2026 Hfx No.

SUPREME COURT OF NOVA SCOTIA

In the Matter of the Receivership of

BETWEEN:

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP,
each by their general partner, Fiera Private Debt GP Inc.

Applicants

-and-

3306133 Nova Scotia Limited and 1003940 Nova Scotia Limited

Respondents

BOOK OF AUTHORITIES

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A

SCHEDULE "A"

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Ontario Supreme Court
Bank of Nova Scotia v. Freure Village of Clair Creek
Date: 1996-05-31

Bank of Nova Scotia

and

Freure Village on Clair Creek et al

Ontario Court of Justice (General Division – Commercial List) Blair J.

Judgment – May 31, 1996.

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.

May 31, 1996. Endorsement.

[1] BLAIR J.: – 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).

This endorsement pertains to both motions.

The Motion for Summary Judgment

[2] 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.

[3] 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.).

[4] 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).

[5] 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 issues exists in that regard.

[6] 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.

[7] 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

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

[9] 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.

[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 (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]).

[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.

[13] 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 11/2 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.

[14] 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.

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

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

Motions granted.

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CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. 2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:	
BCIMC CONSTRUCTION FUND CORPORATION AND BCIMC SPECIALTY FUND CORPORATION Applicants	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for the Applicants
– and –	
THE CLOVER ON YONGE INC., THE CLOVER ON YONGE LIMITED PARTNERSHIP, 480 YONGE STREET INC. AND 480 YONGE STREET LIMITED PARTNERSHIP Respondents	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents
AND BEWTWEEN	
BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC. Applicants	*David Bish, Adam M. Slavens, Jeremy Opolsky* Counsel for BCIMC Construction Fund Corporation *Virginie Gauthier, Allan Merskey and Peter Tae-Min Choi* counsel for Otera Capital Inc.
- and -	
33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED	*Steven Graff, Ian Aversa, Jeremy Nemers* for the Respondents

PARTNERSHIP)
Respondents) See Schedule A for complete list of counsel

Heard: March 27, 2020

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 Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List), paras. 28-29; *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 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. S.C.J.(Commercial List) 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 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 financer 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 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 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (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.

Koehnen J.

Released: March 30, 2020

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

CITATION: BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.
2020 ONSC 1953
COURT FILE NO.: CV-20-00637301-00CL & CV-20-00637297-00CL
DATE: 2020-03-30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

AND BEWTWEEN

BCIMC CONSTRUCTION FUND CORPORATION AND OTERA CAPITAL INC.

Applicants

- and -

33 YORKVILLE RESIDENCES INC. AND 33 YORKVILLE RESIDENCES LIMITED PARTNERSHIP

Respondents

REASONS FOR JUDGMENT

Koehnen, J.

Released: March 30, 2020

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CITATION: *C & K Mortgage et al. v. 11282751 Canada Inc. et al.*, 2024 ONSC 1039
COURT FILE NO.: CV-24-00712796-00CL
DATE: 20240209

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: C & K MORTGAGE SERVICES INC. et al., Plaintiffs

AND:

11282751 CANADA INC. et al., Defendants

BEFORE: Osborne J.

COUNSEL: *George Benchetrit and Laura Culleton*, for C & K Mortgage Services Inc., Plaintiffs

Jeffery Frymer, for Larden Investments Inc., 2489876 Ontario Inc., Steven Gallen & Debra Gallen, Defendants

Jake Harris, for Suncor Energy Products Partnership

HEARD: February 9, 2024

ENDORSEMENT

1. The Plaintiffs move for the appointment of a receiver in this action.

2. The Service List, which includes for greater certainty the Debtors and the subsequent ranking lenders, has been served, although service was short.

3. As further set out below, I would have been prepared to consider an adjournment request, but counsel for all parties in Court today were clear that none was requesting an adjournment.

4. In the circumstances, and notwithstanding the short service, the Plaintiffs seek the appointment of a receiver today.

5. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.

6. The relevant Property is located at 170 Burton Ave., Barrie, Ontario. Until recently, the Debtors ran a Petro Canada gas station and associated convenience store on the Property under the banner "Neighbours".

7. C&K is a mortgage broker and lender in the Toronto area. Canadian Western Trust Company is a Canadian financial institution. Those two parties together are the Lenders.

8. 11282751 Canada Inc. is a federally incorporated company and is the Borrower. Its principal, Gazi Belayet Hossain, personally guaranteed the indebtedness of the Borrower to the Lenders.

9. The Lenders have a first position mortgage in the amount of $4,400,000 as well as a GSA. The GSA contains the contractual covenant to the effect that upon an event of default, the Lenders are entitled to appoint a receiver.

10. The Loan matured on January 1, 2024. The Record discloses that current indebtedness to the lenders is $4,626,699.74 as of December 12, 2023 with interest continuing to accrue. Sporadic payments were made until last December; there have been no payments since January 2024.

11. It appears that the Borrower and its principals have abandoned the premises. When representatives of the Lenders inspected the property to ascertain status on December 12, 2023, they found that it had been abandoned. The gas station was not operating, nor was the convenience store. Inventory in the convenience store had been stripped out. It has not operated since that time. This heightens, and the submission of the Plaintiffs, the necessity of the appointment of a receiver to preserve assets, and the urgency of this motion.

12. There is a subsequent mortgage in favour of Suncor Energy Inc., postponed to the charge of the Lenders. Suncor appears today represented by Mr. Harris and fully supports the appointment of a receiver and the relief sought by the Plaintiffs, with a view to preserving the assets and maximizing recovery for the benefit of all stakeholders.

