

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

-and-

1340182 ONTARIO LIMITED AND KAZEMBE & ASSOCIATES PROFESSIONAL
CORPORATION

Respondent

SUPPLEMENTARY FACTUM OF ARTHUR BRYAN

PART I –OVERVIEW OF RESPONSE

1. By way of explanation, the sequencing and nomenclature of facta in this Application do not follow the usual course, with the Respondent, Arthur Bryan, filing the first factum. The Applicant, Canadian Imperial Bank of Commerce (“CIBC”) subsequently filed its factum, and Mr. Bryan is filing the herein factum as supplementary and responding to CIBC’s factum. Mr. Bryan was obligated to file his first factum as CIBC obstinately refused to agree to an adjournment of its unilaterally scheduled Application. It was only after service of Mr. Bryan’s materials that CIBC immediately sought an adjournment.

Bryan Aide Memoire, filed May 10, 2023

2. Mr. Bryan respectfully submits that CIBC has failed to advance compelling grounds as to why a Receiver ought to be appointed over Real Estate Co. (all terms as defined in first factum), whose sole asset is a relatively modest Toronto property, without any business operations.

3. CIBC’s factum directs the following four arguments against the Bryan Sale Proposal (as defined by CIBC) as follows:

(a) The draft sale order breaches the BIA and strips stakeholders of important protections;

- (b) Mr. Bryan has no discernible experience in selling distressed assets;*
- (c) The Bryan sale proposal will not result in the most favourable price with for the mortgaged property; and*
- (d) It is not clear that the Bryan Sale Proposal will result in a transaction capable of being closed.*

Each of these arguments will be addressed in turn.

PART II –RESPONDING ARGUMENT

I. The Bryan Sale Order Does Not Breach the BIA or strip any Stakeholder Rights

4. CIBC’s first argument is premised on asserting that Mr. Bryan is assuming the role of a Receiver, and then arguing that Mr. Bryan being a Receiver contravenes the BIA. This is blatant straw man fallacy.

5. Mr. Bryan is not seeking to assume the role of a Receiver. Rather, he simply seeks – through his counsel – a cost effective way to sell a property, to maintain as much equity as possible, while not prejudicing the rights of any stakeholders. Mr. Bryan respectfully submits that in most circumstances, parties would not even be entertaining the notion of a Receivership to sell a modest property, without any operating business. Mr. Bryan is not attempting to step into the shoes of a licensed insolvency trustee, but rather is simply acting as a typical mortgagee.

6. Moreover, there is no prejudice to CIBC. Mr. Bryan’s proposal seeks to pay the sales proceeds into court, pending resolution of the priority dispute. If anything, CIBC is placed into a better position – by having fees capped at \$30,000 – than unknown and uncapped fees of a Receiver. CIBC does not – and cannot – point to any actual prejudice that would arise from the Bryan Sale Proposal. Mr. Bryan has every motivation to maximize the sale price of the Property, and obtain maximum recovery. As set out in the Bryan Sale Proposal, Mr. Bryan has been – and continues to be – more than willing to work with CIBC in the listing and sales process.

II. Mr. Bryan’s Counsel has Experience in Selling Properties with Defaulted Mortgages

7. CIBC advances the argument that Mr. Bryan “has no discernible experience in selling distressed assets”. What CIBC seeks to sidestep is that the Bryan Sales Proposal does not seek to have

Mr. Bryan, personally, sell the Property. Rather, it proposes that Mr. Bryan’s counsel, Papazian Heisey Myers, sell the Property.

8. Just like the proposed Receiver, Mr. Bryan’s counsel are officers of the Court. They have held themselves out as capable of selling the Property, and CIBC never cross-examined Mr. Bryan, nor made any queries to his counsel regarding their experience or capability in selling properties.

9. In its Application Record, CIBC did not provide a CV or credentials of its proposed Receiver. Just as the Court may take judicial notice of the proposed Receiver’s ability to act as Receiver, Mr. Bryan submits that the Court can take similar judicial notice that a law firm that holds itself out as capable of selling properties, is, in fact capable of doing so.

10. From published secondary sources, it is clear that Mr. Bryan’s counsel is well-positioned and equipped to sell a modest property without any operating business. By way of example:

- (a) *LexisNexis’ “Solo and Small e-Brief”* of December 2020, has a “Solo Lawyer Spotlight” on Michael Myers, Managing Partner of Papazian Heisey Myers, which states (in part);

With over 40 years’ experience, Michael’s current practice focuses on mortgage and debt collections.... Michael co-chairs the Law Society’s 6 Minute Debtor-Creditor and Insolvency Lawyer bi-annual seminars and he is a contributor to the mortgage enforcement and debt collection topics in the Litigation & Dispute Resolution module of Practical Guidance (formerly Lexis Practice Advisor).

