

COURT FILE NUMBER 2201-07148

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT **PRIVATE DEBT PARTNERS SENIOR OPPORTUNITIES FUND GP INC. carrying on business as PRIVATE DEBT PARTNERS**

RESPONDENT **HOME SOLUTIONS CORPORATION**

DOCUMENT **BRIEF OF LAW OF THE APPLICANT IN SUPPORT OF APPLICATION FOR RECEIVERSHIP ORDER**

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BENCH BRIEF OF THE APPLICANT, PRIVATE DEBT PARTNERS SENIOR OPPORTUNITIES FUND GP INC. carrying on business as PRIVATE DEBT PARTNERS
DATE OF HEARING: 2:00 p.m. on June 28, 2022
Before the Honourable Justice D.B. Nixon

INDEX

I. INTRODUCTION.....2

II. BRIEF SUMMARY OF FACTS2

III. ISSUES4

IV. LAW AND ARGUMENT.....4

V. RELIEF REQUESTED.....7

VI. BOOK OF AUTHORITIES8

I. INTRODUCTION

1. This brief is submitted on behalf of Private Debt Partners Senior Opportunities Fund GP Inc. carrying on business as Private Debt Partners (“**PDP**”) in support of its application to appoint a receiver or receiver-manager over the undertakings, real and personal property, and assets of Home Solutions Corporation (“**Home Solutions**”) excluding inventory and accounts receivable (the “**Current Assets**”).
2. PDP extended a non-revolving credit facility in the principal amount of \$9,135,000.00 (the “**Credit Facility**”) to Home Solutions pursuant to a Credit Agreement dated January 11, 2022 (the “**Credit Agreement**”).¹
3. As of May 4, 2022 Home Solutions was indebted to PDP in the amount of \$9,224,815.23 plus interest and costs which continue to accrue in respect of the Credit Facility (the “**Indebtedness**”).²
4. The terms of the Security (as defined below) include the right to appoint or apply to this Honourable Court to appoint a receiver and manager.
5. As Home Solutions is in default of its obligations to PDP under both the Credit Agreement and the Security PDP seeks to enforce its contractual right to appoint a Receiver, and it is just and convenient to do so.

II. BRIEF SUMMARY OF FACTS

6. The facts in support of PDP’s application are set forth in the Affidavit of Jeffrey Deacon (the “Deacon Affidavit”).
7. Home Solutions is a corporation incorporated pursuant to the laws of Alberta with its registered office in Calgary. The main business activities of Home Solutions was the manufacture and supply of materials for closets and glassware. It operated out of leased premises in Calgary and Edmonton.³

¹ Deacon Affidavit at para 6

² Deacon Affidavit at para 7

³ Deacon Affidavit at para 4 and 5

8. To secure due payment and discharge of all present and future indebtedness and liabilities of Home Solutions to PDP, Home Solutions executed a General Security Agreement dated January 11, 2022, granting PDP a security interest in all of its present and after-acquired personal property and an Assignment of Insurance Policies dated January 11, 2022.⁴ (collectively, the “Security”)
9. As additional security for the Credit Facility, the sole shareholder of Home Solutions, 2087212 Alberta Ltd. (“2087”) executed a Limited-Recourse Guarantee and Share Pledge Agreement dated January 11, 2022.⁵
10. PDP has the first general security interest over the assets of Home Solutions (except for inventory and accounts receivable) as the other creditors of Home Solutions with general security interests have subordinated and postponed their security interests to PDP. Pursuant to a Priority Agreement between PDP and The Toronto-Dominion Bank (“TD”), TD has priority over the inventory and accounts receivable (the “**Current Assets**”).⁶
11. Home Solutions is in default of the Credit Agreement and the Security and all amounts owing under the Credit Agreement are immediately due and payable. On May 5, 2022, PDP issued demand for payment and notice of its intention to enforce security (“**244 Notice**”) pursuant to section 244(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) to Home Solutions.⁷
12. In early May 2022 Home Solutions advised PDP that it intended to file a Notice of Intention to Make a Proposal under Part III Division 1 of the BIA (“**NOI Proceedings**”). The Borrower wished to use the NOI Proceedings to conduct a sale process. PDP entered into a Forbearance Agreement with Home Solutions and the guarantors of Home Solutions on the understanding that PDP would forbear from enforcement provided that 2087 executed a share transfer agreement to transfer the shares of Home Solutions to PDP or its nominee (as was contemplated under the Limited-Recourse

⁴ Deacon Affidavit at para 8

⁵ Deacon Affidavit at para 8

⁶ Deacon Affidavit at para 10

⁷ Deacon Affidavit at para 12 and 13

Guarantee). Home Solutions would then proceed to initiate NOI Proceedings and complete a sales process.⁸

13. After the Forbearance Agreement was signed and more information was obtained PDP learned that the financial situation of Home Solutions was worse than thought. Home Solutions was unable to secure DIP financing which was necessary to proceed with the NOI Proceedings.⁹
14. Home Solutions made an assignment in bankruptcy on May 20, 2022, and MNP Ltd. (“MNP”) was appointed as licensed insolvency trustee.¹⁰
15. MNP issued a letter to PDP on June 16, 2022 releasing any interest of the estate in Home Solutions’ property and equipment excluding the Current Assets. PDP requires the appointment of a receiver to realize on the all present and after-acquired personal property of Home Solutions excluding the Current Assets (the “**Property**”).¹¹

III. ISSUES

16. The issue before the Court is whether it is just or convenient to appoint a Receiver or Receiver and Manager Home Solutions in these circumstances.