13. Mr. Frymer appears today representing the Gallens who also hold a subsequent mortgage which he advises is a collateral mortgage to secure debt on an unrelated property. If that other property is sold, the indebtedness under that mortgage would be in the order of approximately $150,000. The numbered company, 2489876 Ontario Inc., also has a mortgage registered against the Property, also postponed to the Charge of the Lenders.

14. Mr. Frymer opposes the relief sought. I specifically inquired as to whether he was seeking an adjournment, and he candidly advised that he was not, and did not require a further opportunity to file responding materials, and made submissions today. He submits that a receivership will be unnecessarily expensive, and the Property should simply be sold. Indeed, his clients apparently caused the Property to be listed for sale pursuant to power of sale terms in their mortgage, in December 2023. In the alternative, he submits that if a receiver is appointed, its powers should be limited at least at this point to those of an investigative receiver, again to minimize costs.

15. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

16. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court 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. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

17. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

18. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.,* 2020 ONSC 1953 at paras. 43-44.

19. As observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25):

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

    c. the nature of the property;

    d. the apprehended or actual waste of the debtor's assets;

    e. the preservation and protection of the property pending judicial resolution;

    f. the balance of convenience to the parties;

    g. the fact that the creditor has a right to appointment under the loan documentation;

    h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

    i. the principle that the appointment of a receiver should be granted cautiously;

    j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

    k. the effect of the order upon the parties;

    l. the conduct of the parties;

    m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

20. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

21. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras. 24, 28-29.

22. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case? If so, on what terms?

23. In my view, it is not only just *or* convenient, but in fact just *and* convenient to appoint a receiver here. There is no dispute about the indebtedness (some $4.6 million) to the Lenders, their contractual right to appoint a receiver in the event of default, the delivery of demands for payment and section 244 *BIA* notices in December 2023 and the other facts set out above.

24. The Borrower appears to have walked away and abandoned the Property completely. Neither the Borrower nor the principals thereof have responded in any way whatsoever to the demands, to the Statement of Claim which was personally served on the Defendants, or to this motion. They appear to have simply cleared out the inventory from the convenience store and fled.

25. In the circumstances, I am satisfied that the appointment of a receiver will be to the benefit of all stakeholders in that the receiver can get into the property, determine what is there and what is not, and determine next steps to maximize recoveries.

26. Mr. Frymer advises that the gas station is relatively new, and that the tanks, pumps and equipment are relatively new and in good condition. In my view, a receiver can consider whether or not the parties can find a buyer who will operate the business as a going concern, which may very well provide a more favourable outcome to an asset sale. Such a going concern outcome is automatically precluded by the refusal to appoint a receiver and, by implication, by the power of sale listing already begun. In my view, it is premature to preclude that possibility, at this point. It should be explored, and the receiver can and should make a recommendation as to the most advantageous path forward.

27. In the circumstances, it is equally important that a receiver be appointed as soon as possible, since the gas station is effectively abandoned at this point in time. It is best preserved by

someone managing the Property, and that person should be the receiver under the supervision of this Court.

28. In my view, there is no basis to restrict the powers of a receiver to those necessary for investigation only.

29. I acknowledge Mr. Frymer's concerns about controlling expenses, and the receiver will engage in a dialogue with all stakeholders as part of its considerations of the path forward.

30. I observe that the draft order includes at paragraph 33, and in a manner consistent with the Model Order of the Commercial List, the usual seven day comeback clause. If any affected party feels that the advice and directions of this Court, or other relief, is required, it may return to Court and seek that relief.

31. Rosen Goldberg Inc. is a well-qualified receiver and consents to being so appointed here.

32. The terms of the draft order are consistent with the Model Order of the Commercial List. While that is not determinative of the issue of whether a receiver should be appointed, and what terms may be appropriate, it does in this case provide me with additional comfort.

33. Rosen Goldberg Inc. is appointed as receiver.

34. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

35. The Plaintiffs will ensure that the full Service List is provided with a copy of this Endorsement and the receivership order. For greater certainty, that will include the Borrower and the principals thereof, including the personal guarantor.

Osborne J.

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CITATION: Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, 2022 ONSC 6186
COURT FILE NO.: CV-22-678808-00CL
DATE: 20221028

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Canadian Equipment Finance and Leasing Inc., Applicant

AND:

The Hypoint Company Limited, 2618905 Ontario Limited, 1618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, Respondents

BEFORE: Osborne J.

COUNSEL: *R. Brendan Bissell and Joel Turgeon*, for the Applicant

Jonathan Rosenstein, for the Mortgagees
Domenico Magisano, for the Proposed Receiver, Albert Gelman Inc.

HEARD: September 2, 2022

ENDORSEMENT

The Issue

[1] What happens when rights under the *Mortgages Act* and the *Personal Property Security Act* intersect? As is often the case, a business is carried on through two related entities. One owns the real estate and one operates the business. One creditor finances the purchase of equipment and has a security interest. Another creditor finances the purchase of the real property and has conventional mortgage security. The security of each is over a different asset, and the result is generally straightforward. However, when the purchased equipment is affixed to the property, and there is a dispute about whether and how it can be removed and whether such removal will cause a diminution in the value of both the equipment and the real property, the question is more complex: who has rights of enforcement, and over what assets?

[2] The Applicant, Canadian Equipment Finance and Leasing Inc. ["CEF"] brings this Application for a receivership order, judgment and interest. On this motion within the Application, it seeks only the appointment of a receiver as more particularly described below.