LexisNexis, *Solo and Small E-Brief – Solo Lawyer Spotlight – Michael Myers (December 2020)*, online: <<https://www.lexisnexis.ca/en-ca/sl/ebrief-archive/december-2020-issue.page>>

- (b) A *Canadian Lawyer Magazine* article, dated September 15, 2014, about a case involving Michael Myers, states the following:

Myers is a lawyer at Papazian Heisey Myers in Toronto whose practice focuses on contract enforcement and who is one of two counsel who manage the National Bank’s residential mortgage enforcement and retail debt collection portfolio in Ontario and western Canada

Canadian Lawyer Magazine, *Law Firm Beats Debtor’s Legal Manoeuvre for \$2.8 million (September 15, 2014)*, online: <<https://www.canadianlawyermag.com/news/general/law-firm-beats-debtors-legal-manoeuvre-for-28-million/272788>>

(c) Michael Myers presented a paper at the LSO's "Six-Minute Debtor-Creditor and Insolvency Lawyer 2020" entitled "*The New Reality: Mortgage Enforcement and Debt Recovery During the 2020 COVID-19 Pandemic*"; and

Michael Myers, "The New Reality: Mortgage Enforcement and Debt Recovery During the 2020 COVID-19 Pandemic"(October 28, 2020), Law Society of Ontario

(d) Perry (Parjot) Benipal presented a paper at the LSO's "Six-Minute Debtor-Creditor and Insolvency Lawyer 2022" entitled "*Protecting the Seller when the Sale of a House does not Close*";

Perry (Parjot) Benipal, "Protecting the Seller when the Sale of a House does not Close" (October 13, 2022), Law Society of Ontario

III. The Sale by Mr. Bryan's Counsel Will Achieve the Best Price for the Property

11. CIBC's factum makes much ado about the proposed inclusion of a price reduction mechanism in the Bryan Sale Proposal, and that it would somehow result in less than fair market value being obtained.

12. This is both alarmist and misconstrues or misunderstands the intent and effect of the Bryan Sale Proposal.

13. The Bryan Sale Proposal envisions each of the three mortgagees obtaining an appraisal, and the Property being listed at the average appraised value. This is an even-handed approach, taking into account the interest of all stakeholders.

14. The Bryan Sale Proposal then envisions that – if the Property does not sell at the listing price – there be price reductions of 10% on a bi-weekly basis until the price is reduced to 70% of the listing price. Mr. Bryan intended this proposed price reduction mechanism as a concession to CIBC, and to allay any concern that Mr. Bryan was maintaining too high of a listing price that was stalling a sale (with Mr. Bryan's mortgage registered in third position).

15. CIBC's assertion that this price reduction mechanism would result in a below-value price ignores the realities of the market. The claim that a buyer would sit on the sidelines appears to be based

on the view that there are no other potential buyers in Toronto. The reality is that fair market value will be achieved by the proposed sale.

16. Moreover, Mr. Bryan is flexible in the listing strategy, and not wedded to the price reduction mechanism (again, which was offered for CIBC's benefit). CIBC is free to propose a different listing strategy, and Mr. Bryan is willing to either not have a price reduction mechanism, or to use one agreeable to CIBC. Mr. Bryan is also content with this Honourable Court modifying the proposed terms of the sale order, which may or may not include a price reduction mechanism.

17. Relatedly, filing the Bryan Sale Proposal does not telegraph signals to potential buyers that will depress the purchase price. As noted: (i) Mr. Bryan is flexible with regard to a price reduction mechanism, (ii) CIBC and Mr. Bryan can come to terms on a listing strategy which differs from the Bryan Sale Proposal; and (iii) any Order from this Honourable Court can exclude reference to a price reduction mechanism. Moreover, even if the price reduction mechanism was public (which, again, it need not be), in Toronto's competitive and large market, interested buyers will make offers at fair market value.

18. Importantly, the Bryan Sale Proposal will also generate the highest *net* sales proceeds for the mortgagees, given that Mr. Bryan has agreed to capped fees of \$30,000, compared to the uncapped and unknown fees proposed by CIBC for the Receiver (and Receiver's counsel fees).

IV. The Bryan Sale Proposal will Result in a Sale Capable of Closing

19. CIBC asserts that a sale conducted by Mr. Bryan may not be capable of closing, as CIBC will not consent to the conveying of title free of its mortgage.

20. Notably, Mr. Kazembe/Real Estate Co. have not taken a position opposing the Bryan Sale Proposal, and nor have they otherwise indicated any resistance to the sale of the Property. In fact, Mr. Kazembe/Real Estate Co. themselves recently listed the Property for sale.