IV. LAW AND ARGUMENT

17. PDP satisfied the procedural prerequisite to seeking the appointment of the Receiver when it issued the 244 Notice on Home Solutions.
18. Each of section 243 of the *BIA*¹², section 13(2) of the *Judicature Act*¹³, and section 65(7) of the *Personal Property Security Act*¹⁴, RSA 2000, c.P-7 vest in this Honourable Court, authority to appoint a receiver where it is just or convenient to do so.

⁸ Deacon Affidavit at para 16

⁹ Deacon Affidavit at para 17

¹⁰ Deacon Affidavit at para 20

¹¹ Deacon Affidavit at para 25

¹² *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, Section 243 [TAB 1]

¹³ *Judicature Act*, RSA 2000 c. J-2, Section 13(2) [TAB 2]

¹⁴ *Personal Property Security Act*, RSA 2000, c. P-7 (“PPSA”), Section 65(7) [TAB 3]

19. The test to appoint a receiver is whether it is just or convenient to do so in light of the circumstances.¹⁵
20. A receivership is appropriate when required to protect the interests of a secured lender and when it is just or convenient, having considered and balanced the interest of the parties.¹⁶
21. PDP respectfully submits that this Honourable Court ought to exercise its discretion to appoint a Receiver over the Property because it is just, convenient and otherwise appropriate in the circumstance and would be in accordance with the contractual terms agreed upon by PDP and Home Solutions under the Security.
22. Justice Romaine in *Paragon Capital Corp. v Merchants & Traders Assurance Co.* adopted the non-exhaustive list of factors provided by Frank Bennett in *Bennett on Receiverships* to consider on an application to appoint a receiver; the list includes:
 - (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 rights of the parties thereto;
 - (e) the apprehended or actual waste of the debtor's assets;
 - (f) the preservation and protection of the property pending judicial resolution;
 - (g) the balance of convenience to the parties;
 - (h) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

¹⁵ *Servus Credit Union Ltd. v Proform Management Inc.* [Proform] 2020 ABQB 316 at para 65 [TAB 4]

¹⁶ *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63, at para 21 [TAB 5]

- (i) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
 - (j) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
 - (k) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
 - (l) the effect of the order upon the parties;
 - (m) the conduct of the parties;
 - (n) the length of time that a receiver may be in place;
 - (o) the cost to the parties;
 - (p) the likelihood of maximizing return to the parties;
 - (q) the goal of facilitating the duties of the receiver; and
 - (r) the secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity.¹⁷
23. The Court has recognized that where a secured creditor applicant holds security that provides for the remedy of the appointment of a receiver, the extraordinary nature an appointment of a receiver is "less essential to the inquiry".¹⁸
24. Having regard to the factors listed by Justice Romaine in *Paragon*, PDP notes:
- (a) PDP is the first-ranking secured creditor of Home Solutions and holds a first-ranking security interest in the Property;
 - (b) Upon default, PDP has the contractual remedy under its General Security Agreement to appoint a receiver over Home Solutions, its personal property;
 - (c) Home Solutions is bankrupt;

¹⁷ *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co.*, [Paragon] 2002 ABQB 430 at para 27 [TAB 6]

¹⁸ *Schendel Management Ltd. Re*, 2019 ABQB 545 at para 44 [TAB 7]

- (d) there is legitimate concern that if a receiver is not appointed that the Property may be lost or damaged, particularly if MNP disclaims the lease for the premises where the Property is located;
 - (e) the Court appointment is necessary so that the Receiver will have sufficient authority to deal with the leased premises where the Property is located;
 - (f) the appointment of a receiver is necessary to maximize return to the stakeholders of Home Solutions and is commercially reasonable under the circumstances;
 - (g) the Statement of Affairs of Home Solutions filed in the Bankruptcy Proceedings confirms that its total liabilities (\$16,137,277.15) exceed its total assets (\$12,770,187.15) and as such Home Solutions appears not to have any equity in the assets; and
 - (h) PDP attempted to work with Home Solutions and had agreed to facilitate the NOI Proceedings but given the current circumstances, there are no other options available to realize on the Property.
25. Given the facts set out above, it is just or equitable for the Court to grant PDP's application to appoint a receiver and manager. There are no other remedies available to PDP short of the appointment of a receiver that will sufficiently protect its interests. The balancing of interests of the parties favours PDP and the appointment of a receiver.

V. RELIEF REQUESTED

26. For the reasons as set forth above, PDP seeks a Receivership Order substantially in the form appended as Schedule "A" to the Application in order to maximize value for all of the stakeholders of Home Solutions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20th DAY OF JUNE, 2022

MILLER THOMSON LLP

Per:



Nicole T. Taylor-Smith
Counsel for Private Debt Partners

VI. BOOK OF AUTHORITIES

TAB

1. *Bankruptcy and Insolvency Act, RSC 1985, c. B-3*, s. 243.
2. *Judicature Act, RSA 2000, c. J-2*, s. 13(2).
3. *Personal Property Security Act, RSA 2000, c. P-7*, s. 65(7).
4. *Servus Credit Union Ltd. v. Proform Management Inc.*, 2020 ABQB 316.
5. *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.*, 2013 ABQB 63.
6. *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430.
7. *Schendel Management Ltd. Re.*, 2019 ABQB 545.