *Mining Act* and numerous other acts set out a number of circumstances in which vesting orders may be granted.¹⁰ As there are some differences as to how vesting orders are treated, pursuant to each of these statutes, reference should be made to the specific act regarding any unique requirements. For example, vesting orders made pursuant to the *Mining Act* are available on application to the Mining and Lands Commissioner, rather than a judge of the Superior Court of Justice, pursuant to the *Courts of Justice Act*.¹¹

⁸ See e.g. *Stevens v. Stevens*, 2006 CanLII 23141 (ON CA)

⁹ *Family Law Act*, RSO 1990, c F.3, at ss. 9 and 34.

¹⁰ See the *Trustee Act*, RSO 1990, c.T.23, ss.10, 12, 13; *Mining Act*, RSO 1990, c M.14 ("*Mining Act*") at ss. 68, 69, 74, 181, 196.

¹¹ *Mining Act*, *ibid.*

PART IV: VESTING ORDERS IN CIVIL AND FAMILY LAW PROCEEDINGS

In many civil proceedings, a judgment for damages may be all that is required for a plaintiff to be able to recover from defendants who are found liable. The defendant recognizes the judgment and the authority of the court and complies with the court order. In those cases, nothing further is required. Similarly, in family law cases, orders for the making of support payments or requiring the payment of a certain sum of money in respect of an equalization payment may be satisfied without the need for further court involvement or court orders. However, in other situations, the simple fact of the court order requiring the party to pay may not be sufficient to achieve compliance, and additional court involvement may be required. In many of these types of cases, the courts have demonstrated a willingness to grant alternate or additional relief to achieve a fair result for the parties.

This alternate or additional relief may include the granting of certain equitable remedies, including specific performance or the imposition of a constructive trust over property to which the defendant/respondent has title. Where the court grants such remedies, the plaintiff/applicant becomes entitled to an interest in the property in question, such that a court may then choose to exercise its authority to dispose of, encumber or convey the property in dispute, pursuant to section 100 of the *Courts of Justice Act*.

In the case of *Langston v. Landen*, Mr. Landen was found to have breached his obligations as an estate trustee, having fraudulently stolen millions of dollars from the estate and used the money to purchase a house in his wife's name. A representative of the estate commenced proceedings against Mr. Landen for breach of fiduciary duty and breach of trust and sought a vesting order in respect of the house purchased in Mrs. Langden's name, vesting title in the estate. On a motion for summary judgment, the motion judge found in favour of the representative of the estate (not

Mr. Landen!) and held that the imposition of a constructive trust and the sale of the house were appropriate. He also ordered the vesting of title to the house in the estate.¹² On appeal, the Court of Appeal for Ontario held that the imposition of a constructive trust and the granting of the vesting order were “logical and even necessary precursors to the order for sale of the property” and were within the motion judge’s discretion to order.¹³

It is important to consider once again that a vesting order is a discretionary order, and it is incumbent on a party seeking a vesting order to persuade the presiding judge that such an order is appropriate in all of the circumstances. As stated by Blair J.A. in *Lynch v. Segal*:

I do not think any useful purpose is served by attempting to categorize the types of circumstances in which a vesting order may issue in family law proceedings. The court has a broad discretion, and whether such an order will or will not be granted will depend upon the circumstances of the particular case. I agree with the appellants that the onus is on the person seeking such an order to establish that it is appropriate. As a vesting order – in the family law context, at least – is in the nature of an enforcement order, the court will need to be satisfied (as the trial judge was here) that the previous conduct of the person obliged to pay, and his or her reasonably anticipated future behaviour, indicate that the payment order will not likely be complied with in the absence of more intrusive provisions...the spouse seeking the vesting order will have already established a payment liability on the part of the other spouse and the amount of that liability, and will

¹² *Langston v. Landen*, 2007 CanLII 39890 (ON SC) (“Langston SCJ”)

¹³ *Langston v. Landen*, 2008 ONCA 321 (CanLII) at para 26.

need to persuade the court that the vesting order is necessary to ensure compliance with the obligation.

