

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**WEICHANG YANG**

Applicant

and

**BESCO INTERNATIONAL INVESTMENT CO., LTD.**

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, as amended, and section 101 of the *Courts of Justice Act*, RSO 1990, c C.43, as amended

**RESPONDING FACTUM OF THE RESPONDENT,  
BESCO INTERNATIONAL INVESTMENT CO., LTD.**

February 7, 2019

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**PART I - OVERVIEW**

1. The Applicant, Weichang Yang (“Yang”) seeks an Order appointing a receiver over the property of the Respondent, Besco International Investment Co. Ltd. (“Besco”) at 414 Croft Street East, Port Hope Ontario (“Port Hope Property”), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (“BIA”), and section 101 of the *Courts of Justice Act*.
2. Besco submits that, in all of the circumstances of this case, it is not just and convenient to appoint a court-appointed receiver over the Port Hope Property. Besco is in the process of completing a financing transaction with a lender to secure sufficient financing to repay Yang. The completion of the transaction is taking longer than the lender had anticipated, but it continues to move forward. As soon as the financing transaction closes, there will be funds available to repay

Yang, and Yang has undertaken to discharge his security against the Port Hope Property upon repayment. Appointing a receiver will impair the completion of the financing and will cause Besco to incur unnecessary costs.

3. In the alternative, if the Court were inclined to appoint a receiver, Besco submits that the effectiveness of any order appointing a receiver should be postponed for 30 days to permit the financing by the lender to be completed. This way the appointment of the receiver will not impair the completion of the financing or Besco to incur unnecessary costs in the short term, and it will protect Yang's interests in the event the financing cannot be completed and a receiver will be appointed without further delay.

## **PART II - SUMMARY OF FACTS**

### **Yang Over-Encumbers Besco's Property**

4. The debt in question arises from money lent to the principal of Besco, Hui Geng Sun ("Sun"), in June 2017 by Yang of RMB in China to be repaid in Canadian dollars. The amount to be repaid was \$5,000,000 Canadian. At the time of the loan, Sun agreed to pledge his assets in China and Canada if the loan was not fully repaid on July 20, 2017.<sup>1</sup> The funds were never borrowed by Besco.

5. On June 20, 2017, Sun repaid \$1.2 million of the loan and by July 20, 2017, an additional \$300,000 was paid in interest and principal, leaving only \$3,711,300 million owing on the loan.<sup>2</sup>

6. The Loan Agreement was not entered into until July 20, 2017. Under the Loan Agreement, Besco provides a guarantee of the amounts Sun owes to Yang. Pursuant to paragraph 2.5 of the

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<sup>1</sup> "Description of Loan and Promissory Note" (English translation), Application Record, Tab 2(C), p. 83.

<sup>2</sup> Loan Schedule, Application Record, Tab 2(A), p. 74.

Loan Agreement, the Guarantors only guarantee to the Yang payment and performance in full of the “Indebtedness” under the Loan Agreement. The Indebtedness is defined under the Loan Agreement as present and future obligations, indebtedness, and liabilities under the Loan Agreement. As at July 20, 2017, the Indebtedness was \$3,711,300 plus interest of 15% per annum and costs.<sup>3</sup>

7. Despite that only \$3,711,300 was owing, the Charge registered as ND153386 on July 24, 2017 (“July 24, 2017 Charge”) against the Port Hope Property as security for the Indebtedness under the Loan Agreement has a Principal amount of \$5,000,000 with an interest rate of 36.5% per annum.<sup>4</sup> The terms of the Charge are inconsistent with and contrary to the Loan Agreement and the Guarantee provided by Besco to guarantee the Indebtedness of \$3,711,300.<sup>5</sup> The July 24, 2017 Charge over-encumbers the Port Hope Property by \$1,288,700.00.

8. Sun executed the Loan Agreement, the Guarantee by Besco, and related documents at the offices of Dentons Canada LLP. Sun’s first language is Mandarin and he speaks very little English. He relied upon Wai Shao at Dentons to explain the documents to him. Wai Shao did not explain the documents to Sun.<sup>6</sup> Sun does not recall whether he saw the July 24, 2017 Charge at the time he signed the Guarantee or whether it was attached to the document that he signed at page 226 of the Application Record at the time it was signed. Had he seen the Charge with \$5,000,000 at an interest rate of 36.5% he would not have approved it. The Indebtedness was only \$3,200,000 at the interest rate of 15%.<sup>7</sup>

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<sup>3</sup> Loan Agreement, Application Record, Tab (D), p. 89-90.

