

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

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

30 ROE INVESTMENTS CORP.

Respondent

**IN THE MATTER OF AN 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**

**BOOK OF AUTHORITIES OF THE APPLICANT
(Returnable January 17, 2022)**

January 13, 2022

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TAB 1

2021 ONSC 3755
Ontario Superior Court of Justice [Commercial List]

Meridian v. Okje Cho & Family Enterprise Ltd.

2021 CarswellOnt 7466, 2021 ONSC 3755, 332 A.C.W.S. (3d) 215, 89 C.B.R. (6th) 50

**MERIDIAN CREDIT UNION LIMITED (Applicant)
and OKJE CHO & FAMILY ENTERPRISE LTD.
and 2341567 ONTARIO LTD. (Respondents)**

L.A. Pattillo J.

Heard: May 21, 2021

Judgment: May 25, 2021

Docket: CV-21-00660390-00CL

Counsel: Ian Klaiman, Jason Spetter, for Applicant
Robert Choi, Adam Beyhum, for Respondents

L.A. Pattillo J.:

1 The applicant, Meridian Credit Union Limited ("Meridian") seeks an order pursuant to [s. 243\(1\) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 \(BIA\)](#) and [s. 10 of the Courts of Justice Act, R.S.O. 1990, c. C.43 \("CJA"\)](#), appointing BDO Canada Limited ("BDO") as receiver and manager over all property, assets and undertaking of the respondents, Okje Cho & Family Enterprise Ltd. ("Okje") and 2341567 Ontario Ltd. ("234").

2 234 operates as franchisee a Hampton Inn by Hilton at 40 McPherson Drive in Napanee, Ontario (the "Property") which is owned by Okje. Paul OJ Cho and his wife Choon Bum Cho are the principals and the officers and directors of both Okje and 234.

3 Pursuant to a Credit Agreement dated September 20, 2018, Meridian authorized a non-revolving loan to Okje to a maximum of \$7,200,000, payable on demand. That agreement was superseded by a Credit Agreement dated November 4, 2019 pursuant to which Meridian authorized the following credit facilities, payable on demand:

- a) A non-revolving loan to a maximum of \$6,995,000 (Credit Facility 1); and
- b) An installment loan to a maximum of \$700,000 (Credit Facility 2).

4 In the spring of 2020, as a result COVID-19 and the government restrictions, Okje requested payment relief from its obligations under the 2019 Credit Agreement. Pursuant to amending agreements dated April 8, 2020 and July 14, 2020, Meridian agreed to defer Okje's monthly principal and interest payments for three months and then a further two months. The July 14, 2020 amending agreement also authorized a further credit facility to Okje, payable on demand, to a maximum of \$102,000 to capitalize the interest accrued pursuant to the April 8, 2020 amending agreement (Credit Facility 3).

5 Okje's indebtedness under the Credit Facilities is secured by:

a) Personal guarantees and postponement of claims from the Chos of the loans under Credit Facilities 1 & 2;

b) Guarantee and postponement of claim of Okje's liabilities by 234;

c) General Security Agreements from both Okje and 234, registered under the *Personal Property Security Act*;

d) A collateral mortgage granted by Okje in favour of Meridian for \$8,000,000 registered against the Property (the "Mortgage");

6 Okje is in default under the Credit Facilities. It has made no payments under Credit Facility 1 since December 1, 2020; made no payments on Credit Facility 2 since January 1, 2021 and failed to repay Credit Facility 3 by its maturity date, October 31, 2020.

7 In addition, Okje and 234 were also in default under the Credit Agreement in respect of the following arrears: property taxes for the Property totaling \$135,350.18 as at October 6, 2020; non-resident tax of \$102,386.14 as of July 29, 2020; GST/HST arrears for Okje of \$8,904.29 as at June 30, 2020; GST/HST arrears for 234 of \$115,183.91 as at December 31, 2019.

8 In October 2020, Okje made an application for a \$1.4 million loan under the EDC Business Credit Availability Program ("BCAP Loan") through Meridian. The application was declined by Meridian on December 8, 2020. Subsequently, Meridian and Okje attempted to address the respondents' defaults.

9 On February 26, 2021, after a payment by Okje of past due amounts under Credit Facility 2 was returned due to "insufficient funds", Meridian made a demand for payment upon Okje, 234 and the personal guarantors of the entire amount of the indebtedness under the Credit Facilities, which at that date was \$7,770,121.39. The indebtedness remains outstanding.

10 The application was commenced on April 13, 2021 and returnable April 22, 2021 at which time it was put over to May 11, 2021 to permit the respondents to file responding materials. On

May 11, 2021 it came before me. As part of their responding material, the respondents filed an affidavit from Mr. Maneet Singh Gadhok (also known as Monty Singh), in which he deposed that he had entered into an Agreement of Purchase and Sale with Okje dated April 8, 2021, amended April 16, 2021, to purchase the Property for \$8,000,000.00 (the "Agreement"). The Agreement was conditional on, among other things, the approval of the terms of the Agreement by Mr. Singh's solicitor and assumption by him of the Mortgage. As a result of the amendment, the date for satisfying the conditions was May 17, 2021 and the closing date was June 1, 2021.

11 Meridian's position was that it was not prepared to consent to Mr. Singh assuming the Mortgage. Further, and even if the Agreement as produced was completed, there would likely still be money owing to it and to Okje and 234's other creditors, some of whom have priority over the Mortgage. In response, Okje and 234 took issue with the statement Meridian would not assume the Mortgage and stated the Chos' including their son, have indicated that they were prepared to or have already listed their homes in Toronto for sale and there is sufficient equity to pay off both Meridian and the outstanding creditors.

12 In the circumstances, I granted a short adjournment to May 21, 2021 to enable Okje and 234 to firm up their plan to resolve their obligations. In so doing, I stated that prior to the return date, the respondents must provide evidence concerning the status of the Agreement and specifically whether the conditions in the Agreement had been fulfilled or waived such that the Agreement was firm as well as evidence of the status of both the Chos and their son's proposed sales of their Toronto properties including whether the properties have been listed; the listing price; the total amount of mortgages and other encumbrances on the properties and the expected "net" proceeds that will be available.

13 I further advised the parties that if I was satisfied on the return date that based on the evidence, there was a realistic possibility that the respondents and the Chos could resolve their obligations to Meridian and their other creditors, I would further adjourn the application for a reasonable period to let that happen. For that to happen, however, the respondents must have a concrete plan including a firm agreement of purchase and sale.

14 Prior to the return on May 21, 2021, both parties filed further evidence concerning events subsequent to May 11, 2021. Mr. Cho advised that the Agreement was "alive" and that it had been further amended to reduce the purchase price of the Property to \$7 million. The amended Agreement contained a clause that the buyer agreed to lend \$2 million to the seller for closing the deal. Both parties agreed to "register this money" on the Chos' personal residence. The amended Agreement still contained the buyer's lawyer's approval condition but not the assumption of the Mortgage. Finally, the time to satisfy conditions was extended to June 15, 2021 and the closing date to June 30, 2021.

15 Mr. Cho further deposed that the \$9 million (the new purchase price together with the \$2 million loan) would be sufficient to pay off all the respondents' liabilities. He further stated that Okje had become aware of and submitted a loan application for \$1 million to the Regional Relief and Recovery Fund, a Federal programme to help small businesses and he anticipated that funding would be distributed in 6 to 9 weeks-time. Finally, he provided evidence of listings of both his personal residence (\$6,990,000) and his son's residence (\$3.289 million).

16 Meridian filed a further affidavit of Amber Waheed, a Commercial Credit Specialist and the person responsible for managing the respondents' loans. On May 18, 2021, Ms. Waheed had a telephone discussion with Mr. Singh during which he advised he had not yet retained legal counsel; the removal of the condition requiring the assumption of Meridian's mortgage was an error and that he still required the condition to be included; although he'd been in touch with the franchisor, he had not received its approval to take over the hotel; his understanding was that Okje currently owed the franchisor between a \$100,000 and \$150,000 in outstanding franchise fees; in respect of the \$2 million loan, he said Meridian would receive approximately \$1 million and the balance would be used for priority and trade payables although he could not provide any details of the timing or the amounts owing.

17 Following the above discussion with Mr. Singh, he retained a lawyer and discussions took place between Mr. Singh and Meridian, but no agreement was reached.

18 Mr. Cho filed a further brief affidavit taking issue with Ms. Waheed's statement that Mr. Singh had said that the deletion of the condition requiring the assumption of the Meridian mortgage was an "error". Mr. Cho said that the condition was specifically discussed and deleted, and that Mr. Singh communicated to him that he could finance the acquisition of the hotel.

19 Both [s. 243\(1\) of the BIA](#) and [s. 101 of the CJA](#) provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

20 In determining whether it is just or convenient, the court must have regard to all of the circumstances of the case including the nature of the property, the rights and interests of the parties to the property, whether the lender's security is at risk of deteriorating, whether there is a need to stabilize and preserve the business, whether there is a loss of confidence in the debtor's management and the positions and interests of other creditors. See: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991 CarswellOnt 1511](#) (Ont. S.C.J. (Commercial List) at para. 20; *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#).

21 Further, while the appointment of a receiver is considered an extraordinary remedy, in circumstances such as in this case, where the Credit Agreement, the Okje and 234 General Security Agreements and the Mortgage all provide that Meridian is entitled to appoint a receiver and manager in the event of a default, as Meridian's right to the appointment of a receiver is derived

from a private contract, the appointment of a receiver cannot be considered an extraordinary remedy. See: *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965; *BCIMC Construction Fund*, at para. 43.

22 Meridian submits that it is just and convenient to appoint a receiver in this case. The respondents are clearly in default of the Credit Agreement. They are insolvent and have presented no clear path to resolve their obligations. There is no assurance the Agreement will be completed and even if it is, the respondents, by their actions, concede that more money will be required to pay out Meridian and the other ranking creditors, the source of which is also tenuous. Meanwhile, the longer the delay, the more its security is in jeopardy and at risk of eroding. Meridian has lost confidence in Okje's management and the appointment of a receiver will bring stability to the business and permit an orderly resolution of the issues.

23 The respondents submit that a receivership would not be just or convenient. It would result in a substantial reduction in the value of the hotel and add substantial unnecessary expense to the process of finding a purchaser. It would also lead to the termination of 234's franchise pursuant to the franchise agreement. The respondents submit that they ought to be provided a fair opportunity to rectify any defaults and to sell their assets in an orderly manner.

24 The respondents also raise issues of misrepresentation and bad faith conduct on the part of Meridian in relation to its handling of Okje's application for BCAP Loan in October 2020 and Meridian's subsequent decline of the application. They have commenced an action against Meridian and submit, given the factual issues in dispute, the application should be converted to an action.

25 Finally, the respondents rely on the Agreement together with their actions in attempting to liquidate their assets to demonstrate that they have a plan which they are executing to enable them to pay off Meridian and their other creditors. They also point to their recent application for \$1 million in funding to the Regional Relief and Recovery Fund.

26 In my view, based on all the evidence, I am satisfied the appointment of a receiver is justified in this case.

27 There is no issue that the loans are in default and have been for some time. The amount involved is substantial. The respondents essentially seek an opportunity to either bring the loans into good standing or sell the Property and business and repay Meridian and their other creditors. The evidence of how they intend to do that however does not in my view establish that to be a realistic possibility.

28 The Agreement, which has been amended twice, is far from firm. There is also evidence that the parties may have a disagreement over whether there is a condition regarding Mr. Singh's assumption of the Mortgage. The further \$2 million loan from Mr. Singh and/or the sale of the

residences are also far from firm. The former is not documented and is to be secured by a mortgage on the Chos' residence which is for sale. Nor is there evidence of the encumbrances on the residences or what the net proceeds from the proposed sales would be should they occur.

29 There is also no evidence that Okje's recent application for funding from Regional Relief and Recovery Fund will solve the respondents' issues. Even if approved, funding is still 6-9 weeks away and will not resolve their issues with Meridian or with the other creditors.

30 There is also no evidence on the financial status of the hotel, including its recent cash flow and liabilities. As part of its disclosure for the BCAP Loan in the fall of 2020, Okje noted cash shortfalls of \$622,593 for 2020 and projected \$923,437 for 2021. That was before the province wide stay at home order in March of this year which has impacted all small businesses. Mr. Singh's information that there are substantial franchise fees in arrears is also troubling. In my view, in the circumstances, a receiver is required to stabilize and preserve the business.

31 I also not satisfied that the application should be converted to an action or that Meridian's actions in respect of declining the BCAP Loan should impact on this application. The documentary evidence does not come close to establishing that Meridian made any misrepresentations to the respondents concerning the availability of the BCAP Loan or its actions in declining it. The respondents were aware at all times that approval of the loan was subject to the approval of Meridian's credit department, which was not forthcoming for reasons which were communicated to the respondents.

32 For the above reasons, BDO is appointed as receiver and manager over all property, assets and undertaking of Okje and 234.

33 I am not prepared at this stage to authorize BDO to assign the respondents into bankruptcy. Such a request is premature in my view.

34 Nor do I consider that the Agreement should be sealed. There is no evidence that it was obtained based on a formal sale process or that the proposed purchase price has any relation to the actual market value of the Property. In the circumstances, it should have no impact on the value of the Property.

35 A receivership order, substantially in the form of the Commercial List order shall issue.
Application granted as to receiver; application dismissed as to assignment.

TAB 2

2013 ONSC 6866
Ontario Superior Court of Justice [Commercial List]

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.

