



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00703754-00CL DATE: 2 August 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: **Macquarie Equipment Finance Limited v.
Validus Power Corp.**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Jeremy Opolsky	Applicant	jopolsky@torys.com
Scott Bomhof		sbomhof@torys.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Catherine Francis	Respondents	cfrancis@mindengross.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Brett Harrison	CIBC	Brett.harrison@mcmillan.ca
Evan Cobb	Counsel for the Proposed Receiver	Evan.cobb@nortonrosefulbright.com
David Sieradzki	KSV Restructuring Inc. (Proposed Receiver)	dsieradzki@ksvadvisory.com

ENDORSEMENT OF JUSTICE KIMMEL:

1. The applicant seeks the appointment of KSV Restructuring Inc. ("KSV") as receiver and manager (in such capacity, the "Receiver") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* (Ontario) over all of the undertakings, properties and assets ("Property") of the respondents to this application (collectively, the "Debtors" or "Validus Group").
2. The Validus Group is a power generation company that generates and sells power to the Independent Energy System Operator ("IESO") as a participant in its "capacity auction" market. The Validus Group's operations consist of four power plants located in the Ontario regions of North Bay, Kapuskasing, Iroquois Falls and Kingston. They also own a non-operational data centre in North Bay.
3. There are complicated lending and transactional documents between the applicant and the Debtors. The Debtors are indebted to the Applicant in the total outstanding amount of \$55,598,575 as of July 31, 2023. The Debtors granted the Applicant first-ranking security over substantially all of their Property. The Applicant has a contractual right to appoint a receiver in the event of defaults.
4. In addition to monetary defaults, the Applicant has detailed in its supporting evidence various other financial and operational defaults of the Debtors, including failing to pay rent and remit HST, failing to pay and remit taxes, incurring a large lien in respect of unpaid taxes, allegedly breaching an agreement with a key customer, failing to properly maintain books and records and failing to maintain insurance.
5. The Debtors' principals are alleged to have misappropriated and failed to return funds from a bank account with CIBC that the bank alleges they were erroneously granted access to, and allegedly failed to provide benefits and RRSP contributions to their unionized employees in accordance with a collective bargaining agreement. The Applicant has identified further concerns about the retention of senior management and employee. The allegations raise serious concerns about the stability of the Debtors.
6. Since early 2023, the Applicant has made numerous payments on behalf of the Debtors on account of critical items, in order to protect its collateral and minimize the risk of potential destabilization of the Debtors and their operations. Those payments included: (i) \$675,379.60 of insurance premiums that were required to prevent the Debtors' insurance coverage from lapsing; and (ii) \$745,990.78 of the Debtors' accounts payable, including for gas transportation services, gas procurement services, legal fees and information technology services. Those amounts were subsequently repaid to the Applicant on July 24, 2023 through a set-off.
7. After making efforts to accommodate the Debtors starting in early 2023, including by agreeing to enter into a forbearance agreement with the Debtors in February 2023, the situation arguably got worse, not better. The Applicant is no longer willing to continue deferring amounts due and payable and/or funding operational expenses in the absence of a court-supervised process.
8. The Applicant issued demand letters and notices of intention to enforce security pursuant to section 244 of the BIA first on June 9, 2023 addressing the immediate defaults. On June 9, 2023, the Applicant sent out notices of intention to enforce security pursuant to section 244 of the BIA giving notice to the Debtors of the Applicant's intention to enforce against security. New demands were sent out on July 24, 2023 for repayment of all rent and HST outstanding and accelerated, as of July 31, 2023. The proposed Receiver has proceeded cautiously and took the time to make arrangements with a licensed operator who can assume control of the Debtors' Property before bringing this application.
9. The Debtors asked for the receivership application to be adjourned for a few weeks to allow time for them to respond. They would also like to use that time to try to find an alternative source of debt and/or equity so that the Applicant can be repaid in full (something that they have been working on since the beginning of 2023, although they say there may be a recent development that gives them reason for greater optimism). They suggest that the Applicant has more than sufficient security for its debt and already has *de facto* control of the bank accounts and is, thus, protected. Despite the ongoing dealings and demands and notices, the Debtors claimed that this application came out of the blue.
10. The Applicant does not agree that it has sufficient comfort from the security it has. By way of example, it points to a recent failed sales process that the Debtors undertook for the sale of one of the power plants

and the lack of liquidity or any market interest at least in that property. There are no valuations, which the Applicant in part blames upon the state of disarray of the Debtors' books and records.

11. The Applicant has made it known that one of its intended objectives in the receivership is a sale process and stalking horse bid for substantially all of the Debtors' assets, the terms of which the Debtors say they expect they will object to. A CCAA application is also contemplated. The SISP and CCAA application are matters that were not intended to be addressed at the time of the receivership application, but the prospect of them may be relevant.
12. They are entitled to respond to the application, but the time they ask for is too long having regard to the circumstances described by the Applicant in its supporting material. Given the seriousness of the allegations and the urgency of some of the circumstances described, but recognizing that the Debtors should be permitted to address these allegations if they can, the court granted a brief adjournment of this application to August 10, 2023, on terms which include an interim receivership order to allow the Receiver to gain access to information and documents and some additional insight and transparency into the records and operations of the business, without taking possession of the Property, and to provide some additional protections if, in the meantime, further funding advanced by the Applicant for operational needs.
13. Counsel for the Applicant and the Debtors were asked to work out the terms of this interim receivership order which they have now done. I am satisfied that the Applicant has sent the s. 244 notices and shown that it is necessary for the protection of the Debtors' estate for the benefit of all stakeholders, as well as the interests of the Applicant, such that the appointment of an interim receiver is appropriate under s. 47(1) of the BIA and that it is just and convenient for this interim receivership order to be granted pursuant to s. 101 of the *Courts of Justice Act*, pending the return of this application.
14. Given the short duration of this interim order, I am satisfied that the inclusion of the stay and requirement for services to be continued in favour of the Debtors is appropriate, as it is supported by the Applicant's record filed for the full receivership order and is important for the protection of the Debtors' estate in this interim period.
15. Some other secured creditors were identified by the Applicant. They were all given notice of this hearing and none appeared. The Applicant shall serve this endorsement and the order signed today on the service list, including but not limited to all secured creditors, and they shall have the opportunity to appear at the next attendance should they wish to do so.
16. The parties shall work out a timetable for the exchange of any additional material to be relied upon at the return of this application, all of which shall be served, filed and uploaded into CaseLines by no later than 2 p.m. on August 9, 2023. A copy of this endorsement shall also be uploaded into CaseLines by the Applicant.
17. Order to go in the form signed by me today.



KIMMEL J.