In *Lynch*, and in a number of subsequent decisions, where the court was satisfied that the applicant would not receive the payments the court had ordered to be made, unless the court granted a vesting order, the court ordered that title to the property be vested in the applicant and the property sold.¹⁴

Further, in considering whether a vesting order is appropriate, the court will have regard to whether there is a reasonable relationship between the value of the assets to be transferred and any amounts ordered to be paid, taking into account other creditors' claims.¹⁵ Where the value of the assets to be transferred exceeds the value of the creditor's claim, the court may determine that it would not be appropriate to order that the property be transferred to the creditor. On the other hand, in situations where the value of the assets was an issue, the court addressed this by simply ordering that the applicant was required to pay any excess proceeds to the respondent.¹⁶

PART V: VESTING ORDERS IN INSOLVENCY PROCEEDINGS

Vesting orders are also used quite frequently in insolvency proceedings. Their use in that context differs quite substantially from their use in civil and family law proceedings. In the sections that follow, we address the use of vesting orders in the insolvency context, including where they may be granted, why they are useful, and the different insolvency proceedings in which they may be used.

¹⁴ *Lynch, supra* at para. 17; this may happen where the payor flees the jurisdiction, breaches prior court orders for payment or simply does not have any other assets to satisfy the order. In particular, see *Bulman v. Bulman*, 2009 CanLII 63126 (ON SC) at para 66; *Schaarschmidt v. Schaarschmidt*, 2008 CanLII 54327 (ON SC) at para 20.

¹⁵ *Lynch, supra* at para 50.

¹⁶ See e.g. *Danicic, supra*.

As business and real estate lawyers, it is important to know that there are a number of different processes that exist to deal with insolvent debtors and their assets. Whether you act on behalf of a purchaser of assets or a creditor, it is important to have a basic understanding of insolvency law. While this paper cannot begin to address these matters in any depth, it is important to understand the differences in the different proceedings and how they may impact on obtaining a vesting order.

Insolvency Proceedings where Vesting Orders may be granted

When a debtor is insolvent, its creditors may seek to sell its assets, with the proceeds being used to pay down the outstanding debts. Creditors may choose from a variety of remedies, some in the nature of self-help remedies, others which require the court's assistance. Further, with the knowledge that creditors may be pressing for repayment of their debts, debtors themselves may wish to commence certain formal legal proceedings that enable them to deal with their creditors and their debts in an organized fashion. In this way, debtors ensure that their actions cannot later be questioned or attacked, which may not be the case where the debtor arrives at an agreement with one or more creditors over others.

In proceedings that are creditor driven, a creditor may:

- (a) take possession of and sell personal property pursuant to the terms of a security agreement, such actions being subject to the provisions of the *Personal Property Security Act*,
- (b) take possession of and sell real property pursuant to the terms of a mortgage, subject to the the provisions of the *Mortgages Act*;

- (c) appoint a receiver, privately, or seek the appointment of a receiver by the court, over all or part of the debtor's assets; or,
- (d) commence an application against the debtor for a bankruptcy order, which, if successful, would result in the appointment of a trustee in bankruptcy, who would then liquidate the debtor's assets.

On the debtor side, companies could file a proposal (or a notice of intention to file a proposal) pursuant to the provisions of the *BIA*, or commence an application in which they seek a stay of proceedings under the *Companies' Creditors Arrangement Act* ("CCAA") while they formulate a plan of arrangement, that they would then put before their creditors in the hope that the creditors and the court may find the proposal or the plan acceptable. In certain cases, these proposals and plans may call for the liquidation of certain of the debtor's assets in a manner that will hopefully lead to greater realizations and greater value for the creditors.

In each of these cases, the end result may be the sale of and the transfer of title to certain assets, such that a vesting order is not only appropriate, but necessary.

A Word About Receivers

Pursuant to section 101(1) of the *Courts of Justice Act*, a creditor (or any other person for that matter) may seek the appointment of a receiver. That section provides:

101.(1) In the Superior Court of Justice, ... a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

In certain circumstances, an interested person may also seek the appointment by the court of an interim receiver, pursuant to ss. 46 or 47 of the *BIA*, and a secured creditor may seek the appointment of a so-called “national” receiver, pursuant to s. 243 of the *BIA*.¹⁷

The role of an interim receiver is to protect the interest of creditors for brief, specified periods - either following the commencement of an application for a bankruptcy order and prior to its disposition, or following the delivery by a secured creditor of a notice of intention to enforce security and certain other events.¹⁸ During the period of its appointment, an interim receiver may summarily dispose of the debtor’s property, but may only sell property that is perishable or likely to depreciate rapidly in value.¹⁹

A national receiver appointed pursuant to s. 243 of the *BIA* has greater powers than those of an interim receiver and, unlike with interim receivers, there is no statutory limitation on the duration of a national receiver’s appointment. A national receiver, as noted earlier, can also receive and sell property located anywhere across Canada.