2013 CarswellOnt 16639, 2013 ONSC 6866, 235 A.C.W.S. (3d) 683

Elleway Acquisitions Limited, Applicant and The Cruise Professionals Limited, 4358376 Canada Inc. (Operating as Itravel2000.com) and 7500106 Canada Inc., Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: November 4, 2013
Docket: CV-13-10320-00CL

Counsel: Jay Swartz, Natalie Renner, for Applicant
John N. Birch, for Respondents
David Bish, Lee Cassey, for Grant Thornton, Proposed Receiver

Morawetz J.:

1 At the conclusion of argument, the requested relief was granted with reasons to follow. These are the reasons.

2 Elleway Acquisitions Limited ("Elleway" or the "Applicant") seeks an order (the "Receivership Order") appointing Grant Thornton Limited ("GTL") as receiver (the "Receiver"), without security, of all of the property, assets and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., ("Travelcash"), and The Cruise Professionals ("Cruise") and together with itravel and Travelcash, "itravel Canada"), pursuant to section 243 of the *Bankruptcy and Insolvency Act (Canada)* (the "BIA") and section 101 of the *Courts of Justice Act (Ontario)* (the "CJA").

3 The application was not opposed.

4 The itravel Group (as defined below) is indebted to Elleway in the aggregate principal amount of £17,171,690 pursuant to a secured credit facility that was purchased by Elleway and a working capital facility that was established by Elleway. The indebtedness is guaranteed by each of itravel, Cruise and Travelcash, among others. The itravel Group is in default of the credit facility and the working capital facility, and Elleway has demanded repayment of the amounts owing

thereunder. Elleway has also served each of itravel, Cruise and Travelcash with a notice of intention to enforce its security under [section 244\(1\) of the BIA](#). Each of itravel, Cruise and Travelcash has acknowledged its inability to pay the indebtedness and consented to early enforcement pursuant to [section 244\(2\) of the BIA](#).

5 Counsel to the Applicant submits that the itravel Group is insolvent and suffering from a liquidity crisis that is jeopardizing the itravel Group's continued operations. Counsel to the Applicant submits that the appointment of a receiver is necessary to protect itravel Canada's business and the interests of itravel Canada's employees, customers and suppliers.

6 Counsel further submits that itravel Canada's core business is the sale of travel services, including vacation, flight, hotel, car rentals, and insurance packages offered by third parties, to its customers. itravel Canada's business is largely seasonal and the majority of its revenues are generated in the months of October to March. itravel Canada would have to borrow approximately £3.1 million to fund its operations during this period and it is highly unlikely that another lender would be prepared to advance any funds to itravel Canada at this time given its financial circumstances.

7 Further, counsel contends that the Canadian travel agent business is an intensely competitive industry with a high profile among consumers, making it very easy for consumers to comparison shop to determine which travel agent can provide services at the lowest possible cost. Given its visibility in the consumer market and the travel industry, counsel submits that it is imperative that itravel Canada maintain existing goodwill and the confidence of its customers. If itravel Canada's business is to survive, potential customers must be assured that the business will continue uninterrupted and their advance payments for vacations will be protected notwithstanding itravel Canada's financial circumstances.

8 Therefore, counsel submits that, if a receiver is not appointed at this critical juncture, there is a substantial risk that itravel Canada will not be able to book trips and cruises during its most profitable period. This will result in a disruption to or, even worse, a complete cessation of itravel Canada's business. Employees will resign, consumer confidence will be lost and existing goodwill will be irreparably harmed.

9 It is contemplated that if GTL is appointed as the Receiver, GTL intends to seek the Court's approval of the sale of substantially all of itravel Canada's assets to certain affiliates of Elleway, who will operate the business of itravel Canada as a going concern following the consummation of the purchase transactions. Counsel submits that, it is in the best interests of all stakeholders that the Receivership Order be made because it will facilitate a going concern sale of itravel Canada's business, preserving consumer confidence, existing goodwill and the jobs of over 250 employees.

10 Elleway is a corporation incorporated under the laws of the British Virgin Islands. Elleway is an indirect wholly owned subsidiary of The Aldenham Grange Trust, a discretionary trust governed under Jersey law.

11 itravel, Cruise and Travelcash are indirect wholly owned subsidiaries of Travelzest plc ("Travelzest"), a publicly traded United Kingdom ("UK") company that operates a group of companies that includes itravel Canada (the "itravel Group"). The itravel Group's UK operations were closed in March 2013. Since the cessation of the itravel Group's UK operations, all of the itravel Group's remaining operations are based in Canada. itravel Canada currently employs approximately 255 employees. itravel Canada's employees are not represented by a union and it does not sponsor a pension plan for any of its employees.

12 The itravel Group's primary credit facilities (the "Credit Facilities") were extended by Barclays Bank PLC ("Barclays") pursuant to a credit agreement (the "Credit Agreement") and corresponding fee letter (the "Fee Letter" and together with the Credit Agreement, the "Credit Facility Documents") under which Travelzest is the borrower.

13 Pursuant to a series of guarantees and security documents (the "Security Documents"), each of Travelzest, Travelzest Canco, Travelzest Holdings, Itravel, Cruise and Travelcash guaranteed the obligations under the Credit Facility Documents and granted a security interest over all of its property to secure such obligations (the "Credit Facility Security"). Travelzest Canco and Travelzest Holdings are direct wholly owned UK subsidiaries of Travelzest. In addition, itravel and Cruise granted a confirmation of security interest in certain intellectual property (the "IP Security Confirmation and together with the Credit Facility Security, the "Security").

14 The Security Documents provide the following remedies, among others, to the secured party, upon the occurrence of an event of default under the Credit Facility Documents: (a) the appointment by instrument in writing of a receiver; and (b) the institution of proceedings in any court of competent jurisdiction for the appointment of a receiver. The Security Documents do not require Barclays to look to the property of Travelzest before enforcing its security against the property of itravel Canada upon the occurrence of an event of default.

15 Commencing on or about April 2012, the itravel Group began to default on its obligations under the Credit Agreement.

16 Pursuant to a series of letter agreements, Barclays agreed to, among other things, defer the applicable payment instalments due under the Credit Agreement until July 12, 2013 (the "Repayment Date"). Travelzest failed to pay any amounts to Barclays on the Repayment Date. Travelzest's failure to comply with financial covenants and its default on scheduled payments under the Repayment Plans constitute events of default under the Credit Facility Documents.

17 Since 2010, Itravel Canada has attempted to refinance its debt through various methods, including the implementation of a global restructuring plan and the search for a potential purchaser through formal and informal sales processes. Two formal sales processes yielded some interest from prospective purchasers. Ultimately, however, neither sales process generated a viable offer for Itravel Canada's assets or the shares of Travelzest.

18 Counsel submits that GTL has been working to familiarize itself with the business operations of Itravel Canada since August 2013 and that GTL is prepared to act as the Receiver of all of the property, assets and undertaking of ittravel Canada.

19 Counsel further submits that, if appointed as the Receiver, GTL intends to bring a motion (the "Sales Approval Motion") seeking Court approval of certain purchase transactions wherein Elleway, through certain of its affiliates, 8635919 Canada Inc. (the "ittravel Purchaser"), 8635854 Canada Inc. (the "Cruise Purchaser") and 1775305 Alberta Ltd. (the "Travelcash Purchaser" and together with the ittravel Purchaser and the Cruise Purchaser, the "Purchasers"), will acquire substantially all of the assets of ittravel Canada (the "Purchase Transactions").

20 If the Purchase Transactions are approved, Elleway has agreed to fund the ongoing operations of ittravel Canada during the receivership. It is the intention of the parties that the Purchase Transactions will close shortly after approval by the Court and it is not expected that the Receiver will require significant funding.

21 The purchase price for the Purchase Transactions will be comprised of cash, assumed liabilities and a cancellation of a portion of the Indebtedness. Elleway will supply the cash portion of the purchase price under each Purchase Transaction, which will be sufficient to pay any prior ranking secured claim or priority claim that is not being assumed.

22 The Purchasers intend to offer substantially all of the employees of ittravel and Cruise the opportunity to continue their employment with the Purchasers.

23 This motion raises the issue as to whether the Court should make an order pursuant to [section 243 of the BIA](#) and [section 101 of the CJA](#) appointing GTL as the Receiver.

1. The Court Should Make the Receivership Order

a. The Test for Appointing a Receiver under the BIA and the CJA

24 [Section 243\(1\) of the BIA](#) authorizes a court to appoint a receiver where such appointment is "just or convenient".

25 Similarly, [section 101\(1\) of the CJA](#) provides for the appointment of a receiver by interlocutory order where the appointment is "just or convenient".

26 In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]) at para. 10

27 Counsel to the Applicant submits that where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. Further, while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 (B.C. S.C. [In Chambers]) at paras. 50 and 75; *Freure Village*, *supra*, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (Ont. S.C.J. [Commercial List]) at para. 18; *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, [2011] O.J. No. 671 (Ont. S.C.J.) at para. 27. I accept this submission.

28 Counsel further submits that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have the receiver appointed by the court. The court should consider the following factors, among others, in making such a determination:

- (a) the potential costs of the receiver;
- (a) the relationship between the debtor and the creditors;
- (b) the likelihood of preserving and maximizing the return on the subject property; and
- (c) the best way of facilitating the work and duties of the receiver.

See *Freure Village*, *supra*, at paras. 10-12; *Canada Tire*, *supra*, at para. 18; *Carnival National Leasing*, *supra*, at paras 26-29; *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (Ont. S.C.J.) at para. 15.

29 Counsel to the Applicant submits that it is just and convenient to appoint GTL as the Receiver in the circumstances of this case. As described above, the itravel Group has defaulted on its obligations under the Credit Agreement and the Fee Letter. Such defaults are continuing and have not been remedied as of the date of this Application. This has given rise to Elleway's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

30 It is submitted that it is just and convenient, or in the interests of all concerned, for the Court to appoint GTL as the Receiver for five main reasons:

- (a) the potential costs of the receivership will be borne by Elleway;
- (a) the relationships between ittravel Canada and its creditors, including Elleway, militate in favour of appointing GTL as the Receiver;
- (b) appointing GTL as the Receiver is the best way to preserve ittravel Canada's business and maximize value for all stakeholders;
- (c) appointing GTL as the Receiver is the best way to facilitate the work and duties of the Receiver; and
- (d) all other attempts to refinance ittravel Canada's debt or sell its assets have failed.

31 It is noted that Elleway has also served a notice of intention to enforce security under [section 244\(1\) of the BIA](#). ittravel Canada has acknowledged its inability to pay the Indebtedness and consented to early enforcement pursuant to [section 244\(2\) of the BIA](#).

32 Further, if GTL is appointed as the Receiver and the Purchase Transactions are approved, the Purchasers will assume some of ittravel Canada's liabilities and cancel a portion of the Indebtedness. Therefore, counsel submits that the appointment of GTL as the Receiver is beneficial to both ittravel Canada and Elleway.

33 Counsel also points out that if GTL is appointed as the Receiver and the Purchase Transactions are approved by the Court, the business of ittravel Canada will continue as a going concern and the jobs of substantially all of ittravel Canada's employees will be saved.

34 Having considered the foregoing, I am of the view that the Applicant has demonstrated that it is both just and convenient to appoint GTL as Receiver of ittravel Canada under both [section 243 of the BIA](#) and [section 101 of the CJA](#). The Application is granted and the order has been signed in the form presented.

TAB 3

2013 ONSC 7023
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Sherco Properties Inc.

2013 CarswellOnt 16848, 2013 ONSC 7023, 235 A.C.W.S. (3d) 682

**Bank of Montreal, Applicant and Sherco
Properties Inc., Sherk Farm Limited, Cosher
Properties Inc., and Donald Sherk, Respondents**

Morawetz J.

Heard: November 4, 2013
Judgment: December 3, 2013
Docket: CV-13-10244-00CL

Counsel: S.D. Thom, for Applicant
R.B. Moldaver, Q.C., for Respondents

Morawetz J.:

1 This application is brought by Bank of Montreal (the "Bank") and seeks the appointment of a receiver in respect of Sherco Properties Inc. ("Sherco") and Sherk Farm Limited ("Farm"), both of which are owned by the respondent, Mr. Donald Sherk. The Bank also seeks a receivership order in respect of two residential properties owned by Mr. Sherk pursuant to receivership clauses in the mortgages held by the Bank in respect of same.

Background

2 Sherco is the principal debtor in connection with a series of loan facilities extended by the Bank. Both Sherco, as principal debtor, and Farm, as guarantor, have granted general security agreements to the Bank in respect of the indebtedness of Sherco. Mr. Sherk and Cosher Properties Inc. ("Cosher") have each executed guarantees of the indebtedness of Sherco as well as providing other security.

3 The Bank takes the position that, as of September 9, 2013, Sherco was indebted to the Bank pursuant to the credit facilities in the amount of \$2,619,669.95, together with outstanding interest, fees and costs, all accrued daily to the date of payment (the "Indebtedness").

4 The respondents do not directly challenge the amount of the Indebtedness, other than to state that the debt of Sherco was settled in August 2013 at \$2,300,000 and that the additional costs added in for legals, appraisals and receivership are unreasonable and not in accord with the terms of the credit facility.

5 Sherco is a developer and sub-divider of real property in Ontario and carries on business in Midland, Ontario. Mr. Sherk is listed as the sole officer and director of Sherco, Farm and Cosher.

6 Pursuant to the credit facility letter, Sherco has granted to the Bank security over all of its personal property pursuant to a general security agreement dated September 21, 2006 (the "GSA").

7 In addition, Sherco granted to the Bank a demand \$6,500,000 first mortgage over lands known municipally as the Bellisle Heights Subdivision. The mortgage provides for the appointment of a receiver and manager in the event of default.

