



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-23-00698539-00CL

DATE: June 23, 2023

NO. ON LIST: 4

TITLE OF PROCEEDING: CANADIAN IMPERIAL BANK OF COMMERCE v. 1340182 ONTARIO LIMITED et al

BEFORE: STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Parjot Krygier- Baum	Counsel for Arthur Bryan- 3 rd Mortgagee	krygier-baum@phmlaw.com
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Courtney Kazembe	Counsel for Respondent – Self represented	courtney@kazembelaw.com
Ian Katchin	Counsel for 1 st Mortgagee	ikatchin@foglers.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Jerry Henechowicz	Proposed Receiver	jerry.henechowicz@mnp.ca

ENDORSEMENT OF JUSTICE STEELE:

1. The applicant, Canadian Imperial Bank of Commerce (“CIBC”) seeks to appoint a receiver over all of the property of 1340182 Ontario Limited (“Real Estate Co”) pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada) (the “BIA”) and section 101 of the *Courts of Justice Act* (Ontario) (the “CJA”).
2. The first ranking secured creditor supports CIBC’s application.
3. The application is opposed by one of the secured creditors, Arthur Bryan (“Bryan”). Bryan instead proposes that sale proceedings be carried out either by him or one of the other mortgagees with payment into Court of the sales proceeds. Both the other secured creditors oppose this approach.

Background

4. Real Estate Co owns the property (lands and premises) municipally known as 1888 Wilson Avenue, Toronto (the “Property”). The Property is the sole significant assets of Real Estate Co. The respondent, Kazembe & Associates Professional Corporation (“K&A Opco”) operated their business at the Property. Mr. Kazembe is the principal of K&A Opco.
5. Mr. Kazembe is the sole officer, director and shareholder of both Real Estate Co and K&A Opco.
6. On May 11, 2023, MNP Ltd. (“MNP”) was appointed as receiver over all of the property, assets and undertakings of K&A Opco on consent. This hearing was scheduled to consider the applicant’s request for the receiver to also be appointed over Real Estate Co’s property.
7. The first ranking mortgage charge against the Property is 923944 Ontario (“923 Ontario”) in the principal amount of \$1,000,000 (the “923 Mortgage”). As of February 1, 2023, the 923 Mortgage is in arrears and approximately \$1,158,250 is owing to 923 Ontario.
8. Bryan holds a mortgage secured against the Real Property in the current amount of approximately \$391,000 (the “Bryan Mortgage”). CIBC also holds a mortgage secured against the Real Property in the principal amount of \$945,000 (the “CIBC Mortgage”). There is a separate dispute between Bryan and CIBC, which is not part of the motion before me, regarding which mortgage is the second mortgage on the Property.
9. There have been defaults under the CIBC Mortgage, including:
 - The registration of the CIBC Mortgage behind the 923 Mortgage contrary to the Letter of Direction and the terms of the Real Estate Co Credit Agreement with CIBC;
 - Payment defaults; and
 - Failure to remit taxes when due.
10. CIBC has issued the Notice of Intention to Enforce a Security as required under the BIA. The notice period for the NITES expired on February 25, 2023.

Analysis

11. As noted above, Bryan opposes CIBC's application for the appointment of a receiver and instead proposes that he and his counsel sell the Property. Bryan's preference is to enforce his right to sell as mortgagee.
12. Under section 101(1) of the CJA, the Court may grant an order appointing a receiver where it is "just or convenient" to do so.
13. Similarly, under section 243(1) of the BIA, on an application by a secured creditor, where the Court considers it to be just or convenient to do so, the Court may appoint a creditor to:
 - 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;
 - Exercise any control that the Court considers advisable over that property and over the insolvent person's or bankrupt's business; or
 - Take any other action that the Court considers advisable.
14. In order to determine whether it is just and convenient to appoint a receiver, the Court must have regard to all of the circumstances, including the nature of the property and the rights and interest of all parties in relation thereto. In particular, the following considerations have been held to be relevant:
 - The moving party has a right under its security to appoint a receiver;
 - The security is in jeopardy; and
 - Whether it is in the interests of all concerned to have a receiver appointed by the Court. This analysis includes an examination of 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 working duties of the receiver and manager.

Bank of Nova Scotia v. Freure Village on the Clair Creek, 1996 CanLII 8258 (ONSC) at paras. 10-13.

15. Bryan argues that the appointment of a receiver is an extraordinary remedy, which is generally true.
16. However, where the rights of the secured creditor include, pursuant to the terms of the security, the right to seek the appointment of a receiver, the burden on the applicant seeking the appointment of the receiver is relaxed. As noted, generally, the appointment of a receiver is an extraordinary remedy. However, the Courts do not regard the remedy in this way where the relevant security documents permit the appointment. This is because the applicant is seeking to enforce a terms of an agreement that both parties made: *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023, at para. 42.
17. There was some debate by Bryan as to whether CIBC's security documents permit the appointment of a receiver. I am satisfied based on the evidence that CIBC's credit documents with Real Estate Co provide for the appointment of a receiver. As noted by this Court in *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*, 2018 ONSC 7382, at para. 100, where a secured creditor has bargained for the contractual right to have a receiver appointed, there must be a good reason to deprive the creditor of that contractual right. CIBC submits that there is no such reason here.

18. Another factor that supports the appointment of a receiver in this case is the priority dispute. The Court noted in *Halex Capital Inc. v. Natural Energy Systems Inc.*, 2020 ONSC 7910, at para 27, that: "...a court-appointed receiver, being a neutral third party, can provide the court with an unbiased and impartial opinion on the validity, enforceability, and priority of [competing creditors] respective security." By having a receiver in place, a separate proceeding regarding the priority dispute can be avoided.
19. CIBC submits that it is just and convenient to appoint MNP as Receiver because:
- a. The appointment of the Receiver over Real Estate Co will create a transparent marketing process for the sale of the Property and the realization of the personal property assets of Real Estate Co at the highest possible value, and will provide a clear way forward for the repayment of amounts owed to secured creditors of Real Estate Co;
 - b. The appointment of the Receiver will allow the Property to be preserved and placed under the stewardship of a Court-appointed officer while the priority dispute is advanced. In this respect, it will avoid a multiplicity of proceedings;
 - c. CIBC's credit documents specifically provide CIBC with the right to seek the appointment of the Receiver and CIBC should not be deprived of this contractual right; and
 - d. There has been a fundamental breakdown in the relationship between CIBC and Real Estate Co.
20. Bryan's concern with the proposed receivership relates primarily to the potential cost. Bryan is concerned that a receivership will erode the estate and if the priorities are such that Bryan holds the second mortgage he will be impacted. As noted, CIBC takes the position that its mortgage is in second position. This is a priority issue that will have to be determined. An independent Court appointed receiver would be in a good position to assist with this determination.
21. As is generally the case, it is proposed that the Receiver's Charge will have priority over other security interests. In this case, there is a fee cap that has priority over the first mortgagee's security in the amount of \$75,000. However, that fee cap does not apply in respect of the other two mortgages.
22. The first ranking secured creditor supports CIBC's application to appoint a receiver. MNP has already been appointed as a receiver over the law practice, K&A Opco, which is the business operating on the Property (owned by the same person as Real Estate Co). There are priority disputes to be determined. Importantly, CIBC has the right under its credit facility terms to seek the appointment of a receiver. While I accept that it will likely be more costly to have a receiver sell the Property, in the circumstances I am satisfied that it is just and convenient to appoint MNP as Receiver. I further note that as Bryan is a secured creditor of Real Estate Co, he may make submissions on the receiver's fees when the receiver seeks Court approval of same.
23. Order attached.