[3] CEF seeks the appointment of Albert Gelman Inc. as receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* ["CJA"], over all of the assets and property of the Respondents, The Hypoint Company Limited ["Hypoint"] and 2618909 Ontario Limited ["909"] that was used in relation to a business carried on by either or both of them.

[4] The Mortgagees [as defined below] do not oppose the appointment of a receiver over the assets of Hypoint pledged as collateral for CEF's equipment loan, but oppose the appointment of a receiver over the assets of 909, the related entity that owns the real estate against title to which they hold mortgage security.

[5] The mortgagees do however concede that this Court has the discretion to appoint a receiver over the assets of both entities pursuant to section 101 of the CJA and submit in the alternative that if a receiver is appointed, that receiver be the firm nominated by them, MSI Spergel Inc. Each proposed receiver has filed a consent to act in that court-appointed capacity.

[6] Having reviewed all of the evidence filed by the parties and having heard the submissions of their counsel, I have concluded that it is just and convenient to appoint a receiver over all of the assets of both related debtors, being Hypoint and 909 pursuant to section 101 of the CJA. I appoint the firm nominated by the mortgagees, MSI Spergel Inc., as that Court-appointed receiver.

The Business, The Loans and The Security

[7] The assets and property of Hypoint include HVAC equipment installed at the premises from which the business of the Respondents was conducted at 25 Morrow Ave., Toronto [the "Premises"]. The Premises was essentially a custom-built cannabis production facility.

[8] CEF and the Respondent, Hypoint, entered into a loan and security agreement [the "Agreement"] made as of June 1, 2020. There is no dispute that CEF has first ranking security over that HVAC equipment [the "Collateral"] and, in the circumstances, is entitled to the appointment of a receiver over same.

[9] There is, however, a corollary dispute between the parties over whether the equipment pledged as Collateral includes, in addition to the physical HVAC units affixed to the exterior of the building on the Premises, electronic control units located within the building.

[10] The main dispute arises because CEF is seeking the appointment over the Premises as well as the Collateral, with the intent to sell the Premises with the HVAC equipment still installed, through a single sales process approved and overseen by a receiver under the direction of this Court.

[11] While all parties are in agreement that the Premises ought to be sold, the mortgagees who hold registered mortgage security against title to the Premises argue that the real estate itself is owned by the Respondent 909. Those mortgagees, including the first mortgagee Bruce Lubelsky and the second mortgagees Delrin Investments Inc. and three other individuals, [collectively, the "Mortgagees"] hold registered mortgage interests against title to the Premises.

[12] Those Mortgagees argue that, while 909 is a related entity to Hypoint, it is not a party to the loan and security agreement with CEF, and that only the HVAC equipment was pledged as Collateral, all with the result that CEF has no legal right to the appointment of a receiver of property owned by any party other than that belonging to the debtor, Hypoint.

[13] The Mortgagees do not oppose the appointment of a receiver over the HVAC equipment only, nor do they oppose CEF or a receiver acting on its behalf entering onto the premises to remove the HVAC equipment [in accordance with section 35 of the PPSA], subject to determination or resolution of the ancillary dispute referred to above about whether the control units inside the Premises are properly considered to be part of the Collateral.

[14] I observe that 909 guaranteed the debt of Hypoint to CEF, although CEF does not seek in its Notice of Application judgment on that guarantee. Accordingly, for the purposes of this motion, that guarantee is of less relevance since judgment based on that guarantee is not the basis relied upon for the appointment of a receiver.

[15] While Hypoint defaulted on the equipment loan in respect of the HVAC to CEF, 909 defaulted on the mortgages. The equipment loan was in the approximate amount of $780,000. The mortgages were in the approximate amount of $5.3 million.

[16] CEF argues that the practical effect of the position of the Mortgagees is that if CEF enforces its rights only as against the Collateral, it will have to remove and sell separately that Collateral which will devalue both the Collateral itself as well as the Premises, to the detriment of all stakeholders, since proceeds and recovery will be maximized for all only if the Premises are sold as a turnkey cannabis production facility, with the HVAC still installed.

[17] CEF argues that a receiver can then resolve disputes over competing priorities and/or entitlement to proceeds of sale, with the later assistance of this Court if necessary, none of which needs to be decided on this motion. CEF notes that the Mortgagees originally cooperated with the Applicant regarding a potential sale transaction, but have now advised that that potential sale was not completed, and the Mortgagees are not prepared to cooperate in an *en masse* sale now.

[18] The Mortgagees take the position that they are entitled, by the terms of their mortgage security and the *Mortgages Act*, to enforce their mortgages by selling the premises under power of sale. That is precisely the fragmented sales process to which CEF objects.

[19] This matter was before the Court on June 29, 2022, on which date Justice Gilmore authorized the appointment of a receiver over the HVAC equipment, although CEF has not proceeded to have a receiver appointed pursuant to that order. The Mortgagees have now delivered notices of sale following on the mortgage defaults. There were discussions and, for a time, some level of cooperation between and among the parties with respect to a potential sale of the Premises, including the affixed Collateral.

[20] When that potential sales transaction collapsed, however, the Mortgagees decided to proceed with a more conventional sale by way of obtaining fair market value appraisals and retaining a commercial real estate brokerage to market the properties. They have begun that process.

[21] While they maintain their primary position that no receiver should be appointed over the property of 909, the Mortgagees do concede that the Court has the discretionary ability to appoint such a receiver pursuant to section 101 of the *Courts of Justice Act*. If the Court determines to exercise that discretion in appoint a receiver, the Mortgagees take the position that the receiver should be the firm nominated by them.

Analysis

[22] The test for appointing a receiver, whether under the BIA or the CJA, is whether it is just and convenient to do so. The overarching objective is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors.