8 As additional security, Mr. Sherk granted the Bank a \$5,263,000 guarantee, dated November 22, 2007 (the "Sherk Guarantee"). Mr. Sherk also granted two separate and independent collateral demand mortgages in support of his guarantee, each in the principal amount of \$275,000, over real property known as 317 and 325 Estate Court, Midland, Ontario (collectively with the Sherk Guarantee, the "Sherk Guarantor Security"). Each mortgage also contains an appointment of receiver and manager provision in the event of default.

9 Farm also granted the guarantee of the Sherco Indebtedness and delivered to the Bank a \$5,263,000 guarantee dated November 22, 2007 ("Farm Guarantee"). Farm also granted a general security agreement ("Farm GSA") to the Bank dated September 21, 2006.

10 Cosher, as security for the Sherco obligations to the Bank, granted a \$770,000 guarantee to the Bank dated November 22, 2007 (the "Cosher Guarantee").

11 In November 2007, Cosher also granted to the Bank, as security for its guarantee, an assignment of a mortgage granted to Cosher by its mortgagor, Coland Developments Corporation. The respondents challenge the amounts outstanding under this mortgage.

The Bellisle Project

12 The Bank advanced Sherco the funds in connection with Sherco's development of Phase 1 of a property development in Penetanguishene known as the Bellisle Heights Subdivision (the "Bellisle Project").

13 The Bellisle Project was to be developed in four proposed phases. After Phase I was completed, there was a significant shortfall of funds which were to repay the Bank. The Bank contends that, as a result, it had concerns about the financial prospects of the Bellisle Project and

Sherco's ability to repay the Bank from future proceeds of the sale of presently undeveloped land over which the Bank holds security.

14 In January 2011, the Bank advised Mr. Sherk that it was not willing to fund the development of any further phases of the Bellisle Project and that alternative funding for Phase II and all subsequent phases should be sourced by Sherco. This position was apparently reiterated on a number of occasions.

15 At the present time, neither alternative funding nor sale of properties sufficient to repay the Bank has materialized.

16 Over much of this period, since August 2012, Sherco has failed to make interest payments to the Bank. The Bank takes the position, which is unchallenged, that Sherco has been in default of its obligations for over 14 months.

17 As of September 9, 2013, interest arrears total approximately \$124,346.79.

18 In addition, realty taxes in respect of those properties secured by Bank mortgages have fallen into arrears. The Bank contends that this is another breach of the agreements it has with Sherco. Current property tax arrears over the Estate Court properties mortgaged to the Bank amount to:

(a) 317 Estate Court: \$50,721.52;

(b) 325 Estate Court: \$59,596.49.

19 The Bank takes the position that Sherco and Mr. Sherk have been afforded an abundance of time to secure alternative financing and that the financial risk of permitting Sherco this time has been borne by the Bank, to the prejudice of its secured position. The Bank acknowledges that Sherco has made efforts to secure alternative financing, but take the position that Sherco has not been able to source financing which would repay the Indebtedness in full. The Bank also contends that all proposals put forth by Sherco to date have involved either the Bank being required to accept a lesser amount than the total indebtedness, or accept payment on a deferred basis.

20 On May 31, 2013, the Bank demanded payment from Sherco of all amounts then outstanding under the credit facilities, together with interest, fees and costs, and issued a Notice of Intention to Enforce Security ("NITES") to Sherco pursuant to [s. 244 of the Bankruptcy and Insolvency Act](#) (the "BIA").

21 On the same day, the Bank also demanded payment from:

(a) Mr. Sherk, pursuant to the Sherk Guarantee, and also issued NITES;

(b) Farm, pursuant to the Farm Guarantee, all amounts outstanding by Sherco, and also issued NITES; and

(c) Cosher, pursuant to the Cosher Guarantee in the amount of \$700,000.

22 The Bank acknowledges that, in spring 2013, discussions took place regarding a proposed financing of Phase IIa (*i.e.* only a portion of Phase II) from Desjardins ("Desjardins Financing"). The terms of the financing proposed by Desjardins were not agreeable to the Bank, as Desjardins required the discharge of the Bank's mortgage over the entire Phase II lands (including the undeveloped Phase IIb). The Bank contends that, while it was prepared to consider a postponement of its mortgage to Desjardins, it was not prepared to consider an outright discharge.

23 The Bank had other concerns with the Desjardins proposal including:

(a) the \$800,000 to be advanced by Desjardins was insufficient to pay off the Indebtedness;

(b) the remaining realty tax arrears;

(c) Sherco continued not to pay its monthly interests;

(d) there was no plan put forward as to how the balance of the Indebtedness would be paid; and

(e) the Bank was concerned about servicing issues regarding the phases of development.

24 Sherco continued to search for further sources of alternative financing including negotiations with First Source Mortgage Corporation. However, the Bank indicated that the First Source Letter of Intent did not represent a firm mortgage commitment from First Source and there had been no waiver of the conditions contained in the Letter of Intent.

25 The Bank contends it worked together with Sherco through July 2013 in an attempt to reach a deal that would (i) permit the financing to proceed, while (ii) allowing the Bank sufficient comfort and to retain adequate security. On August 1, 2013, the parties agreed upon how to proceed. The terms were set out in a Forbearance Agreement (the "August Forbearance") which was sent to Sherco's counsel and accepted by Sherco.

26 The parties appear to have differing versions with respect to whether the August Forbearance was "put in place". However, I do accept that issues arose with the performance of the August Forbearance and, as noted by counsel to the Bank, in part, these issues related to requirements on the part of First Source which were not acceptable to the Bank and which First Source ultimately did not waive.

27 Negotiations continued and on August 13, 2013 and it appeared that the parties were very close to concluding a deal under which Sherco would pay \$2,300,000 in exchange for a complete release. However, the \$2,300,000 payment (the "Cash Payout") did not materialize.

Positions of the Parties

28 Counsel to the Bank submits that the Bank is entitled under the terms of its security to appoint a receiver upon default. The Bank is of the view that it has been more than generous in providing Mr. Sherk with the opportunity to either sell the secured properties and repay the Bank or obtain alternative financing to continue with the development of the Bellisle Project. Neither has happened.

29 In response to the contention of Mr. Sherk that he is best positioned to sell the properties in question, the Bank points out that he has already attempted to sell both the Bellisle Property and the Estate Court properties without success.

30 The Bank also takes the position that it has lost confidence in Mr. Sherk. Of particular concern, are the following:

- (a) after permitting Mr. Sherk to access the Coshier mortgage proceeds, the Bank contends that it subsequently learned that Mr. Sherk used these funds for non-permitted purposes. There is no allegation that Mr. Sherk used the funds in an improper manner, but rather that he reallocated the payments within the corporate group;
- (b) Mr. Sherk has failed to make good on his promises when agreements between the Bank and Sherco have been reached;
- (c) Mr. Sherk has allowed realty taxes to erode the Bank's security; and
- (d) Mr. Sherk has allowed large amounts of unpaid interest to accrue.

31 The Bank also contends that it is entitled to appoint a receiver under the terms of its security and, due to the loss of confidence in Mr. Sherk, the Bank wishes that the sale process be controlled by an independent court-supervised receiver.

32 From the standpoint of Sherco, counsel submits that there is no evidence of any urgency to appoint a receiver.

33 Counsel also points out that the main security is unserviced land suitable for subdivision, that the land is vacant and that there is no resistance to the Bank's enforcement.

34 Counsel also submits that the other main security, a matrimonial home and another which is vacant, have some equity and there is no resistance to vacant possession.

35 In short, counsel contends that there is nothing that should attract additional court costs and receiver and counsel fees, all to the detriment of the guarantors. There is no active business to conduct or supervise, nor is there income or a need to preserve or protect.

36 From the standpoint of the respondents, the issue is whether a court-appointed receiver or receiver manager should be appointed on this record. Counsel points out that the Bank has the right to go into possession for default, foreclose, seek a sale or appoint a private receiver or receiver manager. Counsel contends that there are no compelling reasons to permit the receivership appointment.

37 Counsel also submits that the Bank grounds its application in the delay that has occurred over the last many months, but that delay was mutual and could have, and should have, resulted in a settlement.

Law

38 The statutory provisions relied upon by the Bank provide that a receiver may be appointed where it is "just or convenient" to do so.

39 [Section 243\(1\) of the BIA](#) provides that, on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

40 Section 101 of the *Courts of Justice Act* states:

In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or a 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.

41 In determining whether it is just or convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and the rights and interests of all parties in relation to the property. See *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]).

42 Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]); *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 (Ont. S.C.J. [Commercial List]) and *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.).

43 Counsel to the respondents contends that this situation should be governed by *Bank of Nova Scotia v. Sullivan Investments Ltd.* (1982), 21 Sask. R. 14 (Sask. Q.B.) where Estey J. (as he then was) reasoned as follows:

...that where a security agreement provides for the appointment of a receiver manager the court will not intercede and grant an application to appoint a receiver manager unless it is shown to be necessary for the receiver manager to more efficiently carry out its work and duty.

44 Similar comments were stated in *Royal Bank v. White Cross Properties Ltd.* (1984), 53 C.B.R. (N.S.) 96 (Sask. Q.B.).

45 Counsel to the respondents contends that there is nothing in the material before the courts to demonstrate that the appointment is just or convenient or a threat to the contractual remedies.

46 Having reviewed the record and, hearing submissions, I cannot give effect to the position put forth by the respondents, except with respect to the matrimonial home.

47 I have reached this conclusion for the following reasons:

- (a) the terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
- (b) the terms of the mortgages permit the appointment of a receiver upon default;
- (c) the value of the security continues to erode as interest and tax arrears continue to accrue;
- (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

48 In my view the time has come to turn the sales process over to an independent court officer. The security documents provide for this remedy. The involvement in the process of the court officer

will minimize the fallout of litigation between the parties, which could result in a further delay and protracted post-transaction litigation.

49 In the event the properties become subject to a proposed sale by the receiver, and Mr. Sherk takes issue with the manner of their sale or the price obtained, he will have the full opportunity to object to the approval of the sale.

50 I am satisfied that it is both just and convenient and efficient for the Bellisle Project lands to be marketed and sold by a receiver. I am also satisfied that the same receiver can also manage the sale of the vacant Estates Court property.

51 However, I have not been persuaded that it is necessary to appoint a receiver over the matrimonial property occupied by Mr. Sherk. The involvement of a receiver over the matrimonial home in these circumstances is potentially far more invasive than necessary. With respect to the property, it is open for the Bank to pursue its remedies pursuant to the mortgage, including power of sale and foreclosure.

52 In the result, I have concluded that it is both just and convenient to appoint Albert Gelman Inc. as receiver in respect of:

- (a) Sherco;
- (b) Farm; and
- (c) 317 Estates Court

53 The application in respect of Sherco, Farm and 317 Estates Court entities is granted.

54 The receivership order does not extend to the matrimonial home of 325 Estate Court. However, the Bank is free to pursue its other contractual remedies in respect of this property.

55 The Bank is also entitled to its costs on this application.

Application granted.

TAB 4

2011 ONSC 1007
Ontario Superior Court of Justice

Bank of Montreal v. Carnival National Leasing Ltd.

2011 CarswellOnt 896, 2011 ONSC 1007, [2011] O.J.
No. 671, 198 A.C.W.S. (3d) 79, 74 C.B.R. (5th) 300

**Bank of Montreal (Applicant) and Carnival National Leasing
Limited and Carnival Automobiles Limited (Respondents)**

Newbould J.

Heard: February 11, 2011
Judgment: February 15, 2011
Docket: CV-10-9029-00CL

Counsel: John J. Chapman, Arthi Sambasivan for Applicants
Fred Tayar, Colby Linthwaite for Respondents
Rachelle F. Mancur for Royal Bank of Canada

Newbould J.:

1 Bank of Montreal ("BMO") applies for the appointment of PriceWaterhouse Coopers Inc. as national receiver of the respondents Carnival National Leasing Limited ("Carnival") and Carnival Automobiles Limited ("Automobiles") under sections 243 (1) of the *Bankruptcy and Insolvency Act* and 101 of the *Courts of Justice Act*.

2 Carnival is in the business of leasing new and used passenger cars, trucks, vans and equipment vehicles. It has approximately 1300 vehicles in its fleet. Carnival is indebted to BMO for approximately \$17 million pursuant to demand loan facilities. Automobiles guaranteed the indebtedness of Carnival to BMO limited to \$1.5 million. David Hirsh is the president and sole director of Carnival and has guaranteed its indebtedness to BMO limited to \$700,000. BMO holds security over the assets of Carnival and Automobiles, including a general security agreement under which it has the right to appoint a receiver of the debtors or to apply to court for the appointment of a receiver. On November 30, 2010 BMO delivered demands for payment to Carnival, Automobiles and Mr. Hirsh.

3 The respondents contend that no receiver should be appointed. In my view BMO is entitled to appoint PWC as a receiver of the respondents and it is so ordered for the reasons that follow.

Events leading to demand for payment

4 The respondents quarrel with the actions of BMO leading to the demands for payment and assert that as a result a receiver should not be appointed.

5 BMO has been Carnival's banker for 21 years. Loans were made annually on terms contained in a term sheet. Each year BMO did an annual review of the account, after which a new term sheet for the following year was signed. The last term sheet was signed on January 29, 2010 and was for the 2010 calendar year. The last annual review, completed on October 27, 2010, recommended a renewal of the credits with various changes being proposed, including a risk rating upgrade from 45 to 40 and a reduction in the demand wholesale leasing facility from \$21.9 million to \$20 million. That review, however, was not sent to senior management for approval and no agreement was made extending the credit facilities to Carnival for the 2011 calendar year.

