

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

BUDUCHNIST CREDIT UNION LIMITED

Applicant

- and -

**2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA,
2321198 ONTARIO INC., SASI MACH LIMITED, VICAR HOMES LTD. and
TRADE CAPITAL FINANCE CORP.**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY
ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF
JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**UNOFFICIAL TRANSCRIPT OF THE ENDORSEMENT OF
THE HONOURABLE JUSTICE PENNY**

(9:30am Appointment)

January 15, 2020

The parties appeared before me recently at a 9:30 AM appointment for purposes of settling my order of February 22, 2019 as restated.

On February 22, I wrote in an endorsement that costs should be addressed and are contemplated in the model order and that enforcement costs would be dealt with at the distribution phase where all stakeholders could question whether costs were reasonable and fair.

In retrospect, this endorsement was made in haste under the pressure of the moment without a full appreciation of the issues being engaged on the question of costs and how they should be addressed.

I say this because, as it turns out, there is a conflict between these two statements: The Model Order provides that the applicant (creditor) is entitled to its costs in accordance with its security documentation.

The idea that cash would be dealt with at the distribution phase is, in the peculiar circumstances of this case, almost certainly in conflict with an order granting BCU an entitlement to its costs.

This is because of the unusual circumstances that Trade Capital has a world-wide comprehensive injunction against the debtor. It made that order known to BCU.

Trade Capital alleges BCU violated that order by making cash advances to the debtor against existing mortgages after knowledge of the Mareva Order.

Whether, how and to what extent these allegations, if proved, might affect BCU's entitlement to its costs of these proceedings cannot be known at this point. There will, in due course, be a full accounting of all realizations and costs and who and in what amounts should be reimbursed for costs and/or receive any payments on account of net realization.

Thinking these issues through now, with the benefit of a better appreciation of the competing claims and the "intent" of my February 22, 2019 endorsement, I have come to the following conclusion.

The model order language may be used but qualified as BCU's *prima facie* right to recover its costs and further qualified by the language proposed by Trade Capital, as set out in the attachments to this Endorsement.

The Honourable Justice Penny

Attachment to January 15,
2020 Endorsement of
-12-
Penny J.

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.

27. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

28. **THIS COURT ORDERS** ~~that, with respect to the Elm Property and the real property municipally known as 46 Puccini Drive, Richmond Hill, Ontario (the "Puccini Property"),~~ the Applicant shall have its costs of this ~~application~~ Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the sale of the ~~Elm Property and the Puccini Property~~ Real Properties with such priority and at such time as this Court may determine. *a prima facie right* MJD

29. ~~**THIS COURT ORDERS** that, with respect to the Woodland Property and the real property municipally known as 6216 Fifth Line, Egbert, Ontario, costs of this application are reserved pending submissions.~~

29. ~~30.~~ **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

30. ~~31.~~ **THIS COURT ORDERS** that this Order takes precedence over the Order of the Honourable Justice Wilton Siegel, dated November 13, 2018 (the "**IR Order**"), appointing KSV as interim receiver (the "**Interim Receiver**") of the real property municipally known as 46 Puccini Drive, Richmond Hill, Ontario, and the Interim Receiver shall take no further steps to



LOOPSTRA NIXON LLP
BARRISTERS AND SOLICITORS

Attachment to January 15, 2020
Endorsement
of Penny J.

Peter W.G. Carey
Tel: (416) 748-4774
Email: pcarey@loopix.com

BY EMAIL

December 17, 2019

Dentons Canada LLP
77 King Street West, Suite 400
Toronto- Dominion Centre
Toronto, ON M5K 0A1
Attn : Barbara Grossman

Dear Ms. Grossman,

RE: Trade Capital Finance Corporation v. 2321197 Ontario Inc. et al

In response to your latest email, I would propose that paragraph 28 of your proposed third amended and restated order as follows:

"THIS COURT ORDERS that the costs of this Application shall be ~~determined~~ ^{final determination of the} at the distribution phase of the receivership with the exception that the Applicant shall bear its own costs for the motion to add Trade Capital Finance Corp. as a party to this Application."

MAF

This tracks Justice Penny's Endorsement, the previous paragraph 28 did not.

Yours very truly,

LOOPSTRA NIXON LLP

Per:

Peter W.G. Carey
PWC/lb
cc: C. Lee
cc: K. Kraft and A. Campbell (Dentons)
cc: A. Winton and P. Underwood (Lax O'Sullivan)
cc: G. Benchetrit (Chaitons)
cc: A. Mazo (Mazo Chowbay)
cc: D. Zieradzki (KSV Advisory)

December 19, 2019

Court File No: CV-18-00608356-00CL

BUDUCHNIST CREDIT UNION LIMITED
Applicant

- and -

2321197 ONTARIO INC. et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

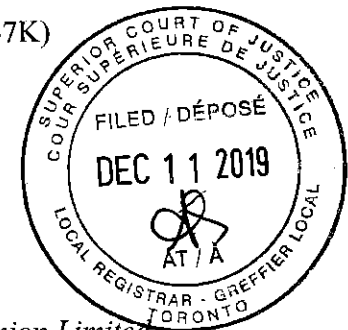
BRIEF OF DOCUMENTS
[Case Conference held December 19, 2019]

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Lawyers for Buduchnist Credit Union Limited



January 15, 2020

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On February 22, I wrote in an endorsement that costs should be addressed as contemplated in the initial order and that enforcement costs would be dealt with at

The distribution phase shows all stakeholders could question whether costs were reasonable and fair. In retrospect, this endorsement was made in haste, under the pressure of the moment without a full appreciation of the issues being engaged on the question of costs and how they should be addressed.

I say this because, as it turns out, there is a conflict between these two statements: The Model Order provides that the applicant (creditor) is entitled to its costs in accordance with its security documentation.

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an order granting BCU an entitlement⁽³⁾
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Ray J.

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- cc: A. Mazo (Mazo Chowbay)
- cc: D. Zieradzki (KSV Advisory)