[23] In making a determination about whether it is, in the circumstances of a particular case, just and convenient to appoint a receiver, the Court 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. These include the rights of the secured creditor pursuant to its security. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258).

[24] Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 7101 at para. 27).

[25] In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

(a) whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has a right to appointment under the loan documentation;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

(i) the principle that the appointment of a receiver should be granted cautiously;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties; and

(p) the goal of facilitating the duties of the receiver.

[26] It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted. [See *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras. 28-29].

[27] In the present case, CEF's submission that this Court should appoint its proposed receiver over the assets of 909 pursuant to section 243 of the BIA fails, in my view, for the simple fact that, as submitted by the Mortgagees, 909 is not a party to the CEF credit agreement and nor is CEF a creditor of 909, contingent or otherwise.

[28] CEF is not a secured creditor of 909. CEF has no contractual right to the appointment of a receiver over the assets of 909 pursuant to any agreement as it does with respect to Hypoint. As noted above, it similarly lacks any rights as a judgment creditor of 909, since it has not commenced any claim to recover under the guarantee, let alone obtained a judgment.

[29] I am satisfied, however, that it is just and convenient to appoint a receiver under section 101 of the CJA.

[30] 909 and Hypoint are related entities operating the same business out of the same Premises. The Premises, including the Collateral, was custom-built for the operation of a cannabis production facility.

[31] Both CEF and the Mortgagees agree that the Premises and the Collateral should be sold. There is a dispute about whether the Collateral is technically a "fixture" to the Premises, and the factual dispute about the cost of removing the Collateral and the extent of any consequent physical damage to, or diminution in the value of, either or both of the Premises and the Collateral itself. Those issues are for another day. Whether, how, and on what terms [i.e.,

together or separately] those assets should be sold can and should be determined by this Court following on a report from the receiver with respect to a proposed sales process and if the process gets that far, a sale approval motion.

[32] However, in circumstances where all parties agreed that all of the assets of both Hypoint and 909 should be sold to maximize recovery for all creditors, but cannot agree on the process pursuant to which that should be undertaken with the result that the entire process is stalled, I am satisfied that this represents a classic example of a situation in which it is just and convenient to appoint a receiver.

[33] The receiver is a court-appointed officer. It has the obligation to design and run a process with a view to monetizing the assets of the debtor for the benefit of all creditors. Further delay is in the interest of no one. There is no activity at the Premises, electricity has been cut off for a significant period of time, and winter is coming. Proof of insurance was requested by CEF and has not been provided.

[34] I am concerned about the real and immediate risk of dissipation of assets and diminution in value of those assets, with the result that I am satisfied that it is important and beneficial to all creditors to accelerate the process. The fair and transparent way to do that is to have a court-appointed receiver run the process. Order needs to be brought to the chaos, and the status quo of competing processes cannot continue unsupervised.

[35] To do otherwise would be to permit CEF to enforce against the Collateral only and the Mortgagees to enforce as against the real property. This has the potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value.

[36] Moreover, nothing in the appointment of a receiver now, over the assets of Hypoint and 909 together, affects or diminishes the ability of the receiver appointed to consider whether in fact recovery will be maximized by a sale of the Collateral and the Premises separately as opposed to together. Even if that were to occur, however, it can occur under a Court-supervised process, by a court-appointed receiver with obligations to all stakeholders, in an orderly and efficient manner.

[37] I should be clear that in appointing a receiver, I am not concluding that the rights of CEF defeat or somehow rank in priority to the rights of the Mortgagees. Rather, I am expressly reserving those rights for another day. In my view, that is the time for a determination if necessary of the relative priority of the competing interests here and whether, for example, the interests of CEF as a secured party of the Collateral are subordinated to the rights of the Mortgagees as a result of the Collateral having become a Fixture to real property [i.e., the Premises].

[38] As the Mortgagees concede in their factum [see paragraph 86], these conflicting interests will be academic in the event that the proceeds of sale of the "Premises" - whenever and however that occurs - are sufficient to satisfy both the Mortgagees and CEF.

[39] I also observe that there are other unsecured creditors whose rights may be affected by the manner in which a sale is undertaken. I am satisfied that their interests also, are best

protected by a fair and transparent process run by a court-appointed receiver rather than any one party individually.

[40] The objective of the appointment of the receiver is to maximize proceeds. If, as all parties agree should occur, the assets of Hypoint and 909 are sold, Court approval of that sale as well, presumably, as the relative rights and priorities over the net proceeds, can be determined. All other issues, including costs of the receivership and who should bear those costs or any proportion thereof, can also be determined.

[41] As to who the court-appointed receiver should be, both firms nominated here are well-known to this Court, and are respected in this area. There is no reason that either would not be appropriate. On balance, however, and given all of the circumstances, including the practical fact that the appointment of a receiver will deprive the Mortgagees of their right to power of sale, as well as the relative debts owed to the Mortgagees and CEF, I appoint MSI Spergel as nominated by the Mortgagees.

[42] Counsel for the Mortgagees is directed to provide to the Court a form of receivership order consistent with these Reasons. If the parties cannot agree on the form of that order, they may schedule a brief attendance before me to settle the terms of that order.

[43] Costs of this motion are reserved to the judge ultimately determining, if necessary, the relative priority to net proceeds of sale of the assets.

Osborne J.