6 The 2010 term sheet provided for two major lines of credit. The larger facility was a demand wholesale leasing facility with a limit of \$21.9 million, under which Carnival submitted vehicle leases to BMO. If a lease was approved BMO advanced up to 100% of the cost of the vehicle and in return received security over the vehicle. The second facility was a general overdraft facility described as a demand operating loan with a limit of \$1.15 million. The term sheet provided that all lines of credit were made on a demand loan basis and that BMO reserved the right to cancel the lines of credit "at any time at its sole discretion".

7 Under the terms of the wholesale leasing facility, total advances for used vehicle financing were not to exceed 30% of the approved lease portfolio credit line. That apparently had been a term of the facility for many years. The annual review of October 27, 2010 stated that for the past year, the concentration of used leases was 27.8%. In the previous annual review in 2009, the figure for used lease concentration was 11.6%. Mr. Findlay of the BMO special accounts management unit (SAMU) said on cross-examination that while he could not say as a fact where those percentages came from, the routine for annual reviews was for the person preparing the annual review to obtain such figures from the support staff of the bank's automotive centre.

8 Shortly after the 2010 annual review had been completed, and before it was sent to higher levels of the bank for approval, Mr. Lavery, the account manager at BMO for Carnival, received information from someone at BMO, the identity of whom I do not believe is in the record, informing him that the used car lease portfolio was approximately 60% of the leases financed by BMO, well in excess of the 30% condition of the loan. That led Mr. Lavery to call Mr. Findlay of SAMU. On November 17, 2010 BMO engaged PWC to review the operations of Carnival. On November 26, 2010 BMO's solicitors delivered to Carnival a letter which stated, amongst other things, that BMO would not finance any future leases until PWC's review engagement was completed, that BMO would no longer allow any overdraft on Carnival's operating line and that the bank reserved its right to demand payment of any indebtedness at any time in the future.

9 On November 29, 2010 PWC provided its initial report to BMO. It contained a number of matters of concern to BMO, including itemizing a number of breaches of the lending agreements that Carnival had with BMO. On November 30, 2010 BMO's solicitors delivered to Carnival a letter itemizing a number of breaches of the loan agreements, one of which was that advances for used vehicle financing were in excess of 30% of the approved lease portfolio credit line. Demand for payment under the lines of credit totalling \$17,736,838.45 was made. Following the demand, PWC continued its engagement and discovered a number of irregularities in the Carnival business, some of which are contained in the affidavit of Mr. Findlay.

10 It turns out that the 30% limit for used vehicle leases had not been met for some time. Carnival provided to BMO's automotive centre copies of the individual leases and bills of sale which showed the model year of the car to be financed and this information was in the BMO automotive centre computer records. Reports on BMO's website as at December 31, 2008 demonstrated 45% of Carnival's BMO financed leases were for used vehicles. At December 31, 2009 it was 73% and as at October 31, 2001 it was 60%. The evidence of Mr. Findlay on cross-examination was that while that information was on the computer system, it was not known by the account management responsible for the Carnival credits. He acknowledged that if the account management went to the computer system they would have seen that information but if they did not they would not have known of it. There is no evidence that Mr. Lavery or others in the account management of BMO responsible for the Carnival credit were aware before late October, 2010 of the true percentage of the used car lease portfolio.

11 Mr. Hirsh said on cross-examination that he assumed somebody in control at the bank knew the percentage of used vehicle leases. Although the loan terms he signed each year contained the 30% condition, he never suggested that the percentage should be changed to a higher figure. One can argue that Mr. Hirsh should have told his account manager at BMO that the condition he was agreeing to was not being met. Of course if he had done so he could well have faced a likely loss of credit needed to run his business. The loan terms included a requirement that Carnival provide an annual detailed analysis of the entire lease portfolio, including a breakdown of the lease concentrations. Had those been provided, it would appear that the percentage of used vehicle leases would have been reported by Carnival. While the record does not indicate whether such reports were provided, I think it can be assumed that if they had been, Mr. Hirsh would have provided that information in his affidavit.

12 Since November 26, 2010, BMO has not financed any further vehicles under the demand wholesale line of credit. Pending the application to appoint a receiver, BMO has continued to extend the \$1.15 million operating facility, in spite of its demand. Under the terms of the demand wholesale line of credit, Carnival is obliged after selling vehicles financed by BMO to pay down the wholesale leasing line within 30 days by transferring the money received from its operating line account to the wholesale leasing line. It has not always done so and PWC estimates the amount

involved to be \$814,000. The operating facility is now in overdraft as a result of the demand for payment.

Issues

(a) Right to enforce payment

13 On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days. See *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 70 O.R. (2d) 225 (Ont. C.A.) per McKinley J.A. See also *Toronto Dominion Bank v. Pritchard*, [1997] O.J. No. 4622 (Ont. Div. Ct.) per Farley J.:

5. It is clear therefore that the reasonable time to repay after demand is a very finite time measured in days, not weeks, and it is not "open ended" beyond this by the difficulties that a borrower may have in seeking replacement financing, be it bridge or permanent.

14 Under the loan agreements, the credits were on demand and as well BMO had the right to cancel the credits at any time at its sole discretion. It is now over 70 days since demand for payment was made.

15 I do not see the issue of BMO management not being aware of the percentage of used car leases as affecting BMO's rights under its loan agreements, even assuming it was all BMO's fault, which I am not at all sure is the case. There is no evidence that BMO in any way intentionally waived its 30% loan condition, nor is it the case that it was only a breach of the 30% condition that led to the demand for payment being delivered to Carnival. There were a number of other concerns that BMO had. In any event, there was no requirement before demand or termination of the credits that BMO had to have justification to demand payment. To the contrary, the agreement provided that BMO had the right to terminate the credits at any time at its sole discretion.

16 In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.

17 The car leasing business for businesses such as Carnival has been very difficult for a number of years, as acknowledged by Mr. Hirsh. Competitors such as Ford, GM and Chrysler began offering very low interest rates for new vehicles that Carnival could not provide. The economy led to more customers missing payments. There were lower sales generally. Carnival's leased assets fell from \$49 million in 2006 to \$35 million in 2009. Carnival had a profit of \$1.2 million in 2006 but in the years 2007 through 2009 had a cumulative net loss of \$244,000. While its business was shrinking, Carnival's accounts receivable grew significantly, from \$1.5 million in 2006 to

\$2.8 million in 2009, indicating, as Mr. Hirsh acknowledged on cross-examination, that customers owed more than in the past for lease payments because of difficult economic times.

18 Carnival also borrowed from RBC to finance its lease portfolio. Some leases were financed with BMO and some with RBC. In the mid-2000s, the size of Carnival's loan facility with BMO and RBC was about even. In 2008 RBC stopped lending to Carnival on new leases and since then Carnival has been paying down its RBC loans. Today Carnival owes RBC approximately \$5.6 million. Thus Carnival owes the two banks approximately \$22.6 million.

19 In an affidavit sworn February 8, 2011, Mr. Hirsh disclosed that he has had discussions with TD Bank and has an indication of a loan of approximately \$11.5 million. A deal sheet has yet to be provided to TD's credit department for approval, but is expected to be considered by the end of February. If approved, it is contemplated that funds could be advanced sometime in April. Mr. Hirsh states that the TD guidelines allow TD to advance (i) on new vehicles \$6.5 million on leases currently financed by BMO and \$1.9 million on leases currently financed by RBC and (ii) on used vehicles, \$2 million on leases currently financed by BMO and \$392,000 on leases currently financed by RBC. A further \$2 million would be available on non-bank financed leases. Thus if a TD loan were granted, at most the amount that would be available to pay down BMO would be \$10.5 million and it might be less if, as is likely, there are not \$6.5 million worth of new car leases currently being financed by BMO.

20 Mr. Hirsh further states in his affidavit that he believes he will be able to pay off the balance of BMO loans through a combination of TD financing new Carnival leases and the payout of existing leases and/or sales of Carnival vehicles. No time estimate is given for this and one can only conclude that it would not be soon.

21 In these circumstances, assuming that it is permissible to consider the chances of refinancing in considering what a reasonable time would be to permit enforcement of security after a demand for payment, I do not consider the chances of refinancing in this case to prevent BMO from acting on its security.

22 BMO had the right under its loan agreements to stop financing new vehicle leases and to demand payment of the outstanding loans. No new term sheet was signed for 2011. Since the demand for payment, it has provided far more time than required in order to enforce its security. In my view, BMO is entitled to payment of the outstanding loans and to enforce its security including, if it wished to do so, to privately appoint a receiver of the assets of Carnival and Automobile or serve notices to the large number of lessees of the assignment of the leases and require payment directly to BMO.

(b) Court appointed receiver

23 Under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a court may appoint a receiver if it is "just and convenient" to do so.

24 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:

10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.

25 It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that as it amounts to execution before judgment, there must be strong evidence that the plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

26 *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.* (1987), 16 C.P.C. (2d) 130 (Ont. H.C.) is relied on by Carnival as supporting its position. That case however dealt with a disputed claim to payments said to be owing and a claim for damages. The plaintiff had no security that permitted the appointment of a receiver and requested a court appointed receiver until trial. Salhany L.J.S.C. likened the situation to a plaintiff seeking execution before judgment and considered that the test to support the appointment of a receiver was no less stringent than the test to support a Mareva injunction. With respect, that is not the law of Ontario so far as enforcing security is concerned. The same situation pertained in *Anderson v. Hunking*, 2010 ONSC 4008 (Ont. S.C.J.) cited by Mr. Tayar. I have serious doubts whether *1468121 Ontario Ltd. v. 663789 Ontario Ltd.*, 2008 CarswellOnt 7601 (Ont. S.C.J.) cited by Mr. Tayar was correctly decided and would not follow it.

27 In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court appointed receiver and the issue was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:

11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager

28 In *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995)*, 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]), in which the bank held security that permitted the appointment of a private or court ordered receiver, Ground J. made similar observations:

28. The first submission of counsel for Odyssey and Weston is that there is no risk of irreparable harm to Swiss Bank if a receiver is not appointed as certificates of pending litigation have been filed against the real estate properties involved, and there is an existing order restraining the disposition of other assets. I know of no authority for the proposition that a creditor must establish irreparable harm if the appointment of a receiver is not granted by the court. In fact, the authorities seem to support the proposition that irreparable harm need not be demonstrated. (see *Bank of Montreal v. Appcon (1981)*, 33 O.R. (2d) 97).

29 See also *Bank of Nova Scotia v. D.G. Jewelry Inc. (2002)*, 38 C.B.R. (4th) 7 (Ont. S.C.J.) in which Ground J. rejected the notion that it is necessary where there is security that permits the appointment of a private or court ordered receiver to establish that the property is threatened with

danger, and said that the test was whether a court ordered receiver could more effectively carry out its duties than it could if privately appointed. He stated:

I do not think that, in order to appoint an Interim Receiver pursuant to Section 47 of the BIA, I must be satisfied that there is an actual and immediate danger of a dissipation of assets. The decision of Nova Scotia Registrar Smith in *Royal Bank v. Zutphen Brothers*, [1993] N.S.J. No. 640, is not, in my view, the law of Ontario.

...

On the main issue of the test to be applied by the court in determining whether to appoint a Receiver, I do not think the Ontario courts have followed the Saskatchewan authorities cited by Mr. Tayar which require a finding that the legal remedies available to the party seeking the appointment are defective or that the appointment is necessary to preserve the property from some danger which threatens it, neither of which could be established in the case before this court. The test, which I think this court should apply, is whether the appointment of a court - appointed Receiver will enable that Receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

30 This is not a case like *Royal Bank v. Chongsim Investments Ltd.* (1997), 32 O.R. (3d) 565 (Ont. Gen. Div.) in which Epstein J. (as she then was) dismissed a motion to appoint a receiver. While the loan was a demand loan and the bank's security permitted the appointment of a receiver, the parties had agreed that the loan would not be demanded absent default, and Epstein J. held that the bank, acting in bad faith, had set out to do whatever was necessary to create a default. Thus she held it was not equitable to grant the relief sought. That case is not applicable to the facts of this case.

31 Carnival relies on a decision in *Royal Bank v. Boussoulas*, [2010] O.J. No. 3611 (Ont. S.C.J.), in which Stinson J. was highly critical of the actions of the bank and its counsel in overstating its case and making unsupportable allegations of fraud in its motion affidavit material and facta filed before him and previously before Cumming J. He thus declined to continue a Mareva injunction earlier ordered by Cumming J. or appoint an interim receiver over the defendant's assets. There is no question but that a court can decline to order equitable relief in the face of misconduct on the part of a party seeking equitable relief.

32 In my view, there is no basis to refuse the order sought because of alleged misconduct on the part of BMO or its counsel. To the contrary, if anything, the shoe is on the other foot. The factum filed on behalf of Carnival is replete with allegations of false assertions on behalf of BMO, none of which have been established.

33 Carnival says the first affidavit of Mr. Findlay was false when it said that the bank first discovered the high concentration of used cars in late October, 2010, because it says the

concentration was on the bank's website. This ignores the fact that the account management personnel responsible for the Carnival account did not know of the high concentration of used car leases in excess of the 30% limit, as testified to by Mr. Findlay and evident from the loan reviews for the past two years prepared by account management which stated that the used car concentration was 27.8 and 11.6 %. Although the BMO internal auditors had conducted quarterly audits, the unchallenged evidence of Mr. Findlay is that the purpose of each audit was to review whether each individual lease has been properly papered and handled. The audit did not look at the Carnival portfolio as a whole or to see what percentage of leases were for new or used vehicles.