As also noted above, secured creditors may also have certain rights pursuant to written security agreements with debtors, including the right to take possession and control of the assets secured under the agreement, the right to sell the assets to recover the amounts owing to the creditor and the right to appoint a receiver over the assets, without applying to the court. A receiver who is

¹⁷ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“BIA”) sections 46(1), 46(2) and 243(1). The reference to a “national” receiver is not found in the legislation, but is really in the nature of a comparison with the various provincial legislation that otherwise provides for the appointment of a receiver. Note that prior to the enactment of this section, the BIA (federal legislation, applicable across the country) only provided for the appointment of an interim receiver, and only in specific circumstances. In cases where there were assets located in various provinces, receivers appointed pursuant to provincial legislation could only act within that provincial territorial jurisdiction. This led to the need to attend in numerous courts in various provinces, where necessary, to obtain the appointment of the receiver wherever the assets were situate. With the enactment of this section, there is now a provision in the federal / national legislation that provides for the appointment of a receiver with national scope.

¹⁸ *BIA* at sections 46(1) and 47(1)

¹⁹ *BIA* at sections 46(2) and 47(2).

appointed pursuant to a security agreement, without having to apply to the court, is known as a private receiver.

Reasons to Seek a Vesting Order in an Insolvency Proceeding

In bankruptcies and receiverships, any assets to be sold will be sold via a trustee in bankruptcy or a receiver, and not by the debtor, who is most likely the registered owner of the assets in question. In the case of debtor driven insolvency proceedings (*BIA* proposals and *CCAA* applications), while the debtor may have actual title to the assets being sold, there are still cogent reasons to obtain a vesting order. First, in the case of a sale of assets by a trustee or receiver, any proposed purchaser will want to know that it is dealing with someone who has the authority to deal with the assets in question and transfer title to the assets, such that the purchaser will obtain good title to the assets upon closing. Second, purchasers will likely wish to ensure that they are protected from any subsequent challenges by other creditors that the sale was somehow improper.

Third, the party selling the assets, be it a receiver or a trustee in bankruptcy, will likely only have limited knowledge about those assets it is selling, and likely less than the actual owner of the assets in question. As a result, when considering the sale of any assets, a trustee or receiver is likely unable and unwilling to make any representations or warranties about the assets being offered for sale, and in particular, whether there are any unregistered, undisclosed claims against the assets. Any offers to sell the assets will therefore likely only be made on an “as is, where is” basis. Purchasers will therefore have to commit their own time and resources to learn more about the assets and seek to learn of any claims against the assets during the due diligence period. As the period within which to conduct any diligence period may be quite short – the

trustee or receiver may be trying to, among other things, avoid perishability or obsolescence of any personal property and minimize any carrying costs of any real property – there may not be a great deal of time for a purchaser to satisfy itself with respect to such matters.

Vesting orders offer a solution to these issues. They can provide comfort to purchasers and a means to transfer title where the transferor is someone other than the person with title to the assets. First, the asset purchase agreement can be made conditional upon the transferor obtaining a vesting order from the court, whereby title will be transferred pursuant to the court order. Second, the vesting order will provide that the purchaser will take title to the assets free and clear of all encumbrances and claims and in a manner that is approved by the court. Thus, the purchaser can be assured that no creditor will “lie in the weeds” or subsequently lay claim to the assets or any part thereof.

A vesting order also provides certainty in that it makes it very difficult to challenge the transfer once the court makes the order in question. It is also often the only means available to transfer the assets of an unwilling or insolvent party.

Vesting Orders in Bankruptcies

If the court makes a bankruptcy order against a debtor (or if the debtor assigns itself into bankruptcy), then the provisions of the *BIA* provide the framework pursuant to which the trustee in bankruptcy may liquidate the bankrupt’s assets and distribute the proceeds of sale among creditors. When a bankruptcy order is made, it will provide for the appointment of a licenced trustee in bankruptcy over all of the assets and property of the bankrupt. The assets and property form the bankrupt’s estate. The *BIA* also provides that a trustee in bankruptcy has the power to sell the bankrupt’s assets (subject to the rights of secured creditors), and sets out a process in a

detailed fashion, such that vesting orders are largely unnecessary, and are therefore seldom sought. In particular, the *BIA* provides that:

- (a) once bankrupt, the bankrupt debtor ceases to have any capacity to dispose of or otherwise deal with its property;²⁰
- (b) property immediately passes to and vests in the trustee in bankruptcy;²¹
- (c) in the case of real property, the trustee is then entitled to be registered as owner of the real property, free of all encumbrances or charges²², except those of secured creditors;²³ and,
- (d) if the trustee sells that property, the property vests in the purchaser all the legal and equitable estate of the bankrupt.²⁴

The *BIA* thus provides a statutory authority for the automatic vesting of title of an asset sold out of a bankrupt estate by its trustee. As a result, a purchaser may purchase assets from a trustee knowing that the trustee is entitled to sell the assets free and clear of any encumbrances, and there is no need for the trustee in bankruptcy or the purchaser to seek a vesting order.