Date: October 28, 2022

5

Confederation Life Insurance Co. v. Double Y Holdings Inc.
1991 CarswellOnt 1511 | Ontario Court of Justice (General Division) | Ontario | September 3, 1991 *(Approx. 7 pages)*

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

al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors

VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.D Irreparable harm

Headnote

Receivers --- Appointment — Application for appointment — Grounds

Plaintiffs mortgaged construction project of defendants — With permission of plaintiffs, defendants used rent proceeds to finance continued construction — Total claims against project amounted to $250 million and efforts of defendants to sell project were unsuccessful — Major tenant of project disputed obligations under lease — Defendants sued tenant and proceeds of litigation were assigned to plaintiff — Plaintiffs held veto over settlement and were to be kept informed — Defendants did not inform plaintiffs of several settlement meetings — Mortgages matured and plaintiffs demanded payment made — Months later, defendants made no principal payment — Plaintiffs brought motion for appointment of receiver — Motion allowed — Plaintiffs extended great latitude to defendants and were under no obligation to continue doing so — In context of matured loan and continued failure to complete project, receiver should be appointed — Defendants failed to show irreparable harm that was not compensable in damages — Plaintiffs would suffer prejudice if project continued in limbo — Receiver restricted to dealing only with project.

MOTION by plaintiffs for appointment of receiver.

***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 arrear. ... 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.

End of Document

6

SUPREME COURT OF NOVA SCOTIA

Citation: *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 NSSC 235

Date: 20180511
Docket: Hfx No. 474742
Registry: Halifax

Between:

First National Financial GP Corporation and
First National Financial LP

Applicants

v.

3291735 Nova Scotia Limited

Respondent

RECEIVERSHIP AND SALES PROCESS

Judge:	The Honourable Justice Christa M. Brothers
Heard:	May 11, 2018, in Halifax, Nova Scotia
Oral Decision:	May 11, 2018
Written Decision:	September 27, 2018
Counsel:	D. Bruce Clarke, Q.C. for the Applicants Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver for the Respondent, 3291735 Nova Scotia Limited) Brian W. Stilwell, Watching Brief

By the Court:

Overview

[1] This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

[2] The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

[3] The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the

affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

[4] The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

[5] The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

[6] I have reviewed all the materials with regard to the proposed Receivership Order.

[7] I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

[8] I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

[9] Section 243(1) of the BIA provides:

> Subject to subsection (1.1) , on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it 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.

[10] In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

[11] The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

[12] In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

1. First National holds first priority security over the Company's real and personal property;
2. The Company is in default of its obligations to First National;
3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
4. Both the Demand Letter and the Notice have expired, without payment being made;
5. First National is in a position to enforce its security as against the Company should it choose to do so;

6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and

7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the property is handled expeditiously and in a commercially reasonable manner.

[13] I have reviewed the case law and, in particular, ***Bank of Montreal v. Carnival National Leasing Limited et al.***, 2011 ONSC 1007. In that case, the Court noted that 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. The Court said:

> 23. 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.

[14] In ***Bank of Nova Scotia v. Freure Village on Clair Creek*** (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Ct. J. (Gen.Div.)), 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. The legal principles involved were summarized 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.

[15] *Bank of Montreal v. Carnival Leasing Limited,* 2011 ONSC 1007, spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

> 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.

[16] I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

[17] Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

[18] Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

[19] The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

[20] First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

[21] KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

[22] KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

[23] On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order to maximize the value for creditors and to minimize the risk of losing this

offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

[24] The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308
- **Purchased Assets:**
  - (i) The Real Property
  - (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property
  - (iii) plans
  - (iv) contracts
  - (v) permits in connection with the Real Property, to the extent transferable
  - (vi) all intellectual property, if any, owned by the Company with respect to the project
- **Purchase Price:** $3,708,750, including HST
- **Deposit:** $322,500 being 10% of the purchase price (before HST)
- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds
- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.
- **Closing:** first business day which is five business days after receipt of Sale Approval Order
- **Material Conditions:**
  - (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;
  - (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to

the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

(iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

(iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

. **Termination:**

(i) The Stalking Horse Agreement can be terminated:

- upon mutual written agreement of the Receiver and 3308;
- if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or
- if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

[25] 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the "stalking horse" sales process.

[26] A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in ***CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.***, 2012 ONSC 1750. While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies' Creditors

Arrangement Act proceeding: ***Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited,*** Hfx. No. 454744.

[27] Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

[28] D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.*, at para 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, *BIA* proposals, and *CCAA* proceedings.

[29] I must consider the following factors as set forth in ***CCM Master Qualified Fund, Ltd., supra*:**

1. The fairness, transparency and integrity of the proposed process;
2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[30] In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding

procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

[31] The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

[32] First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

[33] I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

[34] In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

[35] I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

[36] I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Brothers, J.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527

Date: 20090923
Docket: S095413
Registry: Vancouver

Between:

Maple Trade Finance Inc.

Plaintiff

And:

CY Oriental Holdings Ltd.

Defendant

Before: The Honourable Mr. Justice Masuhara

Oral Reasons for Judgment
In Chambers

Counsel for the Plaintiff:	J.J.L. Hunter, Q.C. B.R.H. Johnston
Counsel for the Defendant:	P.J. Reardon
Place and Date of Hearing:	Vancouver, B.C. September 21, 2009
Place and Date of Judgment:	Vancouver, B.C. September 23, 2009

[1] **THE COURT:** This is my ruling with respect to the application of Maple Trade Finance Ltd. made Monday.

[2] The plaintiff seeks an order pursuant to s. 39 of the *Law and Equity Act* and Rule 47 for the appointment of the Bowra Group as receiver and manager over all of the defendant's current and future assets undertaking in properties, including all proceeds. The application arises out of the default by the defendant of a loan owed to the plaintiff. The principal of said loan was some $3.5 million. The plaintiff says that as of July 15, 2009, the outstanding balance owed was $5.7 million.