34 It is argued that BMO has tried to mislead the Court by suggesting that payments received by Carnival after a leased vehicle was sold were to be held in trust for BMO. There is nothing in this allegation. Mr. Findlay referred in his affidavit to the term "sold out of trust", or SOT, a term apparently widely used in the automobile industry, to refer to the situation in which a borrower such as Carnival fails to remit to its lender the proceeds of sale of a financed vehicle. Mr. Findlay did not say that there was any type of legal trust, nor did he imply it. He identified what he said were SOTs, as did PWC in its report, and while he said on cross-examination that he understood that all proceeds from sales of vehicles were paid into Carnival's account at BMO, Carnival had not paid down its loans with these proceeds as it was required to do under the loan terms, but rather had kept the money in its operating account available for its operating purposes. The fact that some of Mr. Findlay's calculations of amounts involved differ from the calculations of PWC after it was sent in to investigate the situation hardly makes the case that BMO set out to mislead the Court by a fabrication and by use of falsified numbers, as was alleged in Mr. Tayar's factum.

35 In his first affidavit Mr. Findlay referred to a concern of BMO as set out in the initial report that Mr. Hirsh was using the Carnival operating line to pay personal mortgages on his home. On cross-examination he said he understood that the money from the mortgages was put into the Carnival account as an injection of capital and he agreed that the payment of interest on the mortgages from Carnival's account was not an improper use of its resources. This is somewhat different from the statement of concern in his affidavit, but I do not see it as terribly important and as Mr. Findlay was in special account management and not managing the account, it is quite possible that the difference was due to learning more and changing his mind. I do not conclude that he set out to mislead the Court.

36 In my view, it would be preferable to have a court appointed receiver rather than a privately appointed one. Mr. Tayar said that if a private appointment were made, Carnival would litigate its right to do so. This would not at all be helpful when it is recognized that there are some 1300 vehicles under lease and any dispute as to whom lease payments were to be paid could quickly dry up or lessen the payments made. There are already a number of leases in default, and people might opportunistically decide not to pay if there were a dispute as to who was in control. The prospect of more litigation was a consideration that led Blair J. to ordering the appointment of a receiver in *Bank of Nova Scotia v. Freure Village on Clair Creek*.

37 While there may be increased costs over a private receivership, it would appear that this may well be at the expense of BMO and RBC, the other secured creditor. RBC supports the appointment of a receiver by the Court. Carnival has accounts receivable of some \$4.4 million. As at November 25, approximately \$3 million was more than 120 days old. The book value of the leases of \$30 million is therefore questionable, and the repayment of \$22.6 owing to BMO and RBC is not assured. Further, a court appointed receiver would have borrowing powers, which might be required as Cardinal has not so far been able to obtain new operating credit lines.

38 In the circumstances the order sought by BMO is granted in the form contained in tab 3 of the application record.

Application granted.

TAB 5

1996 CarswellOnt 2328
Ontario Court of Justice (General Division — Commercial List)

Bank of Nova Scotia v. Freure Village on Clair Creek

1996 CarswellOnt 2328, [1996] O.J. No. 5088, 40 C.B.R. (3d) 274

Bank of Nova Scotia v. Freure Village on Clair Creek et al

Blair J.

Judgment: May 31, 1996

Docket: none given

Counsel: *John J. Chapman* and *John R. Varley*, for Bank of Nova Scotia.

J. Gregory Murdoch, for Freure Group (all defendants).

John Lancaster, for Boehmers, a Division of St. Lawrence Cement.

Robb English, for Toronto-Dominion Bank.

William T. Houston, for Canada Trust

Blair J.:

1 There are two companion motions here, namely:

(i) the within motion by the Bank for summary judgment on the covenants on mortgages granted by "Freure Management" and "Freure Village" to the Bank, which mortgages have been guaranteed by Freure Investments; and

(ii) the motion for appointment by the Court of a receiver-manager over five different properties which are the subject matter of the mortgages (four of which properties are apartment/townhouse complexes totalling 286 units and one of which is an as yet undeveloped property).

2 This endorsement pertains to both motions.

The Motion for Summary Judgment

3 Three of the mortgages have matured and have not been repaid. The fourth has not yet matured but, along with the first three, is in default as a result of the failure to pay tax arrears. The total tax arrears outstanding are in excess of \$850,000. The Bank is owed in excess of \$13,200,000. There is no question that the mortgages are in default. Nor is it contested that the monies are presently due and owing. The Defendants argue, however, that the Bank had agreed to forebear or to stand-

still for six months to a year in May, 1995 and therefore submit the monies were not due and owing at the time demand was made and proceedings commenced.

4 There is simply no merit to this defence on the evidence and there is no issue with respect to it which survives the "good hard look at the evidence" which the authorities require the Court to take and which requires a trial for its disposition: see Rule 20.01 and Rule 20.04, *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Gen. Div.); *Irving Ungerman Ltd. v. Galanis* (1993) 4 O.R. (3d) 545 (C.A.).

5 On his cross-examination, Mr. Freure admitted:

(i) that he knew the Bank had not entered into any agreement whereby it had waived its rights under its security or to enforce its security; and

(ii) that he realized the Bank was entitled to make demand, that the individual debtors in the Freure Group owed the money, that they did not have the money to pay and the \$13,200,000 indebtedness was "due and owing" (see cross-examination questions 46-54, 88-96, 233-243).

6 As to the guarantees of Freure Investments, an argument was put forward that the Bank changed its position with regard to the accumulation of tax arrears without notice to the guarantor, and accordingly that a triable issue exists in that regard.

7 No such triable issue exists. The guarantee provisions of the mortgage itself permit the Bank to negotiate changes in the security with the principal debtor. Moreover, the principal of the principal debtor and the principal of the guarantor - Mr. Freure - are the same. Finally, the evidence which is relied upon for the change in the Bank's position - an internal Bank memo from the local branch to the credit committee of the Bank in Toronto - is not proof of any such agreement with the debtor or change; it is merely a recitation of various position proposals and a recommendation to the credit committee, which was not followed.

8 Accordingly, summary judgment is granted as sought in accordance with the draft judgment filed today and on which I have placed my fiat. The cost portion of the judgment will bear interest at the *Courts of Justice Act* rate.

Receiver/Manager

9 The more difficult issue for determination is whether or not the Court should appoint a receiver/manager.

10 It is conceded, in effect, that if the loans are in default and not saved from immediate payment by the alleged forbearance agreement - which they are, and are not, respectively - the Bank is entitled to move under its security and appoint a receiver-manager privately. Indeed this is the route which the Defendants - supported by the subsequent creditor on one of the properties (Boehmers,

on the Glencairn property) - urge must be taken. The other major creditors, TD Bank and Canada Trust, who are owed approximately \$20,000,000 between them, take no position on the motion.

11 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 (Ont. Gen. Div.) at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399 (Ont. Gen. Div.); *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 (Sask. Q.B.) at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Ont. Gen. Div. [Commercial List]).

12 The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.

13 While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

14 Here I am satisfied on balance it is just and convenient for the order sought to be made. The Defendants have been attempting to refinance the properties for 1 1/2 years without success, although a letter from Mutual Trust dated yesterday suggests (again) the possibility of a refinancing in the near future. The Bank and the debtors are deadlocked and I infer from the history and evidence that the Bank's attempts to enforce its security privately will only lead to more litigation. Indeed, the debtor's solicitors themselves refer to the prospect of "costly, protracted

and unproductive" litigation in a letter dated March 21st of this year, should the Bank seek to pursue its remedies. More significantly, the parties cannot agree on the proper approach to be taken to marketing the properties which everyone agrees must be sold. Should it be on a unit by unit conversion condominium basis (as the debtor proposes) or on an en bloc basis as the Bank would prefer? A Court appointed receiver with a mandate to develop a marketing plan can resolve that impasse, subject to the Court's approval, whereas a privately appointed receiver in all likelihood could not, at least without further litigious skirmishing. In the end, I am satisfied the interests of the debtors themselves, along with those of the creditors (and the tenants, who will be caught in the middle) and the orderly disposition of the property are all better served by the appointment of the receiver-manager as requested.

15 I am prepared, in the circumstances, however, to render the debtors one last chance to rescue the situation, if they can bring the potential Mutual Trust refinancing to fruition. I postpone the effectiveness of the order appointing Doane Raymond as receiver-manager for a period of three weeks from this date. If a refinancing arrangement which is satisfactory to the Bank and which is firm and concrete can be arranged by that time, I may be spoken to at a 9:30 appointment on Monday, June 24, 1996 with regard to a further postponement. The order will relate back to today's date, if taken out.

16 Should the Bank be advised to appoint Doane Raymond as a private receiver/manager under its mortgages in the interim, it may do so.

17 Counsel may attend at an earlier 9:30 appointment if necessary to speak to the form of the order.

Motions granted.

TAB 6

2020 ONSC 1953
Ontario Superior Court of Justice [Commercial List]

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.

2020 CarswellOnt 5156, 2020 ONSC 1953, 317 A.C.W.S. (3d) 533, 78 C.B.R. (6th) 299

**BCIMC CONSTRUCTION FUND CORPORATION AND
BCIMC SPECIALTY FUND CORPORATION (Applicants) and
THE CLOVER ON YONGE INC., THE CLOVER ON YONGE
LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND
480 YONGE STREET LIMITED PARTNERSHIP (Respondents)**

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL
INC. (Applicants) and 33 YORKVILLE RESIDENCES INC. AND 33
YORKVILLE RESIDENCES LIMITED PARTNERSHIP (Respondents)

Koehnen J.

Heard: March 27, 2020

Judgment: March 30, 2020

Docket: CV-20-00637301-00CL, CV-20-00637297-00CL

Counsel: David Bish, Adam M. Slavens, Jeremy Opolsky for Applicants, BCIMC Construction
Fund Corporation

Steven Graff, Ian Aversa, Jeremy Nemers for Respondents

Virginie Gauthier, Allan Merskey, Peter Tae-Min Choi for Otera Capital Inc.

See Schedule A for complete list of counsel

Koehnen J.:

Overview

1 This proceeding involves competing applications for the appointment of a receiver and manager pursuant to [subsection 243\(1\) 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 and an application for protection under the [Companies' Creditors Arrangement Act](#), R.S.C. 1985, c. C-36, as amended.

2 The hearing was held by telephone conference call due to the COVID-19 emergency on Friday, March 27, 2020. The hearing was held in accordance with: (a) the Notice to the Profession

issued by Chief Justice Morawetz on March 15, 2020; and (b) the "Changes to Commercial List operations in light of COVID-19" developed by the Commercial List judges in consultation with the Commercial List Users Committee. The teleconference line was one provided by the Ontario Superior Court of Justice. Materials were sent to me by email before the hearing.

3 At the end of the hearing I advised counsel that I would dismiss the CCAA application and grant the receivership application with reasons to follow. These are my reasons. I have issued two sets of reasons, a sealed confidential set of reasons and a public set of reasons. The public reasons contains all of the information in the confidential reasons except certain figures which have been redacted.

4 In short, after considering the various factors that all sides brought to my attention, it struck me that a receivership was clearly the preferable route to take. Secured creditors with a blocking position to any plan objected to a CCAA proceeding. They had valid grounds for doing so. They had first mortgages in land, there was no concrete proposal at hand to have them paid out. The mortgagees had made demand on February 20. Demand was prompted by findings of financial irregularity within the debtors. The debtors had agreed to give the mortgagees receivership rights in the lending agreements they signed. Approving a CCAA proceeding would force lenders to continue to be bound to debtors in whom they no longer had any confidence by reason of the debtors' absence of transparency and forthrightness in its dealings with the lender. There was no evidence that a CCAA proceeding would have a material impact on safeguarding jobs nor was there any evidence that it would materially safeguard the interests of other creditors more so than a receivership would.

A. The Parties

5 The Receivership Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation are affiliates of the British Columbia Investment Management Corporation and help manage the pensions of over 500,000 British Columbia public servants.

6 The receivership applicant Otera Capital Inc. is a subsidiary of the Caisse de Dépôt et Placement du Québec and is one of Canada's largest real estate lenders. For ease of reference I will refer to all three applicants as the Receivership Applicants.

7 The Receivership Applicants asked me to appoint PricewaterhouseCoopers Inc. as receiver and manager over all of the undertakings, properties and assets of three residential condominium construction projects known as The Clover, Halo and 33 Yorkville.

8 The BCIMC parties have advanced loans on all three projects. Otera has advanced loans only on 33 Yorkville where it has shared advances equally with the BCIMC parties.

9 The Debtors are special-purpose, project-level entities for the development of each of the three projects.

10 Each of the three projects is affiliated with The Cresford Group, which owns each project through individual, single asset, special purpose corporations. Cresford is a significant developer and builder of residential condominiums in the Toronto area.

11 Clover and Halo object to the receivership application and have brought their own application to seek protection under the [CCAA](#). The Yorkville project seeks to adjourn the receivership application in respect of it. The parties in the proceeding of each project are the corporate general partner and the corporate limited partnership entity.

(a) The Clover Project

12 The Clover project is located at 595 Yonge St., north of Wellesley St. in Toronto. It is comprised of two towers; one 44 storeys, the other 18 storeys containing a total of 522 residential units. The Clover project is the most advanced of the three projects. Construction is well underway with the higher floors now under construction.

13 The Clover Commitment Letter from the Receivership Applicants provides for two non-revolving construction loans in amounts of \$172,616,007 and \$37,450,668 and a non-revolving letter of credit facility of up to \$3,000,000.

14 As of March 2, 2020, the Receivership Applicants had advanced \$107,668,017.82 under the Clover Facilities. In addition, \$3,000,000 in letters of credit have been extended. The Receivership Applicants also extended a mezzanine mortgage on Clover, with \$34,035,878.69 in principal outstanding.