21. The Bryan Sale Proposal poses no prejudice to CIBC, and the net sales proceeds are proposed to be paid into Court. If CIBC is successful in the priority dispute, then it will be receive payment from funds held in Court.

22. There is no justifiable reason for CIBC to endorse a Vesting Order if sought in a Receivership, but not in a sale when net proceeds are paid into Court (which, at the risk of being repetitive, will result

in greater net sales proceeds available to the mortgagee that is successful in the priority dispute). Mr. Bryan is not seeking to extinguish the right of a prior encumbrancer without payment of its mortgage. On the contrary, he is seeking to maximize the funds available to pay out the mortgagee that is ultimately determined to have priority (as between CIBC and himself).

23. Further, the Court has granted Vesting Orders in similar circumstances. In the recent Court of Appeal decision of *Scott, Pichelli & Easter Limited v. Dupont Developments Ltd.*, the central issue was a priority dispute between mortgagees and construction lien claimants. As cited in that appeal decision, the property was sold under a power of sale, and Justice Newbould issued an Amended and Restated Approval and Vesting Order approving the sale, with the net sales proceeds paid into court, pending resolution of the priority dispute.

Scott, Pichelli & Easter Limited v. Dupont Developments Ltd., 2022 ONCA 757 (CanLII) at para. 1.

CIBC v. Computershare Case is Distinguishable

24. CIBC correctly notes at paragraph 45 of its factum that the priority dispute “is not before the Court in this hearing”. However, CIBC then goes on cite the case of *CIBC v. Computershare* in support of its priority argument.

25. While it is not Mr. Bryan’s intent to argue the priority dispute herein, he simply notes (and without limitation to any future argument) that the case at bar is distinguishable from *Computershare*. In the case at bar, Mr. Kazembe and his firm acted as counsel for CIBC with regard to registering its mortgage. In Mr. Bryan’s Statement of Claim, he pled, inter alia:

Further, or in the alternative, the Plaintiffs plead that CIBC had actual or constructive knowledge that the Bryan Mortgage was invalidly discharged. Further, or in the alternative, CIBC had imputed knowledge that the Bryan Mortgage was invalidly discharged, with Mr. Kazembe and/or Kazembe Law acting as counsel with regard to the CIBC mortgage transaction. Specifically, and without limitation, Mr. Kazembe and/or Kazembe Law acted as counsel for CIBC in its mortgage transaction, and the Plaintiffs plead that CIBC – as principal – is imputed with the knowledge of its agent – Mr. Kazembe/Kazembe Law. The Plaintiffs plead and rely upon the doctrine of imputation. (Emphasis added)

Bryan Affidavit, Responding Motion Record, Tab U, pgs 97-98

Mr. Bryan submits that the priority dispute is not a formalistic exercise that lends itself to resolution by the proposed Receiver. Rather, there are complex legal and equitable principles and findings of fact that need to be made, and the Court must ultimately be tasked with adjudicating the priority dispute. The extra layering of a Receiver and its own counsel's costs in the priority dispute will simply add to the further erosion of equity in the Property.

CONCLUSION

26. Mr. Bryan reiterates his position that the Receivership Application, as concerns the Real Estate Co, ought to be denied, and that he be permitted to carry out the possession and sale of the Property, with capped fees of \$30,000.

Dated at Toronto this 15th day of June 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

M. Krygier-Baum

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SCHEDULE “A”

AUTHORITIES CITED

1	<i>Aide Memoire of Arthur Bryan, May 10, 2023</i>
2	LexisNexis, <i>Solo and Small E-Brief – Solo Lawyer Spotlight – Michael Myers</i> (December 2020), online: < https://www.lexisnexis.ca/en-ca/sl/ebrief-archive/december-2020-issue.page >
3	Canadian Lawyer Magazine, <i>Law Firm Beats Debtor’s Legal Manoeuvre for \$2.8 million</i> (September 15, 2014), online: < https://www.canadianlawyermag.com/news/general/law-firm-beats-debtors-legal-manoevre-for-28-million/272788 >
4	Michael Myers, “The New Reality: Mortgage Enforcement and Debt Recovery During the 2020 COVID-19 Pandemic”(October 28, 2020), Law Society of Ontario
5	Perry (Parjot) Benipal, “Protecting the Seller when the Sale of a House does not Close” (October 13, 2022), Law Society of Ontario
6	<i>Scott, Pichelli & Easter Limited v. Dupont Developments Ltd.</i> , 2022 ONCA 757 (CanLII)

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Proceeding commencing in **Toronto**

**SUPPLEMENTARY FACTUM
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