In the insolvency context, this statutory vesting of title in and from the trustee in bankruptcy in the *BIA* is unique, and does not occur in receiverships, *CCAA* or even *BIA* proposal proceedings (noting that the latter two processes are debtor-in-possession proceedings, where court approval is required for the sale of assets out of the ordinary course. This is discussed further below.)

²⁰ *BIA* section 71

²¹ *BIA* section 71

²² *BIA* section 74(2)

²³ *BIA* section 70(1)

²⁴ *BIA* section 84

Thus, as we set out below, in other types of proceedings, the vesting of title in a purchaser will only be possible via a vesting order.

Vesting Orders in Private Receiverships

As referenced above, secured creditors' rights are largely defined in their respective security agreements with the debtor. If a debtor defaults and the security agreement permits it, a secured creditor may take possession and control of the debtor's assets and sell them to reduce the outstanding debt. Where such rights are provided for, a secured creditor may choose to either sell the assets itself or appoint a receiver to do so, as provided above. In either case, the sale will be governed by Part V of the *Personal Property Security Act*. This private sale process provides that the creditor, or its appointed receiver, may transfer title to the assets to a purchaser, pursuant to the powers granted to the secured creditor in the security agreement, that is, without the need for obtaining a vesting order. This process is typically faster and less costly than a court-appointed receivership, the secured creditor maintains significant control over the process, and the actions of the secured creditor will withstand court and creditor scrutiny, provided that all steps taken are "commercially reasonable".²⁵

In a private receivership sale, the purchaser will typically purchase the debtor's assets on an "as is, where is" basis, such that it becomes important for purchasers to conduct their due diligence with respect to the assets. Further, the purchaser will want to obtain a security opinion to confirm the validity of the security, and thus that the secured creditor has the right to sell the assets.

²⁵ *Personal Property Security Act*, R.S.O. 1990, c P.10 ("PPSA") at section 63(2).

While it is possible for a private receiver or the purchaser to apply to the court for a vesting order, rather than just completing the sale privately, such orders are, in practice, rarely granted. The premise is that the secured creditor chose not to engage the court's process, such as by seeking the appointment of a receiver by the court. The court has had no involvement in the process, including the sale process, and has no prior information as to what has transpired. Thus, it would be inappropriate for a creditor to simply come before the court at the last moment and in such circumstances ask, much less expect, that the court will sanction the sale of the assets. Indeed, a purchaser will likely get no better title using a vesting order than it will through the private sale process, sanctioned as it is by the provisions of the PPSA. As a result, the courts are reluctant to commit resources in these situations and will rarely exercise its discretion to grant such an order.

In the case where a purchaser insists on the obtaining of a vesting order from the court, and there are no other more palatable options available, any application for a vesting order ought to be made solely at the purchaser's expense so that the creditors' recovery is not diminished by the unnecessary costs associated with the court application.

Vesting Orders in Court-Appointed Receiverships

In the case where a court decides to appoint a receiver, the receiver is said to be a court-appointed receiver. Unlike a private receiver, who takes its powers from the security agreement between the parties, a court-appointed receiver takes its powers from the order that appoints it. It is therefore critical that the appointment order provide for the powers it is anticipated the receiver will need, including, where appropriate, the power to sell the debtor's assets and the power to apply for a vesting order.

In the Toronto region of the Ontario Superior Court of Justice, motions or applications to appoint a receiver are heard on the Commercial List, a specialized subset of the Superior Court that deals primarily with matters related to commercial disputes and insolvency. The Commercial List has developed a model receivership order that is the starting point from which to prepare an order in respect of a court-appointed receivership. The model order can be and ought to be modified to suit the circumstances of the particular application, though any modifications ought to be brought to the attention of the presiding judge at the hearing of the application or motion. An applicant will still be required to satisfy the court that the order and each of its provision are appropriate. To that end, the court materials prepared in respect of the application must provide a proper evidentiary foundation for the order.

In addressing some of the provisions of the model order itself, paragraphs 3(l) and (m), respectively, authorize a receiver to sell property and seek a vesting order, if necessary. Paragraphs 3(1) and (m), respectively, provide as follows:

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

...

- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$____, provided that the

aggregate consideration for all such transactions does not exceed \$ _____; and

- (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, [or section 31 of the Ontario *Mortgages Act*, as the case may be,] shall not be required, and in each case the Ontario *Bulk Sales Act* shall not apply;

- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

The applicant will be expected to supply the appropriate values with respect to the blanks in clause 3(1) dealing with the amounts for which court approvals are not required, and again, this ought to be addressed in the applicant's materials.

In a court-appointed receivership, where the transaction amounts exceed what is permissible under the order without court authority, a receiver will typically seek the court's approval for a proposed sale process, and, if approval is granted, implement that sale process. Where the receiver proposes to sell assets, either with or without court approval, it may be necessary to seek a vesting order, as provided for in clause 3(m) of the model receivership order. In such a case, the receiver will bring the appropriate motion seeking to have title to the assets vest in the purchaser, prior to the completion of the transaction.

In such a case, the Commercial List also provides for a model approval and vesting order.²⁶ As with the model receivership order, the expectation is that counsel will use the model order as a starting point and tailor it to the specific needs of the transaction. Further, as before, the court will expect counsel to justify why it is appropriate to seek an approval and vesting order, and that should be made clear in the materials provided to the court.

It is important to note that the model approval and vesting order serves two purposes and indeed combines two functions. First, it serves as a means for a court to approve a particular transaction of purchase and sale, and second, it vests title to the assets in question in the purchaser. With respect to approval, the court will need to be satisfied it is appropriate to grant the order and thus provide its imprimatur on the transaction. As part of its consideration of whether or not to approve the transaction, the court will consider and apply the principles enunciated by the Court of Appeal for Ontario in *Royal Bank of Canada v. Soundair*, namely:

- (a) whether the receiver has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.²⁷

With respect to the vesting of title, the court will want to be assured that it is appropriate to vest title to the assets in the purchaser and the parties should have regard to the considerations noted earlier in this paper in that regard.

²⁷ *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA) — 1991-07-03

As a practical matter, court-appointed receivers will usually seek approvals and vesting orders at the same time and as part of a single order. Indeed, as noted above, the Commercial List model order is styled that way as an approval and vesting order. A copy of the Commercial List Model Approval and Vesting Order is attached as appendix “A” hereto.

Vesting Orders in a BIA Proposal or CCAA Plan of Arrangement

Vesting orders are also often useful or even necessary in other types of insolvency proceedings, including those where a debtor may wish to restructure its business or carry on business for some period of time, rather than simply liquidate its assets in the short term. In these cases, a debtor may seek to take advantage of certain provisions in the *BIA* and the *CCAA*. These statutes provide for a more formal restructuring of insolvent debtors, in cases where they may seek to come to some arrangement with their creditors with a view to emerging from these proceedings with a greater chance of survival over the longer term. As part of these restructurings, the debtor companies may wish to and indeed may need to sell some or all of their assets. As in the earlier situations referred to above, vesting orders may enable the sale of those assets, that may otherwise not be able to be sold.

A key distinction between the earlier bankruptcy or receivership proceedings and these restructurings is the fact that the former proceedings involve a transfer of control of the debtor’s property, in whole or in part, to a trustee in bankruptcy or a receiver. In the case of a restructuring involving a *BIA* proposal or a *CCAA* application, the debtor remains in possession and control of, and continues to own, all of its property and assets.²⁸ In either case, the hope is

²⁸ Note however that in each case, the governing statutes provide that, during the pendency of these proceedings, while the debtor may still be in control of its assets, its activities are to be monitored and reported upon to the court by a proposal trustee, in the case of a *BIA* proposal, or a monitor, in a *CCAA* application.

that, given some additional time, and with the protection of a stay of proceedings preventing creditors from taking steps to enforce their rights, the insolvent debtor will be able to come up with a proposal or plan of arrangement to put before its creditors, that will enable the debtor to restructure its affairs and continue on as a viable business.

Section 65.13 of the *BIA* provides that an insolvent person who has filed a proposal or notice of intention to file a proposal may not sell or otherwise dispose of its assets out of the ordinary course of business without court authorization. Section 65.13(4) of the *BIA* provides for a series of factors that a court must take into account in deciding whether or not to grant its approval for the sale. Subsection 36 of the *CCAA* provides similar restrictions on an insolvent debtor under *CCAA* protection seeking to sell or dispose of its assets out of the ordinary course of business and subsection 36(3) of the *CCAA* provides a similar list of factors a court will consider when determining whether it ought to approve a proposed sale to a non-related person. Those considerations are as follows²⁹:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;

²⁹ For expediency sake, only those factors set out in the *CCAA* are set out here and anyone dealing with a *BIA* proposal situation ought to have regard to the specific wording in section 65.13(4) of the *BIA* as noted above.