<sup>4</sup> Charge registered as ND153386 on July 24, 2017, Application Record, Tab 2(H), p. 114-115.

<sup>5</sup> Guarantee of Postponement of Claim, Application Record, Tab 2E, p. 102-105.

<sup>6</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, para. 15-16.

<sup>7</sup> Ibid, paras. 19-22.

9. Pursuant to the Loan Agreement, Sun paid a further \$500,000 on July 26, 2017 to reduce the outstanding principle of the loan to \$3,211,300.<sup>8</sup> In the period between July 2017 and April 2018, Sun continued to make monthly interest payments to Yang of \$40,140.00.<sup>9</sup> The amount of the outstanding Indebtedness remained at \$3,211,300 throughout this period, and no further payment against the principle was due and owing during this period.<sup>10</sup>

10. On March 14, 2018, Besco received a demand letter from counsel for Yang demanding the repayment of Sun's Indebtedness to Yang.<sup>11</sup> In the period between March and May 2018, Sun worked to find new financing. Sun advised Yang that he was trying to get refinancing using Besco's assets in order to repay Yang. In May 2018, Sun received documents for a Forbearance Agreement.<sup>12</sup>

11. On May 17, 2018, Sun entered into the Forbearance Agreement with Yang. Besco was party to the Forbearance Agreement as a Guarantor. The Forbearance Agreement is undated.<sup>13</sup> The Indebtedness under the Forbearance Agreement is \$3,211,300 plus accrued interest of \$8,028.<sup>14</sup>

12. Despite only \$3,211,300 plus accrued interest owing, a second Charge was registered against the Port Hope Property on May 28, 2018 as security for the \$3,211,300 in the amount of \$5,000,000 plus interest of 36.5%. Again, contrary to the terms of the Indebtedness owing under

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<sup>8</sup> Loan Schedule, Application Record, Tab 2(A), p. 74.

<sup>9</sup> Loan Schedule, Application Record, Tab 2(A), p. 74.

<sup>10</sup> Loan Agreement, Application Record, Tab (D), p. 89-90.

<sup>11</sup> Affidavit of Hui Geng Sun Sworn October 2, 2018 ("October 2018 Sun Affidavit"), Responding Application Record, Tab 1, para. 23.

<sup>12</sup> Ibid, paras. 24-27.

<sup>13</sup> Forbearance Agreement, Application Record, Tab 2(P), p. 249-261.

<sup>14</sup> Ibid, p. 250.

the Forbearance Agreement.<sup>15</sup> This new May 28, 2018 Charge was registered against the Port Hope Property without discharging the original July 24, 2017 Charge of \$5,000,000.<sup>16</sup> As of May 28, 2018, Yang had over-encumbered the Port Hope Property by \$6,788,700 more than the amount of Indebtedness owing to Yang.

13. Sun was not aware that a second Charge was registered in addition to the July 24, 2017 Charge, resulting in Yang having registered a total charge of \$10,000,000 against the Port Hope Property as security for Indebtedness of \$3,211,300. Had Sun understood this, he would have objected to the May 28, 2018 Charge being registered against the Port Hope Property.<sup>17</sup>

14. As part of the Forbearance Agreement, Yang's counsel had prepared a Consent to the Appointment of a Receiver pursuant to section 243(1) of the BIA. Sun did not understand or appreciate before signing the Consent that the Guarantor Security secured by the security documents listed in Schedule B to the Consent included two separate \$5,000,000 Charges on the Port Hope Property in favour of Yang for a total of \$10,000,000. Had Sun understood or appreciated this, he would not have executed the Consent to the Appointment of a Receiver.<sup>18</sup>

### **Besco's Attempts to Secure Financing from May 2018 through October 2018**

15. Although Sun has other companies with significant assets including a valuable oilsands property and purchase orders to build homes out of the Port Hope Property, these assets are not

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<sup>15</sup> Charge ND166861 registered May 28, 2018 ("May 28, 2018 Charge"), Application Record, Tab 2(Q) and the Port Hope Property PIN, Affidavit of Hui Geng Sun sworn August 20, 2018 ("August 2018 Affidavit of Sun"), Responding Application Record, Tab 2(A).