15 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Clover Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

16 There are 499 purchasers of units in Clover who have paid a total of approximately \$49 million in deposits.

(b) The Halo Project

17 The Halo project is located at 480 Yonge St. south of Wellesley St. in Toronto. It calls for a 39-storey tower with 413 residential units set-back from the street to accommodate a historic clock tower. Halo is in early stages of construction.

18 The Halo Commitment Letter provides for two non-revolving construction loans in amounts of \$156,850,7747 and \$29,292,804, respectively, and a non-revolving letter of credit facility in the amount of up to \$2,000,000.

19 As of March 2, 2020, the Receivership Applicants have advanced \$47,429,211.83 in principal. In addition, \$1,500,000 in letters of credit have been extended. The Receivership Applicants have also extended a mezzanine mortgage on the Halo project, with \$25,725,159.27 in principal outstanding.

20 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Halo Debtors, and by registered first-ranking and third-ranking charges/mortgages in respect of real property.

21 There are 388 purchasers of units in Halo who have paid a total of approximately \$43 million in deposits.

(c) The Yorkville Project

22 The Yorkville project is located at 33 Yorkville Ave between Bay and Yonge Streets in Toronto. Current plans call for one 43 and one 69 storey tower with 1,079 residential units and an eight storey podium. Excavation began in 2019 but no construction of the towers has begun.

23 The Yorkville Commitment Letter provides for a non-revolving construction loan and a non-revolving letter of credit in amounts of up to \$571,300,000 and \$83,000,000, respectively.

24 As of March 2, 2020, the Receivership Applicants had advanced \$122,432,764.85 under the Facilities. In addition, \$79,592,744.24 in letters of credit have been extended.

25 The obligations are secured by, among other things, a first-ranking security interest in substantially all of the property, assets and undertaking of the Yorkville Debtors, and by registered first-ranking charges/mortgages in respect of real property.

26 There are 918 purchasers of units in Yorkville who have paid a total of approximately \$160 million in deposits.

27 There are three other major secured creditors on the projects. Aviva Insurance Company of Canada has second and fourth priority mortgages. KingSett Capital Inc. has third ranking mortgages. Construction lien holders have liens of approximately \$38,000,000 registered against the properties.

B. Deterioration of the Relationship

28 In January 2020, the Receivership Applicants became aware of a statement of claim issued by Maria Athanasoulis against the Cresford Group. Ms. Athanasoulis was a former officer of Cresford who made allegations of financial irregularities within the Debtors. As a result, the Receivership Applicants appointed PWC and Altus Group Limited to investigate. Altus is a well-known quantity surveyor and cost consultant. The results of the investigation raised three issues showing a lack of transparency and forthrightness by the Debtors which led the Receivership Applicants to lose all confidence in the Debtors and which led the Receivership Applicants to conclude they no longer wanted anything to do with the projects.

29 First, at the outset of the lending relationship, Cresford was required to inject equity into each project. It was important for the Receivership Applicants that Cresford had "skin in the game" in order to align Cresford's interests with those of the lenders.

30 Instead of injecting its own funds, Cresford borrowed money at over 16% interest from a third party and used that loan as "equity" in the project. Cresford then used advances from the Receivership Applicants to pay for the 16% interest on its "equity". Approximately \$10.668 million of the lenders' funds have been diverted from the three projects to service the interest on Cresford's "equity".

31 Second, the projects have maintained two sets of books. A first set of accounting records shows costs that were consistent with the construction budget which had been presented to the lenders. Those records were used to obtain continued advances on the lending facilities. A second set of books records increases over the approved construction budgets. Approximately \$ X of increased costs were hidden in this manner.

32 In furtherance of the two sets of books, the Debtors had certain suppliers issue two invoices for the same supply. The first invoice was consistent with the approved construction budget. It was recorded in the accounting records that were available to the lenders and which showed costs in accordance with the budget. The second invoice from the supplier was for the amount by which the supply exceeded the construction budget. The second invoice was recorded on the second accounting ledger kept for each project and was not disclosed to the lenders.

33 Third, to help further hide increased costs, the Debtors sold units to suppliers at substantial discounts to their listing prices. Over \$ X in discounted sales fall into this category.

34 The agreements between the Receivership Applicants and the Debtors require the Debtors to inform the Receivership Applicants of any cost overruns, seek consent for material changes, always maintain sufficient financing to complete the projects and to fund any cost overruns with equity. The Debtors failed to do so.

35 Cost overruns on the three projects come to more than \$ X above the lender approved budget. The average rate of increase on each of the three projects is X %. Of those increases, approximately \$ X were construction costs that were hidden from the lenders. The amount hidden on Clover was \$ X; on Halo \$ X and on 33 Yorkville, \$ X.

36 Although the Debtors dispute the precise amounts by which the projects are overbudget and take issue with what they say is an overly conservative approach by PWC, the Debtors' numbers would not change the economic viability of the projects. By way of example, PWC says 33 Yorkville is \$ X over budget. The Debtors say PWC's number is overstated by \$ X. Even if I assume the Debtors are correct, it would mean the Yorkville Project is over budget by \$ X. All three Debtors agree that their projects are economically unviable. The only way to make the projects viable is to disclaim all of the agreements of purchase and sale for the condominium units and to sell the units anew at prices higher than those at which they were originally sold.

37 In addition to the foregoing breaches, approximately \$3.5 million in interest payments to the Receivership Applicants are overdue.

38 On February 20, 2020, the Applicants made demand on the Debtors and sent notices under [section 244 of the BIA](#) giving notice of the Receivership Applicants' intention to enforce against security.

39 The receivership application first came before me on March 2, 2020. The Debtors asked me to adjourn to enable them to respond to the allegations. At the time, Debtors' counsel suggested the allegations were questionable because the Receivership Applicants had attached the Athanasoulis statement of claim but had not attached the Cresford statement of defence. I adjourned the hearing to March 27, 2020 but indicated that the new hearing date was peremptory.

40 Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.

41 In referring here to allegations of financial irregularity I am not referring to the allegations contained in Ms. Athanasoulis' statement of claim. I have not even read the statement of claim because it is of no evidentiary worth. Instead, I rely on the affidavits filed by the Receivership Applicants and on the pre-filing reports of PWC. Those materials have evidentiary value and have not been refuted. The allegations in Ms. Athanasoulis' statement of claim form the subject of a separate proceeding. Nothing in these reasons is intended to make any evidentiary findings in

that action. The purpose of these reasons is solely to choose between a receivership or a CCAA proceeding based on the evidence before me on these applications.

C. The Prima Facie Right to a Receivership

42 A receiver may be appointed where it is just and convenient equitable to do so.

43 Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements. See for example: *RMB Australia Holdings Ltd. v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Ont. S.C.J. [Commercial List]), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]) at para. 27.

44 The relief becomes even less extraordinary when dealing with a default under a mortgage: *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. Gen. Div.) at para. 20.

45 In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:

- (a) The lenders' security is at risk of deteriorating;
- (b) There is a need to stabilize and preserve the debtors' business;
- (c) Loss of confidence in the debtors' management;
- (d) Positions and interests of other creditors.

46 All four factors apply here.

47 *Security at risk of deteriorating*: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over \$38,000,000 in construction liens have been registered since March 2. \$3.5 million of interest is overdue. The lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.

48 *The need to stabilize the business*: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.

49 *Loss of confidence in management:* Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.

50 *Position and interests of other creditors:* No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.

51 In the circumstances, the Receivership Applicants have established a *prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.

D. The Debtors' Proposal

52 The Debtors ask me to afford Clover and Halo CCAA protection and to adjourn the receivership application with respect to 33 Yorkville.

53 The Debtors propose to sell the shares in the special purpose corporations that own the Clover and Halo projects to Concord Group Developments, one of Canada's leading developers of residential condominiums. It has developed over 150 condominium towers with over 39,000 units in Canada. It currently has more than 50 development projects in various stages of planning and development in Canada, the United States and the United Kingdom.

54 The share sale to Concord would close on payment of one dollar. An additional \$38,000,000 would be paid to a Cresford related person or entity upon completion of the following:

- (a) Court approval of CCAA protection for Clover and Halo.
- (b) Court approval of the disclaimer of existing condominium unit purchase contracts for Clover and Halo
- (c) Completion of construction financing either with the existing lenders or new lenders.

55 As part of the CCAA process Concord states that it will

- (a) provide \$20,000,000 of debtor-in-possession financing at a rate of 5%. \$7,000,000 would be advanced during the first 10 days.
- (b) Negotiate the resolution of creditors' claims.

(c) Offer unit purchasers a right of first refusal to re-purchase their units at "a discount to current market value."

56 The Receivership Applicants oppose the [CCAA](#) application. They have indicated that they will not provide construction financing to Concord. They simply want their money paid and want nothing further to do with the project.

57 With respect to Yorkville, the Debtor concedes there is nothing as far as advanced there is with Clover and Halo but points to a letter of intent for the purchase of the Yorkville property.

58 Counsel for the purchaser under the letter of intent appeared on the application and produced a letter it had sent to the Debtor indicating that the letter of intent had expired on its terms but that the purchaser remains interested in pursuing a transaction. That purchaser is indifferent about whether they pursue the transaction through a receivership or a [CCAA](#) proceeding.

59 I decline to grant the adjournment with respect to the Yorkville project. I indicated on March 2 that the March 27 date would be peremptory. I have been given no reason to depart from that direction. Even if there were a [CCAA](#) application with respect to the Yorkville project similar to the one for Clover and Halo, I would nevertheless appoint a receiver manager for the same reasons that I have decided to appoint a receiver manager for Clover and Halo.

E. Receivership or CCAA?

60 In choosing between a receivership or a [CCAA](#) process, I must balance the competing interests of the various stakeholders to determine which process is more appropriate: *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781 (Ont. S.C.J. [Commercial List]) at para. 61.

61 The factors addressed in argument relevant to this exercise were as follows:

- (a) Payment of the Receivership Applicants
- (b) Reputational damage
- (c) Preservation of employment
- (d) Speed of the process
- (e) Protection of all stakeholders
- (f) Cost
- (g) Nature of the business

(a) Payment of the Receivership Applicants

62 During the adjournment hearing on March 2, 2020 there was discussion about the desirability of ending the entire dispute by having the Receivership Applicants paid out. The Debtors submit that their proposal does so and is equivalent to having "Pulled a rabbit out of the hat." Unfortunately, I cannot agree.

63 It was abundantly clear as of February 20, 2020 that the Debtors needed new financing when the Receivership Applicants demanded payment on their loans. As a practical matter it was clear before February 20 that the Debtors needed new financing. As soon as allegations of financial wrongdoing arose, the Debtors would have known that they had engaged in conduct that would likely lead a lender to terminate its relationship with them.

64 Despite the assertion that the Debtors have "pulled a rabbit out of the hat," the [CCAA](#) proposal does not address the Receivership Applicants' concerns. The Receivership Applicants want their money back. What is currently on the table is a purchase agreement with Concord that is close to completion. The Debtors and Concord say it should have been completed on March 26, 2020 but was delayed because of a number of what they describe as "technical issues". Regardless of what the issues are, there is no enforceable agreement on the table although there may be in the near future.

65 Even if that enforceable agreement materializes, it would not give the Receivership Applicants what they want. There is still no financing in place. Concord admits that it needs construction financing from either the existing lenders or new lenders. The Receivership Applicants will not provide financing.

66 The Debtors point to a comfort letter from HSBC dated March 25, 2020 as evidence that Concord can obtain financing without difficulty. A closer read of that letter provides little comfort. On the one hand the letter states:

We wish to confirm that Concord possesses significant capital, liquidity and credit lines, and is considered highly credit worthy, with consistent access to debt capital markets in order to facilitate large asset acquisitions and development projects.

67 As the applicants point out however, Concord is not prepared to make any of its "significant capital liquidity and credit lines" available to pay out the Receivership Applicants. Concord is not the buyer of the two projects. The existing sole purpose entities remain the owner of the projects. Concord is simply the new shareholder. It assumes no other liabilities.

68 Finally, the HSBC letter goes on to state:

In light of current market and economic conditions surrounding the COVID-19 health crisis, we are unable to comment specifically on financing aspects regarding the subject development projects at this time.

69 From the perspective of the Receivership Applicants, this is the very problem. Far from pulling a rabbit out of the hat, the Debtors proposal would keep the Receivership Applicants in projects that, at least on the face of the HSBC letter, are currently not capable of obtaining new financing. In those circumstances one can readily expect that any new financing may well be conditional on the Receivership Applicants taking a discount on their debt or being forced to continue financing to avoid such a discount. Concord has not undertaken that the Receivership Applicants will be paid out without discount in any new financing.

70 I intend no criticism of Concord by these comments. I would not expect them to make their own capital or liquidity available to the project. The whole point of financing through project specific entities is to insulate the assets of a larger group from the risks of a particular project. It is readily understandable and commercially reasonable that Concord would pursue that objective.

71 At the same time, however, the Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

(b) Reputational Damage

72 The Debtors submit that a [CCAA](#) process is preferable to a receivership because it would cause less reputational damage to Cresford. In the circumstances of this case, that is irrelevant. Any reputational damage to Cresford is of its own making.

73 One may well have sympathy for a debtor who is caught up in a cycle of increasing construction costs in Toronto's heated construction market. One has less sympathy for a debtor who hides those costs from lenders instead of being transparent and searching for a solution. One has even less sympathy for a debtor who from the outset of the relationship has misled a lender about the nature of the debtor's equity injection and one who uses \$10.6 million of the lender's money to fund the interest on the debtor's equity injection. The Receivership Applicants lent money for construction costs. They did not lend money to finance the Debtor's equity injection.