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties;
and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

In addition to the factors listed in subsection 36(3), the court will also apply the *Soundair* principles, set out above, to determine whether it ought to approve the sale in question.³⁰ If approved, section 36(5) of the *CCAA* expressly allows a court to make a vesting order, passing title of the assets sold free and clear of any security, charge or other restrictions to the purchaser.³¹ In doing so, however, the court must also order that the proceeds from the sale are subject to creditors' security, charges, or other restrictions.

A vesting order made in the context of a *CCAA* proceeding (or *BIA* proposal) essentially converts creditors' claims against the assets into claims against the proceeds of the sale. As the court in *Clemmer Steelcraft Technologies Inc. v. Bangor Metals Corp.* stated:

“The purpose of a vesting order made in the context of a *CCAA* proceeding is to effectively deal with the assets of the corporation and to obtain funds to pay creditors in accordance with the plan of arrangement, so that the corporation and all creditors can move forward.”³²

³⁰ *Terrace Bay Pulp Inc. (Re)*, [2012] O.J. No. 3628 and *Canwest Publishing Inc. (Re)* [2010] O.J. No. 2190

³¹ *Companies' Creditors Arrangement Act* RSC 1985, c C-36 at section 36(5). Again, the *BIA* contains a similar provision at s.65.13(7).

³² [2009] O.J. No. 3080

PART VI: PROCESS FOR OBTAINING A VESTING ORDER

Having explained the context in which vesting orders may be granted, we now turn to the process for obtaining a vesting order.

Applications, Actions and Motions

Vesting orders are necessarily court orders and therefore are only available in the context of a court proceeding. Thus, there must be an extant court proceeding within which a court may grant a vesting order. In most cases in which assets are sold, a proceeding already exists in which either the debtor or one of its creditors has engaged the court's process. In such cases, the vesting order will be obtained by way of motion brought within that proceeding.

If there is no extant proceeding, and the parties wish to seek a vesting order, it will be necessary to commence a proceeding within which the order may be granted. In such a case, a party may wish to commence an application for the purpose of obtaining a vesting order. This may occur, by way of example, when a private receiver has taken possession of and wishes to sell the debtor's assets, and where the purchaser insists on obtaining a vesting order. If that is the case, a party may commence an application for a vesting order pursuant to rule 14.05 of the *Rules of Civil Procedure*.

A third possibility would be for a party to ask for a vesting order as part of the overall relief it is seeking in a civil or family law action. In this case, a plaintiff may request a vesting order, along with other relief, in its statement of claim. If the matter proceeds to trial, the trial judge will determine whether or not to grant the vesting order (as well as any other relief sought). In such

an action, the plaintiff may also seek a vesting order as part of a motion within the action, such as a motion for summary judgment.³³

In all cases, the party seeking the order will need to provide the court with the proper evidentiary foundation to support the granting of such an order. In the first two cases, motions and applications, written materials are provided to the court, to be supplemented by oral argument. The evidence is submitted via a written record containing one or more affidavits of those persons with the greatest personal knowledge of the matter at hand. In the case of court-appointed officers, they prepare and submit their reports as evidence for the court to consider. The moving party will need to address the question of any persons who may have any interest in the assets to be sold. Usually, this will mean including in the materials submitted to the court copies of abstracts of title to real property, copies of *PPSA* search reports, and writ / execution searches in the various jurisdictions where the assets may be located or persons with claimed interests in the assets reside. Any relevant material ought to be included to prevent someone coming forth later claiming that the court was not provided with a full and complete record for the making of its decision.

A factum will also be filed setting out the legal arguments in favour of why the motion or application ought to be granted. In practice, facta are typically provided to the court on both motions and application, though, strictly speaking, they are only required on applications.

In the case of a matter that goes to trial, the evidence will be given orally in court, with the party introducing any relevant documents by way of exhibits. The trial judge will then determine whether the evidence is such that it is appropriate to grant the vesting order requested.

³³ See e.g. *Langston SCJ, supra*.

Service Requirements

It is critical that anyone seeking a vesting order provide proper notice to any and all interested or affected persons. Prior to any court being willing to grant a vesting order, transferring title, free and clear of all encumbrances or interests, the court will want to ensure that all parties who may have any interest in the assets in question are provided with notice of the proceeding, so that those persons have the opportunity to address their concerns to the court. Indeed, rule 37.07 of the *Rules of Civil Procedure* requires that the notice of motion shall be served on any party or other person who will be affected by the order sought. Exceptions to this service requirement arise only where service is impractical or unnecessary, or the delay necessary to effect service might entail serious consequences.

