



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00698539-00CL DATE: 11 May 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: CIBC V 1340182 ONT LTD

BEFORE JUSTICE: OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE

1. The Applicant, CIBC, moves pursuant to section 101 of the *Courts of Justice Act* and section 243 of the *Bankruptcy and Insolvency Act*, for the appointment of a receiver over both Respondents: 1340182 Ontario Limited (“182”) and Kazambe & Associates Professional Corporation (“Prof Co”).
2. The two Respondents are related. 182 is a real estate holding company, the only significant asset of which is a property located at 1888 Wilson Avenue, Toronto, Ontario. Prof Co. is a law firm operating out of the property owned by 182.
3. Mr. Courtney Kazembe is the sole officer and director, and 100% shareholder, of both Respondents. I pause to observe that Mr. Kazembe was present in Court today, albeit as an observer. Neither Respondent has filed any materials, and Mr. Kazembe confirmed that neither Respondent opposes the relief sought today.
4. The appointment of a receiver over Prof Co. is not opposed by any party. The appointment of a receiver over 182 is opposed by other mortgagees, the indebtedness to which is secured by charges registered against title to the property owned by 182. There is a priority dispute.
5. With respect to Prof Co., it is, as noted above, a law firm. Mr. Kazembe’s licence to practise law has been suspended by the Law Society of Ontario (“LSO”). The LSO has been served with the motion materials, and today counsel for the Applicant confirmed that the LSO has advised that it does not oppose the relief sought.
6. 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?
7. 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.
8. 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.
9. As I 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.
10. 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).
11. 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.
12. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?
13. As noted, the appointment of a receiver over Prof Co. is not opposed by any party, nor is it opposed by the regulator, the LSO.
14. The Respondents are indebted to CIBC and the approximate amount, in the aggregate, of \$1,018,011.90. Mr. Kazembe has guaranteed certain obligations. The agreements were amended, as set out in the motion materials.

15. CIBC holds security in the form of a mortgage on the property owned by 182, and a GSA over the assets of each of the two Respondents, among other things and as fully described in the motion materials..
16. Events of default have occurred. Demands and section 244 BIA notices were delivered on February 14, 2023, and the statutory notice period has expired. The security documentation provides for the appointment of a receiver, on consent, in the event of default.
17. For all of the reasons set out in the motion materials, and in particular the affidavit of Jo-Ann Mitchell sworn April 27, 2023 and exhibits thereto, I am satisfied that the relief sought should be granted and a receiver should be appointed. MNP, an experienced licensed insolvency trustee, has consented to act as a receiver.
18. I reviewed today the draft order. Certain amendments were required to be made, and counsel for the Applicant has delivered a revised order incorporating those amendments. It is generally consistent with the Model Order of the Commercial List, amended as is appropriate in the circumstances, particularly given that Prof Co. is a law firm.
19. I am satisfied that the terms of the order are appropriate as to scope and to protect adequately in the circumstances the rights of those third parties most directly affected, being clients of the law firm. I observe that the terms of the order are generally consistent with those granted by this Court in respect of a law firm previously: *The Toronto Dominion Bank v. Brad Duby Professional Corporation*, CV-21-00657656-00CL, Order dated February 25, 2021 (unreported).
20. Order to go in the form signed by me today, which is effective immediately and without the necessity of issuing and entering.
21. Counsel for the Applicant is directed to provide a copy of this Endorsement, and the order granted today, to the LSO, which may wish to consider appointing a trustee.
22. The balance of the relief sought today, and particularly the appointment of a receiver over the assets of 182, is adjourned **to be heard on the merits on June 22, 2023, commencing at 11 AM in person**. All counsel have confirmed their availability for that date, and the fact that the matter will be fully briefed in order that it can be determined on the merits. In the event that counsel agree on the relief sought, in whole or in part, such that the date can be vacated or less time is required, they will immediately notify the Commercial List Office.

Olson, J.