<sup>16</sup> Port Hope Property PIN, Responding Application Record, Tab 2(A).

<sup>17</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, paras. 30-31.

<sup>18</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, para. 32.

liquid or easily monetized. Therefore, Sun had to find alternative financing arrangements to repay Yang.<sup>19</sup>

16. The registration of the May 28, 2018 Charge and the over encumbrance of the Port Hope Property, interfered with Sun and Besco's ability to obtain financing to repay the loan to Yang. Sun's efforts to obtain financing for Besco from a Hong Kong company ended because of the impediment of the two \$5,000,000 Charges registered by Yang against the Port Hope Property.<sup>20</sup>

17. Besco then tried other options to secure funds to repay Yang. The manufacturing facility in Port Hope owned by Besco manufactures houses, windows, cabinets and flooring. Besco tried to secure a loan from a customer, Improve Inc., for \$5,000,000 for a joint venture which would be secured against the Port Hope Property. Part of the \$5,000,000 would be used to repay Yang. However, the fact that Yang had registered two Charges for \$5,000,000 each (over encumbering the Port Hope Property by \$6,788,700 more than the Indebtedness) complicated the negotiations with Improve Inc.<sup>21</sup>

18. Despite Besco's requests in September and October 2018 that Yang discharge one of the July 24, 2018 or May 28, 2018 Charges, Yang has not discharged any of the Charges and the Port Hope Property remains encumbered in the amount of \$10,000,000 by Yang. Yang has indicated a willingness to work with Besco and any financier to discharge the mortgage in exchange for

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<sup>19</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, paras. 36-39.

<sup>20</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, paras. 40-41 and 45.

<sup>21</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, paras. 47-50.



repayment of the Indebtedness.<sup>22</sup> After October 2018, Besco focused its efforts on securing alternative financing.

### **Livesolar Capital Corp. Loan**

19. In October 2018, after the within Application was brought, Besco entered into discussions with a private real estate equity firm, Livesolar Capital Corp. (“Livesolar”) to secure \$5,000,000 in financing to be secured by a mortgage of \$5,000,000 at an interest rate of 12% against the Port Hope Property. By letter of Intent dated October 29, 2018, Bosco Chan, the Managing Director of Livesolar confirmed the above and stated that Livesolar intended to complete the closing within 60 days.<sup>23</sup>

20. The within Application was put over while Besco worked to complete the refinancing deal with Livesolar.

21. On November 14, 2018, Bosco Chan confirmed to counsel for Sun that the last document that Livesolar was waiting to receive to complete its due diligence was an appraisal on the Port Hope Property.<sup>24</sup> Livesolar received a Letter of Value from Colliers International (appraisers) on November 20, 2018. The Letter of Value valued the Port Hope Property at \$8,500,000 and

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<sup>22</sup> See correspondence between Sara Erskine and Dylan Chochla between September 26, 2018 and October 15, 2018 attached as Exhibits “A” through “D” of the Affidavit of Hanqiong (Joan) Xu, affirmed October 15, 2018, Supplemental Responding Application Record, Tab 1(A) through (D).

<sup>23</sup> October 29, 2018 Letter of Intent, Supplementary Application Record, Tab 1(B).

<sup>24</sup> Email correspondence between Bosco Chan and Sara Erskine dated November 14, 2018, Supplemental Responding Application Record, Tab 2(A), p. 20.

indicated that a Full Narrative Appraisal would follow.<sup>25</sup> The Full Narrative Appraisal of Colliers International dated November 24, 2018 was provided to Bosco Chan.<sup>26</sup>

22. By letter dated December 3, 2018, counsel for Livesolar, Peter Liston, wrote to Sun confirming receipt of the appraisal and that the appraisal was being reviewed. The letter further confirms that the financing is subject to approval of the investment committee of Livesolar. Mr. Liston confirmed that the approval process was underway and that Livesolar aimed to close the financing transaction in a timing fashion.<sup>27</sup>

23. By letter dated December 20, 2018, Mr. Liston wrote to Sun confirming that Livesolar was completing its legal due-diligence process but because of the pending holiday time, the final documentation would not be finalized until the middle of January 2019.<sup>28</sup> Bosco Chan then confirmed by email on December 21, 2018 to counsel for Besco that Livesolar was expecting to close the financing transaction on or before January 15, 2019.<sup>29</sup>

24. By email dated January 17, 2019, Peter Liston wrote to counsel for Besco confirming the wire transfer of the funds to Canada for the financing and attached a Commitment Letter from Livesolar to be signed back by Besco. Mr. Liston's email further stated that Bosco Chan needs to complete all documents and that the funding remained "subject to satisfactory prior to funding".<sup>30</sup>

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<sup>25</sup> Colliers Letter of Value dated November 20, 2018, Supplemental Responding Application Record, Tab 2(B), p. 26.

