



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00703958-00CL

DATE: July 25, 2024

NO. ON LIST: 5

TITLE OF PROCEEDING: DEA CAPITAL ALTERNATIVE FUNDS SGR, S.P.A., AS MANAGING COMPANY OF ITALIAN CLOSED-END INVESTMENT FUND IDEA CCR (CORPORATE CREDIT RECOVERY) I v. UTIL CANADA LIMITED

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Nemers	Lawyers for KSV Restructuring Inc., in its capacity as the Court-appointed Receiver	jnemers@airdberlis.com
Mitch Vininsky	KSV Restructuring, Receiver	mvininsky@ksvadvisory.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE KIMMEL:

- [1] KSV Restructuring Inc. ("KSV") is the receiver (the "Receiver") of the property, assets and undertaking (the "Property") of Util Canada Limited (the "Company") appointed pursuant to an order made on August 8, 2023 (the "Receivership Order"). The Receiver seeks an order approving its statement of receipts and disbursements and its activities, approving its fees and disbursements and the fees and disbursements of its counsel, approving a proposed interim distribution to the applicant and a fee accrual for its ongoing work prior to being discharged, and an order for its eventual discharge. None of the requested relief is not opposed by the secured creditors of the Company.
- [2] KSV is also the licensed insolvency trustee (the "Trustee") of the Company's bankruptcy estate pursuant to an assignment in bankruptcy filed by the Company on August 4, 2023 (the "Bankruptcy Date") pursuant to section 49 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended ("BIA").

Receiver's Statement of Receipts and Disbursements

- [3] The primary purpose of the receivership proceeding was to maximize value for the Company's stakeholders by conducting a sale process for the Property (the "Sale Process"). The Sale Process resulted in court-approved sale transactions for aggregate proceeds of approximately US\$2.5 million.
- [4] In addition to selling the Company's equipment in the Sale Process, the Receiver collected substantially all of the Company's accounts receivable owing to the Company as of the Bankruptcy Date. The Receiver also sold raw material, finished goods and tooling that had been on hand at the Premises to most of the Company's customers, resulting in proceeds of approximately US\$2.4 million.
- [5] The Receiver's statement of receipts and disbursements for the period August 8, 2023 to June 30, 2024 (the "R&D") reflects that there is approximately US\$4.8 million and \$370 in the Receiver's estate accounts. These amounts are prior to accrued costs, including professional fees and costs of administration.
- [6] The Statement of R&D appears to be in order and is approved.

Approval of Proposed Distribution

- [7] The application to appoint the Receiver was made by DeA Capital Alternative Funds SGR S.p.A. ("DeA"). Prior to its bankruptcy, the Company had provided secured guarantees of the indebtedness owing by Util Industries S.p.A. ("Util Italy"), which is the Company's parent company based in Italy, to Illimity Bank S.p.A. ("Illimity") and DeA. These indebtedness amounts were estimated in August 2023 to be approximately \$36.5 million

(to Illimity) and \$17.3 million (to DeA). The loans from Illimity and DeA to Util Italy do not mature in the ordinary course until 2027.

- [8] Aird & Berlis provided the Receiver with opinions on Illimity's and DeA's security over the Company (together, the "Security"). Subject to the standard qualifications and assumptions, these opinions conclude that the security interests granted by the Company to Illimity and DeA, respectively, have been properly perfected and rank in priority to the interest of the Trustee.
- [9] Util Italy issued a default notice that summarized several events of default by Util Italy and confirmed the acceleration of Util Italy's payment obligations to DeA (the "Default Notice"). Pursuant to a letter dated June 18, 2024 (the "Demand Letter"), DLA issued a demand on behalf of DeA against the Company, as guarantor. DLA advised, among other things, that €12,348,864 (approximately CDN \$17.3 million), inclusive of principal, accrued interest and other amounts payable by Util Italy under the Amended Facilities Agreement² (plus accrued and accruing interest since June 1, 2024), remains owing by Util Italy to DeA, and accordingly by the Company, as guarantor.
- [10] Util Italy has not objected to the Default Notice and, like the Company, is unable to pay the full amount claimed by DeA.
- [11] Illimity supports the making of a court order authorizing the Receiver to distribute any available proceeds solely in favour of DeA. Illimity has executed and delivered in escrow to DLA a full release of the Company's guaranteed obligations to Illimity (to be released from escrow provided such distribution order is made and becomes final).
- [12] Other than the Receiver's Charge, the Receiver is not aware of any claim that ranks in priority to DeA and Illimity.
- [13] While the Receiver understands from its discussions with DLA that DeA and Illimity do not appear likely to fully recover their loans to Util Italy, the Receiver intends to monitor their recoveries by requesting confirmation annually, until 2027, that a loan balance remains outstanding. If DeA and Illimity advise the Receiver that they have recovered in full their advances to Util Italy, which the Receiver understands to be remote, the Receiver will report to court at that time as the Company may be entitled to subrogate to DeA in respect of its advances to Util Italy, resulting, potentially, in funds being available to the Company's unsecured creditors.
- [14] Based on the Company's Statement of Affairs in its bankruptcy proceeding, the Company's unsecured creditors were owed in excess of \$33 million as of the Bankruptcy Date. KSV, as Trustee, has not reviewed any of the unsecured claims.