[3] The defendant does not dispute that it is in default of the loan. Though it disputes the level of interest that has been accrued. It does not dispute that the amount owing is sizable. However, it is prepared to make payments in the order of some $4 million in six equal monthly installments and to have the interest dealt with as a sole issue. In this regard, the defendant has filed a statement of defence and counterclaim.

[4] In terms of background, the plaintiff firm provides accounts and receivable financing to various businesses, including the defendant. The defendant is a holding company whose principal asset is its wholly owned subsidiary, CY Oriental Garments Inc., a private BC company which in turn owns a BBI based company, which in turn owns a Hong Kong company called Huge Best International, which in turn owns two operating companies in China. The operating companies in China are in the garment manufacturing business.

[5] Until early July 2009, the plaintiff company was listed on the TSX Venture Exchange. In January 2006, the plaintiff and defendant entered into a financing agreement dated January 4, 2006. On June 27, 2006, the defendant executed a general security agreement in favour of the plaintiff granting security over all of the defendant's present and after-acquired property. The finance agreement and the GSA were registered in the BC Personal Property Registry.

[6] The GSA provides, *inter alia*, that in the event of default, the following rights:

> 1) the plaintiff may, by instrument in writing, appoint any person as a receiver of all or any part of the collateral;
>
> 2) the plaintiff may from time to time remove or replace a receiver or make application to any court of competent jurisdiction for the appointment of a receiver.

[7] In July 2007, the January 2006 agreement was amended and restated by way of a credit letter which confirmed the earlier agreements and further increased the defendant's credit facility with the plaintiff from $5 million to $8 million.

[8] In furtherance of the financing agreements, the accounts receivable of Huge Best International were assigned to the defendant, who in turn assigned them to the plaintiff. As well a customer, Ideal Century's accounts receivable was also assigned to the plaintiff and to which Century acknowledged such assignment.

[9] The payments to the plaintiff from Ideal went into default. By letter dated March 3rd, 2009, the plaintiff demanded payment in full of the plaintiff's outstanding indebtedness and gave notice to the defendant pursuant to s. 244 of the *Bankruptcy and Insolvency Act*.

[10] In late March, the defendant made a payment of $100,000 to the plaintiff as a gesture of good faith in furtherance of negotiations related to forbearance. In early June 2009, the defendant made a further payment of $270,000 to the plaintiff as part of what it says was an agreement in principle on forbearance. The defendant has strongly denied any such agreement in principle. However, it accepted the monies.

[11] The current application was originally scheduled to be heard on August 27, 2009. On August 26, 2009, at the defendant's request, the plaintiff agreed to adjourn the application to September 11th in order to give the defendant more time to attempt to satisfy its indebtedness to the plaintiff.

[12] Further communications between the plaintiff and the defendant and their counsel carried on, and a letter dated September 10th, 2009, marked "with prejudice" was delivered. The plaintiff adjourned the within application from September 11th to September 17th in order to fully consider the contents of the "with-prejudice" letter. The plaintiff concluded that the contents of the letter did not set out an acceptable basis for resolving the indebtedness.

[13] The matter now is before the court. The applicable test is whether it is just and convenient to make the order sought for a receiver and manager. The authorities relied upon by the applicant state that the court ought not ordinarily interfere with an express covenant agreeing to the appointment of a receiver in the event of default, which is as in the case of the instant application.

[14] A further case presented to the court, *Bank of Nova Scotia v. Freure* [1996], 40 C.B.R. (3d) 274, the plaintiff has indicated that the test of just inconvenience was said to be met where:

> ... it is more in the interests of all concerned to have the receiver appointed by the court.

[15] In this regard, the applicant submits that for the following reasons, it is more in the interests of all concerned that a receiver and manager be appointed by the court: that the parties have agreed the plaintiff may seek the appointment of a receiver in the event of a default; that the defendant owes a significant sum of money; there appears not to be a dispute with the fact of the size of the indebtedness; and, that the defendant is in default.

[16] The plaintiff noted that there were irregularities within the defendant, including the resignation of its board of directors and its recent delisting from the TSX exchange, which evidences a need to ensure that the defendant's assets are preserved for the plaintiff's benefit; that there are concerns with respect to the financial statements of the defendant; and that the defendant does not indicate what steps are being taken, to address the prospects for early repayment of the defendant's indebtedness.

[17] Further, that the plaintiff is reasonably concerned that the prospect of the defendant performing its various obligation is in jeopardy; that the plaintiff has given the defendant reasonable opportunities to resolve the indebtedness, including the already mentioned adjournments; that the efforts to resolve or restructure or refinance the

defendant's indebtedness to the plaintiff have to date proved unsuccessful; and that the defendant is essentially a holding company and presumably exercises oversight over the affairs of subsidiary companies, including the operating companies. As such, the defendant's value is likely to be optimized by a receiver manager ensuring the continued operation of the defendant's subsidiaries.

[18] The respondent in reply submits the following: that it has made a payment of $100,000, and as well as $270,000, which were after the March 2009 notice; that the negotiations had been initiated by the defendant with the plaintiff for terms of forbearance after the March 2009 notice; that the plaintiff has recourse to legal execution and thus the equitable remedy applied for is not warranted, but notes that the plaintiff has started a:

> ... baseless action in the United States against one of the defendant's customers.

[19] In this regard, a sanctions motion is currently before the US court regarding whether the plaintiff's actions there was an abuse of process.