<sup>26</sup> Full Narrative Appraisal dated November 24, 2018, Supplemental Responding Application Record, Tab 2(C), p. 28-91.

<sup>27</sup> December 3, 2018 Letter from Peter Liston, Supplemental Responding Application Record, Tab 2(D), p. 94.

<sup>28</sup> December 20, 2018 Letter from Peter Liston, Supplemental Responding Application Record, Tab 2(E), p. 99.

<sup>29</sup> December 21, 2018 email from Bosco Chan, Supplemental Responding Application Record, Tab 2(E), p. 96.

<sup>30</sup> January 17, 2019 email from Peter Liston, Supplemental Responding Application Record, Tab 2(F), p. 101-105.

The signed copy of the Commitment Letter was returned to Peter Liston by email dated January 18, 2019.<sup>31</sup>

25. By email dated January 21, 2019, counsel for Besco provided documentation requested by Livesolar's counsel regarding the acquisition of the Port Hope Property by Besco from a receivership.<sup>32</sup>

26. By email dated January 28, 2019, Peter Liston advised counsel for Besco that the first tranche of funding was ready and that Bosco Chan needed to confirm a few details with Sun prior to completion of the loan documents.<sup>33</sup>

27. Further inquiries were made by Peter Liston by email dated February 5, 2019 regarding the ownership of the property the relationship between Besco and Yang. Counsel for Besco responded to this request on February 5, 2019. Counsel for Besco confirmed to Peter Liston that the funds being loaned by Livesolar will be used in part to repay Yang for a loan secured by mortgages against the Port Hope Property. Counsel also confirmed that Yang has undertaken to discharge his security against the Port Hope Property upon repayment of the amount owing to him.

28. The same day, Peter Liston sought additional information regarding the facilities and business at the Port Hope Property. The additional information requested, including provided another copy of the Colliers Appraisal and a contract between Besco's tenant, Viceroy Houses Ltd. and its customer, CIM MacKenzie Creek Inc., for the supply of materials for panelized wood

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<sup>31</sup> January 18, 2019 email from Sara Erskine, Supplemental Responding Application Record, Tab 2(G), p. 107-112.

<sup>32</sup> January 21, 2019 email from Sara Erskine, Supplemental Responding Application Record, Tab 2(H), p. 114-135.

<sup>33</sup> January 28, 2019 email from Peter Liston, Supplemental Responding Application Record, Tab 2(J), p. 145.

structure, window and door, hardwood and cabinetry valued at \$11 million was sent to Peter Liston by email on February 5, 2019.<sup>34</sup>

29. As of February 7, 2019, the financing transaction with Livesolar has not yet closed.

### **It is Not Just and Convenient to Appoint a Receiver**

30. The appointment of a court-appointed receiver will result in unnecessary costs being incurred. It will also harm Besco's tenant, Viceroy Houses Ltd., who manufactures houses and other wood products in the Port Hope Property facilities.<sup>35</sup>

31. In October 2018, Viceroy Houses had purchase orders totalling \$3,700,000 and had begun building houses.<sup>36</sup> In January 2019, it entered into a contract for the supply of products to CIM MacKenzie Creek Inc. valued at \$11 million.<sup>37</sup>

### **PART III - THE LAW**

32. Under section 243 of the BIA and section 101 of the *Courts of Justice Act*, the court may appoint a receiver if it is "just and convenient" to do so.<sup>38</sup>

33. In determining whether the appointment of a receiver is just and convenient, the court must examine all of the circumstances such as the nature of the property, the rights and interests of all parties in relation thereto, the potential costs, the relationship between the debtor and the creditor,

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<sup>34</sup> February 5, 2019 email correspondence between Sara Erskine and Peter Liston, Supplemental Responding Application Record, Tab 2(J), p. 142-250.

<sup>35</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, para. 54-55.