As a result of these notice requirements, prior to commencing any proceeding or bringing a motion for a vesting order, where there is real property involved, the applicant or moving party ought to conduct a search of title to determine if there are any secured creditors who may be affected by the order. In respect of personal property, the Applicant or Moving Party ought to conduct a search of and provide notice to anyone whose interest is registered pursuant to the *PPSA*.

Of course the debtor and any owners or guarantors of the assets being sold are also entitled to notice, along with anyone else who has an interest and requests notice.³⁴ Further, where the party seeking the order has actual notice of a party's unregistered interest, these parties ought to be notified as well.³⁵ In *Lynch*, the Court of Appeal distinguished between registered and unregistered judgment creditors, noting that the latter has no right to notice, while the former

³⁴ *PPSA* section 63(4)

³⁵ *Winick v. 1305067 Ontario Limited*, 2008 CanLII 6937 (ON SC)

would be entitled to either receive notice of the application or to have any vesting of title be subject to its interests in the property, which would be the case even after the vesting of title.³⁶

In an insolvency file, it is typical to develop a "service list" of those parties who are either entitled to notice or who have expressed any interest in receiving notice. Any materials to be served ought to be served on everyone on the service list to ensure that everyone who may have any interest in the assets receives notice. It goes without saying that, in the case of notice, it is better to cast one's net wider, rather than risk a claim after the transfer that the moving party did not provide adequate notice and therefore must personally compensate the aggrieved party.

Appeals from a Vesting Order

Assuming that a court does grant the party a vesting order, that vesting order, like almost any order of the court, is subject to appeal. However, vesting orders are not like any other order of the court. As both a court order and a document that conveys title, vesting orders are said to have a "dual character".

In the case of *Re: Regal Constellation Hotel Ltd.*³⁷, the Court of Appeal for Ontario commented on the dual nature of vesting orders – as both an order and a conveyance of title – in the case of real property and how this affects a party's ability to appeal a vesting order. Blair J.A. noted:

This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and

³⁶ *Lynch, supra* at para 61.

³⁷ *Regal, supra*.

its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

In other words, a vesting order maintains its dual nature until such time as the vesting order is validly registered on title. At that point, the conveyance is valid, the order is spent, and a party who wishes to challenge the vesting of title in the purchaser will only be able to do so if there is a problem with the registration itself. Thus, once the order is registered on title, the challenging party will not be able to appeal the vesting order.

Further, as the filing of a notice of appeal does not automatically stay a court order (other than a judgment for the payment of money), if a party wishes to stay the effect or enforcement of a court order, it will be obliged to seek a stay of proceedings. In the case of a vesting order in respect of real property registered under the Land Titles system, ss. 69(1) and 78(4) of the *Land Titles Act*, taken together, provide that the proper registration of a vesting order on title will convey title to the property. Thus, anyone who wishes to appeal a vesting order in respect of real property is advised to immediately seek a stay of enforcement of the order or a stay of proceedings, to prevent the registration of the vesting order on title to the property, *prior to* it being registered.

Registration of the Vesting Order on title

Once the court grants a vesting order, the party who obtained it is entitled to take steps to register it on title. Further, given the issues noted above with respect to potential appeals, it might even be prudent for the party who obtained the order to register it as soon as possible. As noted above, once the order is registered on title, it is no longer appealable. Assuming that the vesting order is effective and has not been stayed pending appeal, a party may register the order on title

under the land titles system. To do so, the party must prepare an application for registration, which must be accompanied by an affidavit of a solicitor that states that the order is still in full force and effect and has not been stayed. Upon registration, a vesting order is deemed “to be embodied in the register and to be effective according to its nature and intent”. When it is “embodied in the register” it becomes a creature of the land titles system and subject to the dictates of that regime.³⁸

PART VII: CONCLUSION

As noted at the outset, vesting orders can be extremely useful to business and real estate lawyers and are available in myriad circumstances. As equitable remedies, there are no restrictions on how or where they may be employed. As such, interested individuals ought to consider whether it is appropriate to seek a vesting order in their particular circumstances and if so, whether they can satisfy the court as to the appropriateness of the remedy.

³⁸ *Regal*, *supra* at para 38.

