

COUNSEL SLIP

COURT FILE

NO.: CV-18-00608313-00CL

DATE: June 23, 2022

NO. ON LIST 5

TITLE OF
PROCEEDING

Forme Development Group Inc. et. al. v. Windsor Family Credit Union et. al.

COUNSEL FOR:

- PLAINTIFF(S) Sean Zweig (zweigs@bennettjones.com) and Aiden Nelms (nelmsa@bennettjones.com)
counsel to KSV Restructuring Inc. in its capacity as Court-appointed Monitor
- APPLICANT(S)
- PETITIONER(S) David Sieradzki (dsieradzki@ksvadvisory.com) KSV Restructuring Inc. in its capacity as Court-appointed Monitor

COUNSEL FOR:

- DEFENDANT(S) Alexander Soutter (asoutter@tgf.ca) counsel to Ferina Construction Limited
- RESPONDENT(S) Catherine Francis (cfrancis@mindengross.com) counsel to Pollard and Associates
Calvin Ho (cho@laishleyreed.com) counsel to certain Syndicated Mortgage Investors
Dom Michaud (dmichaud@robapp.com) counsel to 2592898 Ontario Inc., 2620094 Ontario Inc., 2627235 Ontario Inc., 2638796 Ontario Inc. and 2646429 Ontario Inc.

OSBORNE, J.

1. This motion by KSV Restructuring Inc. (“KSV”) in its capacity as monitor of the Applicants for a stay extension, termination of proceedings under the CCAA upon the filing of a Discharge Certificate, authorization and direction to make certain distributions and approving the activities of the monitor, and ancillary relief, came on today.
2. The relief sought, and the draft order proposed by the monitor, are on the consent of all parties, save for one issue and one provision of the order: paragraph 8(c) and the next steps to which that provision relates.
3. That provision of the draft order provides that a hearing date would be scheduled by the monitor before a judge of the Commercial List to determine certain claims filed by the secured creditors of Yuan Hua Wang (“Wang”) in the estate of 186 Old Kennedy Development Inc. (“Old Kennedy”). Wang is the principal of the Applicants.]
4. The secured creditors are collectively 2592898 Ontario Inc., 2620094 Ontario Inc., 2627235 Ontario Inc., 2638796 Ontario Inc. and 2646429 Ontario Inc. - referred to in the report of the Trustee as the “259 Group”.
5. The proposed order would specifically provide for the determination of a threshold issue as to whether those claims are barred by any or all of: a prior settlement, the order of Justice Cavanagh dated November 2, 2020 [in proceeding CV – 19 – 627410 – 00 CL], and/or the amended proof of claim filed by the secured creditors in the monitor’s claims procedure. The monitor has now completed its claims process as set out in its reports. The last court appearance in this matter resulted in the Endorsement of Justice Kimmel that referenced two outstanding issues which would need to be determined if they could not be settled. Those have now been settled.

6. The current proceeding is one of several related proceedings. In particular and of relevance to this motion, there are three proceedings relating to 186 Old Kennedy: a receivership, a bankruptcy proceeding and this CCAA. The 259 group now seeks to assert a secured claim in the bankruptcy of 186 Old Kennedy in the amount of \$723,741.22 and it is how this claim ought to be dealt with that is now the live issue.
7. The monitor takes no position on this issue.
8. Ms. Francis for Pollard and Associates in its capacity as Trustee of the estate of 186 Old Kennedy supports the order in the form sought by the monitor. Ms. Francis takes the position that the threshold issue of whether these claims by the secured creditors ought to be permitted to proceed at all, should be determined before the issue of the merits and quantum of such claims. The Trustee takes the position that the proposed claims by the secured creditors are all barred and should not be permitted to proceed.
9. Mr. Michaud for the secured creditors objects to the form of order in this regard and submits that, instead, the three threshold issues set out in paragraph 8(c) of the proposed order should be determined together with, and at the same time as, the validity and quantum of those secured creditor claims on the merits.
10. Both the Trustee and the secured creditors agree that these threshold issues must be determined; the only issue is whether they ought to be determined first, before a determination on a full record of the validity and quantum of the claims now asserted by the secured creditors. I observe that the secured creditors were on notice of and participated in the hearing resulting in the order of Justice Cavanagh referred to above.
11. I agree with the form of order proposed by the Monitor in this regard. In the circumstances it makes good practical sense and will maximize efficiency to have these threshold issues determined first by a judge of the Commercial List. If secured creditors, the 259 Group, are successful on that determination and the claims are not barred, they can then be determined as to validity and quantum according to the claims process. I make no comment on the validity or quantum of those claims.
12. A hearing for a determination on the three threshold issues set out in paragraph 8(c) can be scheduled through the Commercial List office.
13. As noted above, the balance of the proposed order proceeds on the consent of all parties. Of note, it provides for a distribution to unsecured creditors, absent a plan of arrangement and during a CCAA proceeding. Such a distribution has been authorized by this Court and other courts in other cases (see *AbitibiBowater Inc.* 2009 QCCS 6461, *Nortel Networks Corp., Re*, 2014 ONSC 4777, *Carillion Canada Holdings Inc. et al*, Dist. Order dated August 24, 2021, and *FIGR Brands Inc. et al* Order dated February 2, 2022) as referred to in the factum of the monitor filed in support of this motion at paragraphs 36 – 39. Such a distribution in the circumstances is also consistent with the general and flexible objectives of the CCAA.
14. Here, in addition to the consent of all parties, such a distribution makes good practical sense given the complexity of a claims process that would otherwise be required and the associated expense, as against the relatively small dollar value of most of the claims being determined. The proposed distributions have been determined in accordance with the Claims Procedure Order and are being made in accordance with the Undertaking [both as referred to in the report and factum of the monitor].

15. I have signed the order today which is effective without the necessity of it being issued and entered.

Olson, J.