[20] Further, it notes that notwithstanding the cease-trade orders and the delisting of the company from the TSX Venture Exchange and the issues regarding its audited financial statements; that the defendant has a fully functioning board of directors; that the ongoing operations of the defendant's subsidiary operating companies have not been impacted by these issues; and specifically that these operating companies are profitable.

[21] Further, that it has made a with-prejudice proposal to the plaintiff as mentioned on September the 10th, that the essence of which is that the principal majority shareholder of the defendant, who holds 44 percent of the outstanding shares, would be provided as security. I am assuming that is the 20,715,100 common shares referred to in the affidavit of Mr. Gee.

[22] That $4,084,767, which is the principal and non-default interest accrued, will be paid as follows: that the defendant will pay $1,016,019 plus non-default interest to the plaintiff, which it stated in the September 10th letter would be within ten days of that letter; that the balance of some $3 million would be paid in six equal installments every 30 days thereafter with a seven-day curative period, together with interest at the non-default interest rate.

[23] Further, during the course of the hearing, Ms. Carteri advised that the defendant would agree that it would consent to an order that would lead to the immediate appointment of a receiver upon default of any of the said payments.

[24] The position of the defendant is also that there is no evidence of jeopardy to the plaintiff's security.

[25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In *Bennett on Receivership, 2d ed.* (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where

the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

[26] The fact that the finance agreement acknowledged the right of the plaintiff to make application for a receiver is a strong factor in support of the imposition of a receiver.

[27] However, on the other hand, there is a proposal by the defendant to repay a significant amount which was further expanded during the hearing by defendant's counsel. This lends support to the defendant's position. I note as well, the more recent payments made by the defendant to the plaintiff are not insignificant, as well as Mr. Gee's statement that since the summer of 2006, the amounts advanced

by the plaintiff are in the order of $7.6 million and that repayments through August 2009 have been in the order of $5,238,766. I recognize that interest has been accruing on the principal.

[28] The proposal as explored and discussed during the course of the hearing would align with the factor of controlling the costs to the parties at this point. It would also, align with the likelihood of maximizing return to the parties.

[29] If the company's condition as to its viability was accepted, this would deal in part with the plaintiff's concern regarding jeopardy. The difficulty is the confidence that one can have in the defendant's ability to make good on its payments. Mr. Hunter, stated the concern really is not as much to do with the promise, but more to do with performance. I would agree.

[30] However, balancing the factors, an order that would have the automatic imposition of a receiver, upon default in any payment required by the defendant, would address the concerns at this point. I think the balance of convenience can further be achieved through a further modification of the defendant's proposal to reflect the concerns over the lack of financial information to support the contention regarding the financial strength of the operating companies.

[31] To that extent, the payments will be made in this manner: the defendant is to pay the plaintiff on or before the 28th of September, 2009, the sum of $1,016,019 plus non-default interest.

[32] MR. REARDON: Sorry, My Lord, because I'm not familiar, would you mind repeating that number.

[33] THE COURT: Okay. $1,016,019.

[34] MR. REARDON: Yes, thank you.

[35] THE COURT: $1,016,019 plus non-default interest. The defendant is to pay the plaintiff, over four months, the remaining outstanding balance plus non-default interest in equal installments.

[36] The defendant will also provide financial statements related to its company and operations, including its wholly owned subsidiaries. Mr. Chen's shares will be delivered as security to the plaintiff.

[37] There will be a term that any default in payment, not cured within three days, as opposed to the seven days suggested by defence counsel, will lead to the automatic appointment of a receiver on the terms as sought in the application.

[38] There will also be a term that the defendant, will not permit the disposition of any of its property, including wholly owned subsidiaries, except in the ordinary course of business; and that Mr. Chen and Mr. Gee. are to make monthly representations confirming adherence to this term.

[39] Further, any material adverse change in circumstances in the condition of the defendant or its wholly owned subsidiaries are to be reported immediately to the plaintiff, at which time the plaintiff has leave to bring a further application for the immediate appointment of a receiver.

[40] That concludes my ruling.

"The Honourable Mr. Justice D. M. Masuhara"

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COURT FILE NO.: 01-CL-4056
DATE: 20020523

02 154 100

SUPERIOR COURT OF JUSTICE - ONTARIO
Commercial List

RE: **ROYAL BANK OF CANADA**

- and -

BRODAK CONSTRUCTION SERVICES INC., BRODAK GROUP INC., BART BEAUMONT and SYLVIA BEAUMONT

BEFORE: The Honourable Mr. Justice James Spence

COUNSEL: *Tamara Vanmeggelen*, for the Plaintiff

Michael F. O'Connor, for the Defendants

HEARD: May 15, 2002

ENDORSEMENT

[1] The problem with the G.S.A. is that it was executed in connection with the loan that preceded the loan arrangement for up to $400,000 provided for in the Demand Loan Financing Agreement and was apparently not referred to in that Agreement at the time the borrower signed it. That Agreement provides that it supersedes previous such agreements and that the Agreement "and any documents referred to in, or delivered pursuant to" the Agreement "constitute the whole agreement" between the parties with respect to the Loan. In view of these terms, it is said that there is no basis for the Court to treat the G.S.A. as still being in effect. S.14 of the G.S.A. in para (j) might provide such a basis if the Demand Loan Financing Agreement of December 14/99 could properly be regarded as nothing more than the Notice of Discontinuance contemplated by s.14(j), but I do not find any basis for such an interpretation, particularly having regard to the *contra proferentem* rule.