- [15] Given the remoteness of any likely recovery for unsecured creditors, the Receiver recommends that the court authorize and direct the Receiver to make one or more distributions to DeA (after paying the fees and disbursements of the Receiver and Aird & Berlis, and after holding back sufficient funds to secure the Fee Accrual (defined below), up to the amount of the Company's indebtedness owing to DeA.
- [16] In the circumstances and subject to the Fee Accrual and potential contingencies discussed below, the proposed distribution is reasonable and is approved.

Approval of the Receiver's Activities and Fees and Disbursements of the Receiver and its Counsel and Fee Accrual

- [17] The fees and disbursements of the Receiver and Aird & Berlis (before taxes) from November 1, 2023 to June 30, 2024 for which the court's approval is sought are:
- a. \$188,395 for the Receiver; and
 - b. \$ 40,801 for the Receiver's counsel.
- [18] These fees and disbursements are supported by fee affidavits and detailed invoices, reflecting the time spent on tasks described at the regular hourly rates for the professionals involved. The professional fees for which approval is sought are commensurate with the tasks performed and the time spent. I am satisfied that the rates are consistent with rates charged by professionals practicing in restructuring and insolvency in the downtown Toronto market, and that the fees charged are fair, reasonable and appropriate in the circumstances. They are approved.
- [19] The Receiver has proposed an accrual of \$175,000 for fees, excluding HST and disbursements incurred or to be incurred by the Receiver and Aird & Berlis to the completion of these proceedings (the "Fee Accrual"). The court accepts the Receiver's recommendation regarding the appropriate amount of the Fee Accrual for any future monitoring or other work the Receiver may need to undertake prior to its discharge.
- [20] The approval of the Receiver's Third Report and activities described therein has been made subject to the standard qualification that has become the Commercial List practice to include in these types of orders. It has become common practice to seek the approval of the interim fees and activities of court appointed officer, for the stability and other recognized salutary effects that the interim approval process provides. See *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 2 and 23. In this case, if it proceeds as anticipated, there will be no need for a final approval as the Receiver will be discharged.

Approval of Receiver's Eventual Discharge

[21] The Property is insufficient to repay in full the amounts owing under the secured guarantee to DeA. After distribution to DeA, the Receiver advises that there will be no further purpose to these proceedings other than to monitor recoveries against Util Italy. Accordingly, the Receiver recommends that the court make an order now discharging KSV as Receiver, subject to the anticipated later filing of a discharge certificate with the court confirming that all matters to be attended to in connection with the receivership have been completed to the satisfaction of the Receiver (including, without limitation, a final distribution having been made to DeA) after the monitoring period that will expire at the end of 2027. also contemplates that:

- a. the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of this proceeding, including to monitor recoveries against Util Italy, which costs would be funded from the Fee Accrual; and
- b. the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of KSV in its capacity as Receiver.

[22] Provisions have been added to the discharge order, at the court's request, that counsel for the Receiver advises are designed to ensure that the Discharge Certificate will only be filed (and the service list notified of such) if the advice provided by DeA and Illimity as at the end of 2027 confirms that they have not recovered in full their advances to Util Italy (such that there is a deficiency still owing that is subject to the Company's guarantee of those advances), at which point the monitoring period will be concluded and any unused portion of the Fee Accrual will be paid to DeA. In the remote event that they have been repaid in full by the end of the monitoring period, the Receiver will not file its Discharge Certificate and shall instead report to court at that time since this could mean that there is recourse for the Company's unsecured creditors.

[23] I am satisfied that the requested (amended) discharge is appropriate. While there will be a longer than usual time before the anticipated Discharge Certificate is filed, there is certainty around the circumstances under which it will, or will not, be filed and there is some advantage to saving the further cost of serving and re-appearing for the discharge if, as is expected, the circumstances remain as currently anticipated such that the DeA is entitled to all amounts available for distribution from the Company's estate.

Order

[24] The requested order, as revised, shall have immediate effect. It may issue in the form signed by me today.

[25] The Receiver is responsible for ensuring that any previously sealed confidential materials are unsealed now that the auction has been completed (per the court's previous endorsement of November 28, 2023).

A handwritten signature in black ink, appearing to read "Kimmel J.", with a stylized, cursive script.

KIMMEL J.