<sup>36</sup> October 2018 Sun Affidavit, Responding Application Record, Tab 1, para. 55.

<sup>37</sup> February 5, 2019 email correspondence between Sara Erskine and Peter Liston, Supplemental Responding Application Record, Tab 2(J), p. 142-250.

<sup>38</sup> *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ONSC), para. 10 and *Bank of Montreal, v. Carnival National Leasing Limited*, 2011 ONSC 1007, para. 23-24.

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.<sup>39</sup>

34. In the present case, Besco does not dispute that it guaranteed the repayment of a loan by Yang to Sun. Besco is working diligently to secure financing to repay the amount owing to Yang. The fact that Yang over encumbered the Port Hope Property by more than \$6 million had a negative impact on Besco's efforts to secure alternative financing. However, Livesolar has committed and has the funds available to complete financing in the amount of \$5,000,000, which is more than sufficient funds to repay Yang. Besco has been working diligently with Livesolar to complete the financing before this Application being heard.

35. The Applicant's assertion that the appointment of a receiver will preclude the prospect of further litigation is without merit. Besco did not move forward with its motion to require Yang to discharge one of the two Charges for \$5,000,000 that Yang registered against the Port Hope Property. Rather, Besco has focused its efforts on securing and completing financing to repay the amounts owing to Yang. Further, counsel for Besco has provided updates to counsel for Yang of the financing efforts, including providing copies of correspondence from Livesolar and its counsel.<sup>40</sup>

36. Further, the appointment of a receiver will not maximize value for both Yang and Besco and it is not the best way to protect the interests of all stakeholders. Yang's security is fully protected by the Charges registered against the Port Hope Property. A recent appraisal confirms that the value of the Port Hope Property far exceeds the amount of the outstanding indebtedness

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<sup>39</sup> *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ONSC), para. 10 and 12, and *Anderson v. Hunking*, 2010 ONSC 4008, at para. 15.

<sup>40</sup> Tabs 1(B) and (F), Supplementary Application Record.

to Yang. It is not a situation where the value of the asset is depreciating or being wasted. A little more time to permit the Livesolar financing to close will not result in loss of any value of the asset. Moreover, the appointment of a receiver will have a negative impact on the closing of the financing with Livesolar.

37. In addition, the appointment of the receiver will affect Besco's tenant, Viceroy Houses Ltd., which manufactures products at the Port Hope Facility and has outstanding commitments with customers for the supply of products valued at \$11 million.

38. In all of the above circumstances, it is not just and convenient to appoint a court-appointed receiver over the Port Hope Property.

39. In the alternative, if the Court were inclined to appoint a receiver, Besco submits that the effectiveness of any order appointing of a receiver should be postponed for 30 days to permit financing by Livesolar to be completed. The postponement of the effectiveness of an order to appoint a receiver, or a delay of 30 days in appointing a receiver, were considered and granted by Justice Blair (as he then was) in *Bank of Nova Scotia v. Freure Village of Clair Creek*,<sup>41</sup> and recently by Justice McEwen in *Potentia Renewables Inc. v. Deltro Electronic Ltd.*<sup>42</sup>

40. Besco submits that the postponement of the appointment of the receiver will not impair the completion of the financing or incur unnecessary costs in the short term. It will also protect Yang's interests in the event the financing cannot be completed and a receiver will be appointed without further delay.

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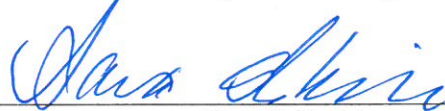
<sup>41</sup> *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ONSC), para. 14.

<sup>42</sup> *Potentia Renewables Inc. v. Deltro Electronic Ltd.*, 2018 ONSC 3437, paras. 136-137.

**PART IV - ORDER REQUESTED**

41. Besco requests that the Application be dismissed with costs. In the alternative, Besco requests that the effectiveness of any order appointing a receiver over the Port Hope Property be postponed for 30 days to permit the completion of Besco's financing with Livesolar.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 7th day of February, 2019.



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Sara J. Erskine

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## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ONSC)
2. *Bank of Montreal, v. Carnival National Leasing Limited*, 2011 ONSC 1007
3. *Anderson v. Hunking*, 2010 ONSC 4008
4. *Potentia Renewables Inc. v. Deltro Electronic Ltd.*, 2018 ONSC 3437



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