74 This is a situation where a debtor has acted in a manner which charitably would be described as lacking in transparency from the inception of its relationship with the creditor. The Debtors took a series of proactive steps to hide information from a creditor over a prolonged period.

75 In those circumstances any reputational damage is of the Debtors' own making. The lenders should not now be required to incur even more risk in order to protect the Debtors' reputation.

76 The Debtors note that there are many examples of CCAA applications involving Debtors who have engaged in wrongdoing such as Hollinger, YBM, Phillips Services and Enron. I am in no way suggesting that the presence of wrongdoing within a corporation automatically precludes a CCAA application. In many cases it is the presence of wrongdoing that demands and justifies a CCAA application. Whether wrongdoing affects the decision to afford CCAA protection depends on balancing the circumstances before the court in each case.

(c) Preservation of Employment

77 The Debtors submit that a CCAA process will preserve jobs. They note that Cresford employs approximately 75 people. While CCAA proceedings often preserve jobs, the evidence before me does not support that assertion in this case.

78 There is no evidence before me about how many of Cresford's 75 employees are devoted exclusively to the projects in issue nor is there any evidence about how many, if any, of those employees will lose their jobs as a result of a receivership. The CCAA proposal is one in which two of the three projects will be owned by Concord. Concord presumably has its own employees who would run the projects. As a result, any job losses within Cresford as a result of a receivership would likely also follow as a result of any sale in the CCAA proceeding. If, on the other hand, that is not the case because there is an arrangement with Concord to continue to use Cresford management, that would only exacerbate the problem from the perspective of the Receivership Applicants. It would mean that their debt remains in place for the foreseeable future and that the project would continue to be administered by the very people who engaged in the financial wrongdoing that created the problem in the first place.

79 The situation with Yorkville is similar. While the Yorkville project is not being acquired by Concord, there are efforts underway to sell it as well.

80 The vast majority of the jobs associated with the three projects are construction jobs. Construction personnel are not employed by the Debtors or Cresford but are employed by arms-length contractors that the Debtors have retained to build the projects. Construction contractors will be needed to complete the projects whether a new owner acquires through a receivership or through a CCAA proceeding. At the moment, construction on the projects is halted in any event because of the Covid 19 emergency and lack of financing.

81 As a result of the foregoing, I do not see any marked difference between a receivership and a CCAA proceeding with respect to either immediate or long term employment.

(d) Speed of the Process

82 The Debtors submit that the CCAA is faster than a receivership.

83 During argument, the Debtor's and Concord's counsel described the steps in a CCAA proceeding. They struck me as fairly long and involved.

84 In all likelihood, the first step in a CCAA proceeding would be to disclaim the sales of condominium units and to re-sell the units. This is the case because any construction financier would probably want to see a certain percentage of units sold before committing to financing.

85 It will also require a process to negotiate with over 1800 purchasers (887 in the Clover and Halo projects) for new agreements or a process to sell the units to new purchasers. Each of the disclaimer and the approval of new agreements of purchase and sale will require a hearing and a court order. Even if there are no appeals from such orders, that process will take time.

86 If Cresford and Concord can make arrangements to address the interests of secured creditors more quickly than the receivership takes, it can apply to the court to end the receivership.

(e) Protection of all Stakeholders

87 The Debtors submit that their CCAA application will protect all stakeholders. The only stakeholder that I see being protected in the CCAA proceeding is Cresford as an equity stakeholder. It will receive \$38,000,000 in a transaction beyond the scrutiny of the court. The condominium purchasers will lose their contracts. The employees will be replaced by Concord employees. The construction employees will not have jobs until new financing has been arranged. The creditors will be left to negotiate the best outcome they can in a CCAA proceeding. The only difference is that in a receivership Cresford will not necessarily receive \$38,000,000 in cash.

88 There has been no explanation in the materials before me to justify the receipt of \$38,000,000 in cash by an equity holder when creditors like unitholders are certain to have to compromise their rights.

89 In my view, it would be preferable to have a receiver acting as an officer of the court who can act without being hamstrung by closing a transaction that favours equity over creditors. This is all the more so because a receivership does not preclude the Concord transaction provided the Debtors and Concord can deal with secured creditors in a manner that is satisfactory to them or is at a minimum reasonable in the eyes of the court. If such a transaction is available, the Debtors and Concord can come before me at any time to present it. That transaction must however be concrete, not aspirational.

90 Although the Debtors and Concord submit that their [CCAA](#) proposal would, after the agreements of purchase and sale have been disclaimed, allow former purchasers the opportunity to repurchase the units at a discount to current market value, that is a fairly vague commitment. Both the concepts of "discount" and of "current market value" are subject to considerable elasticity. They are not sufficiently concrete to lead me to prefer a [CCAA](#) proceeding over a receivership.

(f) Costs

91 The Debtors submit that a [CCAA](#) proceeding will be less expensive than a receivership because Concord can manage the project less expensively than can PWC. PWC will incur significant fees that will prime other interests. While not stated explicitly, the implicit suggestion is that Concord will not charge fees. There is, however, a significant risk that Concord will charge internal management fees. There is no undertaking from Concord not to do so. Charging management and administration fees is a common way for developers to ensure that they get some of their expenses repaid early on. I accept that even if Concord charges fees, they are likely to be less than PWC's fees. Regardless of whether Concord does or does not charge fees, the risk of PWC's fees provides additional incentive to Cresford and Concord to present a transaction that sees secured creditors paid out quickly.

92 The costs of financing a receivership or a [CCAA](#) proceeding are similar. Concord has offered a DIP loan of \$20,000,000 at 5% interest. The Receivership Applicants have offered a loan of \$29,000,000 at 5% interest.

93 [CCAA](#) proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does. Both the proposed monitor, Ernst & Young and the proposed receiver, PWC and their counsel can be expected to have similar rates. In addition, PWC's work to date is fully recoverable pursuant to the security documents of the Receivership Applicants. In its work to date, PWC has acquired significant knowledge of the affairs of the Debtors, the advantage of which would be lost in a [CCAA](#) proceeding.

94 Even if I accept that a [CCAA](#) proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements, the conduct of the Debtors, a [CCAA](#) transaction that would put \$38,000,000 into the hands of equity holders before giving anything to creditors and the absence of other compelling stakeholder interests.

(g) Nature of the Business

95 During the hearing before me there was considerable debate about the degree to which a [CCAA](#) proceeding was even available for a single-purpose land development company. There was

some suggestion that there was a *prima facie* rule or inclination on the part of courts to the effect that CCAA proceedings were not appropriate for such businesses.

96 In my view, the case law does not demonstrate a rule or an inclination one way or the other. Rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a CCAA proceeding is appropriate.

97 More particularly, the cases that are sometimes used to suggest that courts are inclined against using CCAA proceedings for single-purpose land development companies do not turn on the issue of land development. Rather, they turn on the nature of the security and the position of security holders with respect to a CCAA proceeding. Even those factors, however, are not determinative. Rather, they are factors to weigh when determining the best avenue to pursue.

98 In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 (B.C. C.A.) the British Columbia Court of Appeal stated at paragraph 36:

Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

99 Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

100 The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61; *Dondeb Inc., Re*, 2012 ONSC 6087 (Ont. S.C.J. [Commercial List]), at para.16; *Octagon Properties Group Ltd., Re*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Alta. Q.B.), at para. 17.

101 The factors that the British Columbia Court of Appeal articulated in *Cliffs Over Maple Bay* are apposite here. The Receivership Applicants have a blocking position to any CCAA plan. They have expressed the view that they have no intention of compromising their debt within a CCAA proceeding. Their priorities are straightforward and there is little incentive on them to compromise.

They believe they will be in a better position by exerting their receivership remedies than by letting the Debtors remain in control and trying to refinance.

102 As Justice Kent pointed out in *Octagon*, as para 17,

...if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

103 Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

104 Here, the Receivership Applicants have indicated that they want nothing to do with the projects. They have a reasonable basis for coming to that view. I underscore, however, that the nature of the security and the secured creditor's views are not determinative. It may well be appropriate for a court to approve CCAA protection in the face of a first ranking secured creditor who expresses no desire to negotiate a compromise depending on the circumstances.

105 In the case at hand where the breakdown in the relationship is caused by persistent and deliberate wrongdoing by the debtor, where there are no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding and where there are no material employment concerns, there is no reason to restrain the exercise of the Receivership Applicants' contractual rights.

106 The Debtors submit that cases in which receiverships have been preferred over CCAA proceedings in the context of land development companies are distinguishable.

107 By way of example, the Debtors note that *Romspen* involved only one piece of development land, no operating business, no significant progress on development like there is with Clover and Halo and few employees. In addition, they point out that in *Romspen* there was no plan, no purchaser and no financing. Instead, the existing debtor just wanted to carry on.

108 In my view that is not materially different from what we have here. There is no purchaser of the property and there is no financing. The same single purpose entity that owns the project now will continue to own the project. While the shareholder of the project specific entity might be different, the new shareholder does not have financing. Nor does the new shareholder have a plan. Instead, they have the conceptual outline of a plan that they would like to pursue. As noted earlier, I am not persuaded by the issue of employees for the reasons set out earlier. Similarly, the state of

development is moot because construction is frozen pending financing and the resolution of the Covid 19 emergency. Approval of the CCAA application will not allow construction to resume.

109 More importantly, while different cases may help in identifying the range of factors to consider when deciding whether to afford CCAA protection, the actual conclusion of courts in different cases is of significantly less assistance unless those cases are pretty much identical to the one at hand. This is because factors assume different degrees of importance depending on the circumstances of each case.

110 The Debtors also point to *Re 2607380 Ontario Inc.*, a recent unreported endorsement of Justice Conway dated March 6, 2020. The Debtors submit that 260 is relevant because it deals with a development project in which secured creditors preferred a receivership to a CCAA proceeding but one in which the court nevertheless granted CCAA protection. In addition, the Debtors say the case demonstrates that concerns about the debtor remaining in possession, can be addressed through enhanced monitor's powers including prohibitions on any expenditures above a certain threshold without the monitor's approval.

111 In my view *Re 2607380 Ontario Inc.* does not assist the Debtors. In that case Conway J recognized that the choice between a receivership and a CCAA application is discretionary and requires the judge to balance competing interests of the various stakeholders to determine which process is more appropriate. In *Re 2607380 Ontario Inc.*, two of the three first ranking secured creditors supported the CCAA procedure. Only the third objected. Moreover, the applicant in that case had a concrete plan with specific timelines and development budget. That is not the case before me.

112 With respect to the ability to give the monitor enhanced powers, that too depends on the circumstances of the case. If one is dealing with a relatively small operation, giving the monitor enhanced powers to approve low threshold expenditures may be appropriate. Where one is dealing with a large operation with many expenditures and there are significant concerns about how expenditures have been recorded and hidden in the past, enhanced monitor's powers will afford limited protection and be very expensive.

113 For the reasons already set out above, the circumstances in this case render a receivership preferable to a CCAA procedure.

114 For the reasons set out above an order will go appointing PWC as a receiver and manager of each of the Clover Halo and Yorkville projects.

Schedule A — COUNSEL SLIP

David Bish, Adam Slavens, Jeremy Opolsky, for the Applicants, BCIMC Construction Fund Corporation and BCIMC Specialty Fund Corporation

Alan Mersky, Virginie Gauthier, Peter Choi, for the Applicants, Otéra Capital Inc.

Steven L. Graff, Ian Aversa, Jeremy Nemers for the Respondents

Geoff Hall, Heather Meredith, and Alex Steele for PricewaterhouseCoopers Inc.

Sean Zweig and Danish Afroz for KingSett Mortgage Corporation

Jonathan Rosenstein for Aviva Insurance Company of Canada and Westmount Guarantee Services Inc.

Haddon Murray for Tarion Warranty Corporation

David Gruber for Concord Group

Christopher J. Henderson and Diane Zimmer for City of Toronto and Toronto Parking Authority

Shara N. Roy, Aaron Grossman and Sahara Tailibi for 2504670 Ontario Inc., Pine Point International Inc., 2638006 Ontario Inc., Linda Yee Han Chan, Eric Yin Win Chan, 8451761 Canada Inc. and 2595683 Ontario Inc.

Shara N. Roy, Aaron Grossman and Sahara Tailibi for Homelife New World Realty Inc., Paul Lam, Homelife Landmark Realty Inc., TradeWorld Realty Inc., Landpower Real Estate Ltd., Master's Choice Realty Inc., formerly known as Re/Max Master's Choice Realty Inc. and Michael Chen

Brandon Mattalo for certain limited partnership interests

Mark Dunn and Carlie Fox for Maria AthAthanasoulis

Bryan Hanna for 2379646 Ontario Inc.

Brandon Mattale for certain limited partnership investors

Matthew Gottlieb for KingSett Real Estate Growth LP 4

George Benchetrit for Ernst & Young as proposed Monitor

Maria Konyukhova for PJD Developments

DJ Miller for investors in YSL

Application granted.

TAB 7

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

**Confederation Life Insurance Company, Plaintiff
v. Double Y Holdings Inc. et al., Defendants**

Farley J.

Judgment: September 3, 1991

Heard: August 29, 1991

Heard: August 30, 1991

Docket: 91-CQ-72

Counsel: None given.

Farley J.:

- 1 Transferred to Commercial List.
- 2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.
- 3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.
- 4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.
- 5 CT fully advanced its construction mortgage financing and is presently owed about \$114 million. CL is owed about \$100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears

clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about \$2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some \$3.6 million in arrears. Liens (\$3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some \$250 million (including the plaintiffs' mortgages, claim by ANZ Bank \$15 million, Church \$1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for \$56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another \$20 million of which over \$18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present \$950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about \$5 million of modifications will be required. In addition, it is estimated that \$10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a \$20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.

