# COUNSEL SLIP

COURT FILE NO.: CV-21-00670723-00CL

DATE: March 10, 2022

NO. ON LIST 7

TITLE OF PROCEEDING: PS HOLDINGS 1 LLC et al. v. 2738283 ONTARIO INC. et al.

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JUDICIAL NOTES:

## Endorsement of Penny J. – March 11, 2022

Yesterday, I took under reserve overnight my disposition of the receiver's motion for approval of the claim process order and the motion of the Morris Group for leave to bring an application to put the debtors into bankruptcy and for leave to continue with its civil action for damages for breach of contract against the debtors in the Superior Court of Justice.

*Claim Process*

The motion for approval of the claim process order bears one unusual feature. There are three debtor companies which owned the real estate subject to the receivership. Those companies are owned and controlled by Mr. Larsen. Mr. Larsen, through his company 7 Generations, provided all of the project management services for the real property development by the debtor companies. This was done under a management agreement between 7 Generations and the debtors. The debtors gave indemnities to 7 Generations in respect of any liabilities associated with 7 Generations' work on the real property development. Thus, for all claims made against 7 Generations as agent for the debtors in respect of the real estate development, 7 Generations will make indemnity claims against the debtors under its management agreement. As a result, the receiver proposes that, although 7 Generations is not a debtor or under receivership, claims against 7 Generations in relation to the real property development (i.e., claims in respect of which the debtors will be obliged to indemnify 7 Generations) will be handled in the same claim process as claims against the debtor companies directly so that all claims for payment by the debtors will be heard in one, coordinated process.

I accept the logic of this proposal. It is efficient and appropriately balances the interests of the parties. Significant benefits will result from having the claims dealt with in one coordinated process. The appointment order granted broad powers to the receiver. Section 243 of the BIA also grants broad powers to the court, to do not only what justice dictates but also what "practicality demands": *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508 at paras 57-58.

The proposed claim process is a fair, open and transparent method to enable the receiver to call on claims from potential creditors so they can be identified and settled in an orderly fashion to the benefit of both the debtors and their stakeholders. Further, the proposed claims bar date provides a sufficient opportunity for parties to file a proof of claim with the receiver.

*Morris Group Motion*

The Morris Group claims to be owed $633,750 on account of damages for breach of a contract to seek financing for the debtors' real estate development project. Its action for this relief was commenced in the Superior Court of Justice prior to the receiver's appointment but was stayed by the appointment order. The Morris Group now seeks a lifting of the stay so as to permit Morris Group to make an application under s. 43 of the BIA for an order that the debtors are bankrupt and to permit Morris Group to proceed with its civil action for damages in the Superior Court of Justice.

Morris group filed no factum on its motion.

I am not satisfied the Morris Group has discharged its burden of showing why the stay should be lifted in favour bankruptcy or why it should be permitted to proceed with its civil action. The Morris Group claims that the bankruptcy process is better suited to the circumstances of this case. It says, for example, that a bankruptcy will provide certain benefits to unsecured creditors in respect of potential priority claims by CRA. It also says the claims bar date under the receiver's proposal could be disadvantageous to claimants whereas there is effectively no claims bar date in a bankruptcy proceeding until a final distribution is made. The Morris Group also claims that the remaining assets after the receivership "will be returned to" the debtors to the detriment of unsecured creditors. The Morris Group further claims that the receiver has a conflict between its obligations to secured and unsecured creditors. Finally, the Morris Group is

concerned about the cost of a claims process in the receivership and takes the position that a bankruptcy proceeding would be less costly.

I do not accept any of these arguments.

The current expectation of the receiver and the debtors is that the approved sale transaction, if it closes, will generate sufficient funds to pay all creditors, secured and unsecured. In this scenario, the issue of CRA priorities is likely to be a purely theoretical one.

I fail to see how a common feature of claim processes such as a claims bar date, provided it is not an unreasonable one, would give rise to any prejudice to unsecured creditors.

There is nothing to the argument that surplus "will be returned" to the debtors after the receivership. If everyone is paid, there is no issue. If there is a shortfall, there will be no surplus to be returned.

The receiver is not in conflict vis-à-vis secured and unsecured creditors. The receiver is answerable to the court and is obliged to consider the interests of all stakeholders. It is simply wrong to say the receiver is only concerned with the rights of secured creditors.

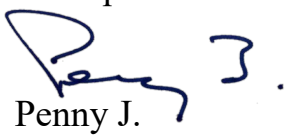
As to cost, the receiver is already fully up to speed on the debtors' affairs and the likely claims. The receiver is very experienced in both realizations and in conducting claim processes. To my mind, it would be significantly more costly to appoint a totally new insolvency professional to invoke a totally new and different claim process. This would be a waste and duplication of professional resources and the progress the receiver has already made.

The Morris Group has not shown why its claims cannot be prosecuted in the claim procedure proposed by the receiver. Nor has it shown that it would suffer any prejudice if it were required to do so.

On a motion to lift a stay of proceedings in a receivership, the moving party bears the onus of convincing the court that the relief should be granted. In considering such a request, the court must look at the totality of the circumstances and the relative prejudice to both sides. Morris Group has failed to satisfy this onus and it has failed to demonstrate any prejudice that requires the stay to be lifted.

*Conclusion*

For these reasons, the claim process order is approved. The Morris Group motion is dismissed. Once provided with a clean copy of the claim process order, I will have it signed and issued.



Penny J.