[2] So, based only on the above analysis, the motion would have to be dealt with as one in which the plaintiff seeks the appointment of a receiver where it has no contractual right to such an appointment, and the plaintiff has an action under way to seek judgment on its outstanding debt, on which it has made demand. The defendant admits that the plaintiff made demand on the Demand Loan and that the defendant has failed to repay the loan, but the defendant disputes that the amount claimed is outstanding and it claims a set-off. The view expressed above as to the

right of appointment of a receiver is based on the analysis concerning the G.S.A., which is subject to the following further considerations.

[3] Reference was made to the affidavit of Mr. Beaumont that he understood the only security expected was as to the assets of the company (Affidavit May 15/01, para. 21). Para 6 of his Supp. Aff. of March 28/02 seeks to explain away the earlier statement but it fails to do so satisfactorily: para 21 is clear in its context.

[4] As between the plaintiff and the defendant, the evidence as to their agreement as at December 14/99 is the Demand Loan Financing Agreement of that date referred to above and Mr. Beaumont's May 15/01 Affidavit, para 21. There is nothing from the Plaintiff that would effectively contradict Mr. Beaumont's statement noted above, i.e. that the bank expected security on the company assets.

[5] On this basis it might be said that the plaintiff and the defendant agreed to the December 14/99 document and also made an oral agreement for the G.S.A. to continue. If the oral agreement was said to be an Amendment it would seem to be ineffective, because of the "Amendments and Waivers" clause which requires amendments to be in writing and to be signed by the borrower.

[6] The foregoing considerations do not provide a complete analysis. The plaintiff and the defendant signed and delivered the December 14/99 Agreement on the understanding that the G.S.A., which was already in place, was to continue. This conclusion is warranted on the evidence, as noted above. The Agreement provides that the only other applicable documents are those "referred to in, or delivered pursuant to" the Agreement. In view of the understanding between the plaintiff and the defendant, the G.S.A. would have been deliverable pursuant to the Agreement. This would clearly not have been an amendment to the Agreement because the Agreement does not purport to specify or determine all the documents that are deliverable pursuant to it.

[7] The G.S.A. did not need to be specified in the Agreement or to be delivered in fact because it was already in place and by its terms continued in effect. So, by allowing the G.S.A. to remain in place, the parties in effect met the requirement for the G.S.A. to be "delivered pursuant" to the Agreement.

[8] Moreover, to the extent that the understanding that the G.S.A. would continue in effect could be viewed as an amendment, the requirement in the terms is that any amendment must be in writing and be signed by the borrower, and there is a revised version of the Agreement of December 14/99 which includes the G.S.A. Mr. Beaumont states that the Agreement as given to him in May 2000 had been altered by the additions of certain specific documents. He mentions "Security Agreement" which may be a reference only to the "Chattel Security Agreement" and not to the G.S.A. In any event, even if the bank added the G.S.A. to the Agreement after Mr. Beaumont signed it, its doing so was consistent with the understanding between parties that the G.S.A. was to continue, so the addition does not breach the protection intended to be afforded by

the requirement for amendments to be in writing and signed. For that reason, that requirement does not invalidate the continuing effectiveness of the G.S.A.

[9] This approach to the interpretation of the Agreement provision was not advanced in these precise terms in the submissions of counsel, but it appears to me to give effect fairly to the understanding between the parties with reference to the Agreement and its terms. It also reflects the commercial reality that the plaintiff, having a secured position in respect of a $200,000 loan, could not reasonably be supposed to have been agreeing to release that security in respect of an increase in the loan by another $200,000, which would in any event be inconsistent with Mr. Beaumont's statement about the expectations of the plaintiff.

[10] In the result, the plaintiff holds a valid G.S.A. on the assets of the defendant, which is in default of its obligations, having failed to repay following demand. The defendant has asserted a claim for set-off for damages suffered but it has not obtained judgment on that claim. The plaintiff has not acted in a way that could be regarded as improper pressuring of the defendant or otherwise causing the default by the defendant.

[11] The existence of defaults with respect to interest and principal payments and failure to pay principal on demand justify the appointment of a receiver.

> *Swiss Bank Corp. v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49 (Gen. Div.) at p. 61.
>
> *Royal Bank of Canada v. 605298 Ontario Inc.* [1998] O.J. No. 4859 (Gen. Div.) at p. 2.

[12] For the above reasons, the motion of the plaintiff is granted and an order is to go as requested by the plaintiff.

[13] The parties may consult me about costs.

SPENCE J.

DATE:

COURT FILE NO.: 01-CL-4056
DATE: 20020523

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ROYAL BANK OF CANADA

-and -

BRODAK CONSTRUCTION SERVICES INC., BRODAK GROUP INC., BART BEAUMONT and SYLVIA BEAUMONT

BEFORE: THE HONOURABLE MR. JUSTICE JAMES SPENCE

COUNSEL: Tamara Venmeggelen, for the Plaintiff

Michael F. O'Connor, for the Defendants

ENDORSEMENT

SPENCE J.

DATE:

4P

B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended**

Definitions

2 ***person*** includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

[...]

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

[...]

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and 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.

[...]

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

***Judicature Act*, RSNS 1989, c 240, as amended**

43 (9) A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just, and if an injunction is asked, either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Supreme Court thinks fit, whether the person against whom such injunction is sought is, or is not, in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained, under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

Fiera Private Debt Fund III LP and Fiera Private Date Fund V LP, each by their general partner, Fiera Private Debt GP Inc.

-and-

3306133 Nova Scotia Limited and 1003940 Nova Scotia Limited

Applicants

Respondents

2026 Hfx No.

SUPREME COURT OF NOVA SCOTIA

Book of Authorities

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