Schedule "A" – Commercial List Model Approval and Vesting Order

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) WEEKDAY, THE #
JUSTICE)
) DAY OF MONTH, 20YR

B E T W E E N:

PLAINTIFF

Plaintiff

- and -

DEFENDANT

Defendant

APPROVAL AND VESTING ORDER

THIS MOTION, made by [RECEIVER'S NAME] in its capacity as the Court-appointed receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor") for an order approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and [NAME OF PURCHASER] (the "Purchaser") dated [DATE] and appended to the Report of the Receiver dated [DATE] (the "Report"), and vesting in the Purchaser the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Receiver, [NAMES OF OTHER PARTIES APPEARING], no one appearing for any other person on the service list, although properly served as appears from the affidavit of [NAME] sworn [DATE] filed³⁹:

1. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved,⁴⁰ and the execution of the Sale Agreement by the Receiver⁴¹ is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2. THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed on Schedule B hereto]⁴² shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured,

³⁹ This model order assumes that the time for service does not need to be abridged. The motion seeking a vesting order should be served on all persons having an economic interest in the Purchased Assets, unless circumstances warrant a different approach. Counsel should consider attaching the affidavit of service to this Order.

⁴⁰ In some cases, notably where this Order may be relied upon for proceedings in the United States, a finding that the Transaction is commercially reasonable and in the best interests of the Debtor and its stakeholders may be necessary. Evidence should be filed to support such a finding, which finding may then be included in the Court's endorsement.

⁴¹ In some cases, the Debtor will be the vendor under the Sale Agreement, or otherwise actively involved in the Transaction. In those cases, care should be taken to ensure that this Order authorizes either or both of the Debtor and the Receiver to execute and deliver documents, and take other steps.

⁴² To allow this Order to be free-standing (and not require reference to the Court record and/or the Sale Agreement), it may be preferable that the Purchased Assets be specifically described in a Schedule.

unsecured or otherwise (collectively, the "Claims"⁴³) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice [NAME] dated [DATE]; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

3. THIS COURT ORDERS that upon the registration in the Land Registry Office for the [Registry Division of {LOCATION}] of a Transfer/Deed of Land in the form prescribed by the *Land Registration Reform Act* duly executed by the Receiver][Land Titles Division of {LOCATION}] of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*⁴⁴, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "Real Property") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.

4. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds⁴⁵ from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior

⁴³ The "Claims" being vested out may, in some cases, include ownership claims, where ownership is disputed and the dispute is brought to the attention of the Court. Such ownership claims would, in that case, still continue as against the net proceeds from the sale of the claimed asset. Similarly, other rights, titles or interests could also be vested out, if the Court is advised what rights are being affected, and the appropriate persons are served. It is the Subcommittee's view that a non-specific vesting out of "rights, titles and interests" is vague and therefore undesirable.

⁴⁴ Elect the language appropriate to the land registry system (Registry vs. Land Titles).

⁴⁵ The Report should identify the disposition costs and any other costs which should be paid from the gross sale proceeds, to arrive at "net proceeds".

to the sale⁴⁶, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

5. THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

6. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Company's records pertaining to the Debtor's past and current employees, including personal information of those employees listed on Schedule "●" to the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

7. THIS COURT ORDERS that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other

⁴⁶ This provision crystallizes the date as of which the Claims will be determined. If a sale occurs early in the insolvency process, or potentially secured claimants may not have had the time or the ability to register or perfect proper claims prior to the sale, this provision may not be appropriate, and should be amended to remove this crystallization concept.

reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

9. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Schedule A – Form of Receiver’s Certificate

Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

PLAINTIFF

Plaintiff

- and -

DEFENDANT

Defendant

RECEIVER’S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable [DATE OF JUDGE] of the Ontario Superior Court of Justice (the "Court") dated [DATE OF ORDER], [NAME OF RECEIVER] was appointed as the receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor").

B. Pursuant to an Order of the Court dated [DATE], the Court approved the agreement of purchase and sale made as of [DATE OF AGREEMENT] (the "Sale Agreement") between the Receiver [Debtor] and [NAME OF PURCHASER] (the "Purchaser") and provided for the vesting in the Purchaser of the Debtor’s right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in section ● of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in section ● of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.
4. This Certificate was delivered by the Receiver at [TIME] on _____ [DATE].

[NAME OF RECEIVER], in its capacity as Receiver of the undertaking, property and assets of [DEBTOR], and not in its personal capacity

Per: _____

Name:

Title:

Schedule B – Purchased Assets

Schedule C – Claims to be deleted and expunged from title to Real Property

**Schedule D – Permitted Encumbrances, Easements and Restrictive Covenants
related to the Real Property(unaffected by the Vesting Order)**