Appointment to Enforce Rights

In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in

arrears. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd. (1985), 3 C.P.C. (2d) 13* (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas (1985), 57 C.B.R. (N.S.) 186* (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre (1989), 75 C.B.R. (N.S.) 74* (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum (1988), 71 C.B.R. (N.S.) 185* (Ont. H.C.) at p.188:

One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note: *These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

TAB 8

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

**CCM Master Qualified Fund, Ltd. (Applicant) and
blutip Power Technologies Ltd. (Respondent)**

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

D.M. Brown J.:

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately \$3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: \$2.6 million and December 29, 2011: \$800,000), (ii) \$65,000 advanced last month pursuant to a Receiver's Certificate, and (iii)

\$47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.¹ Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,² BIA proposals,³ and CCAA proceedings.⁴

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.⁵

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of \$100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of \$100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately

\$3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be \$103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of \$75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.⁶

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.⁷

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

[49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:

In my view, in the absence of the court granting the requested super priority and protection, the objectives of the *CCAA* would be frustrated. It is not reasonable to expect

that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.

...

[51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.⁸

22 In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

Footnotes

- 1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).
- 2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.
- 3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.
- 4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (C.S. Que.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).
- 5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.
- 6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.
- 7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.
- 8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

TAB 9

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

THE HONOURABLE
JUSTICE WILTON-SIEGEL

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WEDNESDAY, THE 9TH
DAY OF JUNE, 2021

BETWEEN:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

SUNRISE ACQUISITIONS (HWY 7) INC.

Respondent

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

**ORDER
(appointing Receiver)**

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties of Sunrise Acquisitions (Hwy 7) Inc. (the "**Debtor**") acquired for, or used in relation to a business carried on by the Debtor and the proceeds therefrom, including, without limitation, the real property legally described within PINs 02985-0591 (LT), 02985-0595 (LT), 02985-0596 (LT), 02985-0597 (LT), 02985-0598 (LT), and 29951-0001 (LT) (the "**Real Property**") and, collectively with the Debtor's other assets, undertakings and

properties, "Property") was heard this day by Zoom videoconference at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Daniel Pollack sworn May 28, 2021 and the Exhibits thereto, the Supplemental Affidavit of Daniel Pollack sworn June 1, 2021 and the Exhibit thereto, and the Affidavit of Muzammil Kodwavi sworn June 9, 2021 and the Exhibit thereto, and on hearing the submissions of counsel for the Applicant and such other parties listed on the Participant Information Form, no one appearing for any other party although duly served as appears from the Affidavits of Service of Benjamin Goodis sworn May 28, 2021 and June 1, 2021, and the Affidavit of Service of Norman Ng sworn May 28, 2021, and on reading the Consent of KSV to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, KSV is hereby appointed Receiver, without security, of the Property.

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:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) subject to paragraph 4 of this Order, to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;
- (d) to engage consultants, appraisers, agents, real estate brokers, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) subject to paragraph 4 of this Order, to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and, subject to paragraph 4 of this Order, to exercise all remedies of the Debtor in collecting such monies; including, without limitation, to enforce any security held by the Debtor;

- (g) subject to paragraph 4 of this Order, to settle, extend or compromise any indebtedness owing to the Debtor;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;
- (i) subject to paragraph 4 of this Order, to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (j) subject to paragraph 4 of this Order, to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) subject to paragraph 4 of this Order, 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 transactions not exceeding \$250,000, provided that the aggregate consideration for all such transactions does not exceed \$500,000; 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* and notice under section 31 of the Ontario *Mortgages Act* shall not be required;

- (l) subject to paragraph 4 of this Order, 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;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;
- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (q) subject to paragraph 4 of this Order, to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. THIS COURT ORDERS that the Receiver shall not exercise the powers granted to it in sub-paragraphs 3(c), 3(e), 3(f), 3(g), 3(i), 3(j), 3(k), 3(l), and 3(q) until further Order of the Court, except as may be reasonably necessary to preserve and protect the Property or to examine and investigate the business, contracts, and affairs of the Debtor or relating to the Property.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

5. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

6. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that

nothing in this paragraph 6 or in paragraph 7 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

7. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

8. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

9. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with

leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that

the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to

report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "Protocol") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: <https://www.ksyadvisory.com/insolvency-cases/case/sunrise-acquisitions>.

26. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

27. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

29. 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.

30. 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.

31. THIS COURT ORDERS that the Applicant shall have its costs of this 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 net realizations from the Property with such priority and at such time as this Court may determine.

32. 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.

W. Khan - L.M.J.

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that KSV Restructuring Inc., the receiver and manager (the "Receiver") of the assets, undertakings and properties of Sunrise Acquisitions (Hwy 7) Inc. (the "Debtor") acquired for, or used in relation to a business carried on by the Debtor and the proceeds therefrom, including, without limitation, the real property legally described within PINs 02985-0591 (LT), 02985-0595 (LT), 02985-0596 (LT), 02985-0597 (LT), 02985-0598 (LT), and 29951-0001 (LT) (the "Real Property" and, collectively with the Debtor's other assets, undertakings and properties, "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ____ day of _____, 2021 (the "Order") made in an action having Court file number -CL- _____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$ _____, being part of the total principal sum of \$ _____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [~~daily~~]**monthly not in advance on the ____ day of each month**] after the date hereof at a notional rate per annum equal to the rate of ____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the

Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____, day of _____, 2021.

KSV Restructuring Inc., solely in its capacity as
Receiver of the Property, and not in its personal
capacity

Per: _____

Name:
Title:

KINGSETT MORTGAGE CORPORATION
Applicant

and

SUNRISE ACQUISITIONS (HWY 7) INC.
Respondent

Court File No. CV-21-00863051-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

ORDER (APPOINTING RECEIVER)

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Lawyers for the Applicant

TAB 10

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE) TUESDAY, THE 9th
)
JUSTICE PENNY) DAY OF NOVEMBER, 2021
)

B E T W E E N :

**PS HOLDINGS 1 LLC, PS HOLDINGS 2 LLC
and PS HOLDINGS 3 LLC**

Applicants

- and -

**2738283 ONTARIO INC., 2738284 ONTARIO INC.
and 2738285 ONTARIO INC.**

Respondents

**IN THE MATTER OF THE RECEIVERSHIP OF 2738283 ONTARIO INC.,
2738284 ONTARIO INC. and 2738285 ONTARIO INC.**

**AND IN THE MATTER OF AN APPLICATION UNDER section 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, RSO 1990, c C.43, as amended**

**ORDER
(Appointing Receiver)**

THIS APPLICATION made by the applicants, PS Holdings 1 LLC, PS Holdings 2 LLC and PS Holdings 3 LLC (collectively, the “**Applicants**”), for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing MNP



Ltd. (“**MNP**”) as receiver (in such capacity, the “**Receiver**”) without security, of the real and personal property, rights and claims of the respondents, 2738283 Ontario Inc., 2738284 Ontario Inc. and 2738285 Ontario Inc. (the “**Debtors**”) described in Schedule “A” to the Receivership Order, including all proceeds thereof (collectively, the “**Property**”), was heard this day by videoconference due to the COVID-19 pandemic.

ON READING the affidavit of Paul Sadlon Jr. sworn October 18, 2021 and the Exhibits thereto and on hearing the submissions of counsel for the Applicants, the Debtors, SvN Architects + Planners Inc. and the proposed Receiver, and John DaRe appearing for himself, no one else appearing although duly served as appears from the affidavits of service and other proof of service, filed, and on reading the consent of MNP to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the notice of application and the application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, MNP is hereby appointed Receiver, without security, of the Property.

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:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business or cease to perform any contracts of the Debtors;
- (d) to engage consultants, appraisers, agents, listing agents and brokers, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by any of the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (j) to market any or all of the Property, including by:
 - (i) obtaining three (3) listing proposals from listing agents or brokers experienced in selling property similar to the Property in the same market as the Property;
 - (ii) engaging the listing agent or broker that the Receiver in its discretion deems has submitted the best listing proposal to advertise and solicit offers in respect of the Property or any part or parts thereof (the "**Realtor**");

- (iii) entering into a listing agreement with the Realtor;
 - (iv) establishing in consultation with the Realtor such terms and conditions of sale as the Receiver in its discretion may deem appropriate, including listing price, marketing strategy and deadline for offers, if appropriate;
- (k) 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 \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$100,000; 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;
- (l) 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;
 - (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the

receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and
- (r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other

persons acting on their instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being “**Persons**” and each being a “**Person**”) shall forthwith advise the Receiver of the existence of any Property in such Person’s possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver’s request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the “**Records**”) in that Person’s possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto

paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a “**Proceeding**”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any “eligible financial contract” as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on

any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

12. THIS COURT ORDERS that, without limiting the generality of the foregoing, no insurer providing insurance to the Debtors or their directors or officers shall terminate or fail to renew such insurance on the existing terms thereof provided that such insurer is paid any premiums, as would be paid in the normal course, in connection with the continuation or renewal of such insurance at current prices, subject to reasonable annual increases in the ordinary course with respect to such premiums.

RECEIVER TO HOLD FUNDS

13. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the “**Post Receivership Accounts**”) and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. THIS COURT ORDERS that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors’ behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a “**Sale**”). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, “**Possession**”) of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations

thereunder (the “**Environmental Legislation**”), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver’s duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER’S LIABILITY

17. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER’S ACCOUNTS

18. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the “**Receiver’s Charge**”) on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver’s Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the “**Receiver’s Borrowings Charge**”) as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver’s Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "B" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at '<https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>') shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: 'www.mnpdebt.ca/2738283-ontario-inc-et-al'.

26. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

27. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any of the Debtors.

29. 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.

30. 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.

31. THIS COURT ORDERS that the Applicant shall have its costs of this 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 full indemnity basis to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.

32. 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.

33. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Toronto time on the date of this Order, and this Order is enforceable without the need for entry and filing.



A handwritten signature in blue ink, appearing to read 'Peng J.', is written above a horizontal line.

SCHEDULE "A"

DESCRIPTION OF PROPERTY

"Property" means all of the present and future legal and beneficial right, title, estate and interest in and to:

- (a) the real property municipally known as 320 Mapleview Drive West, Barrie, Ontario and legally described as PT LT 4 CON 12 INNISFIL AS IN RO1071059 EXCEPT PT 62 PL 51R24730, PTS 1 TO 5 INCL. PL 51R31988 & PTS 2 TO 4 INCL. PL 51R34959, S/T RO1272147; BARRIE, being all of PIN 58730-0303 (LT);
- (b) the real property municipally known as 692 Essa Road, Barrie, Ontario and legally described as CONSOLIDATION OF VARIOUS PROPERTIES PT LT 3 CON 12 INNISFIL BEING PT 1 PL 51R32435 & PT LTS 3 & 4 CON 12 INNISFIL BEING PTS 1 & 2 PL 51R25124, EXCEPT PT 1 PL 51R33177, S/T RO990763; INNISFIL, being all of PIN 58730-0304 (LT);
- (c) the real property municipally known as 664 Essa Road, Barrie, Ontario and legally described as PT LT 4 CON 12 INNISFIL AS IN RO1278789 EXCEPT PT 6 PL 51R31988; BARRIE, being all of PIN 58730-0240 (LT); and
- (d) the real property municipally known as 674 Essa Road, Barrie, Ontario and legally described as PT LT 4 CON 12 INNISFIL AS IN RO1244213 EXCEPT PT 61 51R24730 AND PT 251R33177; S/T RO1272150; BARRIE, being all of PIN 58730-0297 (LT),

together with all buildings, structures, fixtures and improvements of any nature or kind now or hereafter located in, on or under such lands, and all equipment, leases, rents and all other appurtenances thereto, and including all interests, appurtenant or otherwise, held now or in the future by the Debtors in lands adjacent to or used in connection with such lands and premises or in which the Debtors now or in the future have any interest or to which the Debtors are now or may in the future become entitled.

Without limiting the foregoing, “**Property**” also includes all of the following real and personal property, rights and claims and in each case, both present and after acquired: (i) all material agreements, permits and approvals relating to such Property or its development, management or operation; (ii) all expropriation proceeds relating to such Property; (iii) all insurance proceeds and any unearned insurance premiums relating to such Property; (iv) all surveys, drawings, designs, reports, studies, environmental site assessments, tests, plans and specifications relating to such Property; and (v) all renewals, substitutions, improvements, accessions, attachments, additions, replacements and proceeds to, of or from each of the foregoing components of the Property or any part thereof and all conversions of such Property or the security constituted thereby.

SCHEDULE "B"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that MNP, the receiver (the "**Receiver**") of the real and personal property, rights and claims of the respondents, 2738283 Ontario Inc., 2738284 Ontario Inc. and 2738285 Ontario Inc. (the "**Debtors**") described in Schedule "A" to this Receivership Order and including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the ___ day of November 2021 (the "**Order**") made in an application having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**][**monthly not in advance on the _____ day of each month**] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the

charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

MNP, solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

PS HOLDINGS 1 LLC et al.

-and- 2738283 ONTARIO INC. et al.
Applicant

Respondents
Court File No. CV-21-00670723-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

**Proceeding commenced at
Toronto**

ORDER
(Appointing Receiver)

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Lawyers for the applicants

**IN THE MATTER OF AN 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**

**KINGSETT MORTGAGE
CORPORATION**

and

30 ROE INVESTMENTS CORP.

Applicant

Respondent

Court File No.: CV-22-00674810-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceedings commenced in Toronto

**BOOK OF AUTHORITIES OF THE
APPLICANT
(Returnable January 17, 2022)**

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