

**THE KING'S BENCH
GENERAL DIVISION
WINNIPEG CENTRE**

BETWEEN:

FIRST NATIONAL FINANCIAL GP CORPORATION,

applicant,

- and -

**5684995 MANITOBA LTD., 6315402 MANITOBA LTD.,
and K & P PROPERTIES INC.,**

respondents,

JUSTICE: GRAMMOND J.

COUNSEL:

**Ross A. McFadyen/Melanie M. LaBossiere/
Noah Soenen** (Articling Student-At-Law), for the applicant
Grant M. Driedger, for the respondents, 5684995 Manitoba Ltd. and
K & P Properties Inc.
No one appearing, for the respondent, 6315402 Manitoba Ltd.
Catherine E. Howden, for the proposed receiver, MNP Ltd.

ENDORSEMENT

INTRODUCTION

[1] The applicant seeks an order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, and s. 55 of *The Court of King's Bench Act*, C.C.S.M. c. C280, for the appointment of MNP Ltd. as receiver and manager, without security, of all of the assets, undertakings and properties of the respondent 5684995 Manitoba Ltd. ("568") comprising, located at, arising from, or any way related to the property commonly known as 737 and 743 Sargent Avenue in Winnipeg, Manitoba (the "Property").

[2] The application first appeared before me on October 4, 2023, at which time I granted an adjournment to permit 568 to file responding affidavit evidence and an application brief.

BACKGROUND

[3] Between 2011 and 2014, the applicant and 568 entered into a series of loan agreements pursuant to which the applicant loaned to 568 over \$3.6 million, secured by a mortgage on the Property and other security instruments.

[4] In 2019, 568 defaulted on the monthly payments due to the applicant, and in August 2019 the applicant paid property tax arrears owing to the City of Winnipeg (the "City") with respect to the Property, in the amount of \$143,010.24.

[5] In April 2020, a fire occurred at the Property. In December 2020, the parties entered into a forbearance agreement after which 568 generally met its obligations with respect to the Property until June 2022, when it missed a payment.

[6] Between January and August 2023 the applicant paid additional property tax arrears with respect to the Property, in the aggregate amount of \$212,566.37. In February 2023, the applicant pursued foreclosure proceedings pursuant to the mortgage and obtained an order for sale of the Property. An abortive public auction followed. Apparently, the applicant attempted to list the Property for sale privately thereafter, but was unable to engage a broker willing to assist in that process.

[7] There was a second fire at the Property in January 2023, and a third fire in August 2023. The City then issued a vacation order for the Property, followed by a remedial order reflecting that it is unsafe due to fire damage. The remedial order requires that 568 perform remedial work at the Property including the retainer of a variety of design professionals and the submission of construction plans detailing all required repairs.

[8] As at September 2023, the applicant was owed over \$3.1 million, and the arrears exceeded \$550,000.00.

THE LAW AND ANALYSIS

[9] The law that applies on a receivership application is well established. In particular, the court may appoint a receiver where it is "just or convenient" to do so.

[10] The applicant bears the onus of proof on the application, and there is no presumption of an entitlement to the appointment of a receiver. Conversely, the respondent need not prove any special hardship, much less "undue hardship" to resist a receivership application (*BG International Limited. v. Canadian Superior Energy Inc.*, 2009 ABCA 127).

[11] The case law sets out a variety of factors to be considered on such an application, the most pertinent of which in this case are the following:

- a) the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
- b) whether the security holder has the right to appoint a receiver and manager under the security agreement;
- c) the nature of the property at issue;
- d) whether the value of the creditor's security continues to erode;
- e) the likelihood of maximizing return to the parties;
- f) whether there has been a loss of confidence in the debtor;
- g) the balance of convenience; and
- h) the cost to the parties.

[12] In this case, the applicant has the right to appoint a receiver and manager pursuant to the security agreements. While not determinative, this factor carries significant weight, because

568 agreed to this term, and generally, courts will enforce bargains made between parties (*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527).

[13] I have also considered the nature of the Property. As 568 argued, since the secured asset is real property, different considerations apply relative to concerns of waste and preservation than where moveable or perishable assets are at issue. Certainly, there is a need to protect the Property, which is located in downtown Winnipeg, and 568 has provided evidence that it has engaged security services for that purpose. 568 has pointed to related properties for which MNP Ltd. is the receiver, alleging that those properties have deteriorated since the receivership order, but no specific evidence has been advanced¹. Certainly, the need for appropriate physical security services at the Property will continue if a receiver is appointed.

[14] The applicant also takes issue with the insurance coverage currently in effect at the Property, which it alleges does not comply with the terms of the security agreements for a variety of reasons. The applicant's concerns appear to be well-grounded given the nature of the policy in place as compared with the insurance requirements reflected in the security agreements.

[15] Although the Property cannot be dissipated *per se*, I am satisfied that its condition has deteriorated over the last number of years for a variety of reasons, including the fires, and in turn, that the value of the applicant's security has diminished. As such, the likelihood of maximizing returns to the parties is at risk.

[16] I acknowledge that 568 is pursuing an insurance claim arising from the fires, and is hoping to acquire funds to further remediate the Property, such that tenants may be able to inhabit the Property by December 2023. I also accept that 568 has taken some steps to rectify the

¹ MNP Ltd. disagreed with 568's submissions regarding the condition of the other properties and reserved the right to address these issues in those receivership proceedings.

deficiencies at the Property pursuant to the remedial order, including work on emergency lighting and fire alarms. Having said that, both the extent to which the remediation ordered by the City has been performed and the current state of the Property are unclear. Similarly, the status of the insurance claim is unclear.

[17] I am satisfied, therefore, that the Property is in a state of some disrepair and its value will be diminished accordingly. Moreover, I note that these issues arose over a period of years while the Property was under 568's control, and that there is no specific plan before me pursuant to which 568 intends to correct the outstanding issues. The applicant also alleged, and 568 did not dispute, that 568 did not advise the applicant that there were two fires at the Property in 2023. For all of these reasons, I understand why the applicant has expressed a loss of confidence in 568 and is concerned about the need to protect the Property going forward.

[18] I note that there is a history of payment default and that arrears have accumulated since June 2022, with the last payment being made, according to the applicant, on August 1, 2023. There is a dispute over whether the applicant attempted to withdraw the September 1, 2023 payment from 568's account, but regardless of whether an attempt was made, the funds were not received. It is also significant, in my view, that the applicant, and not 568, paid the property taxes assessed against the Property over a period of years, to the extent of over \$350,000.00.

[19] The evidence is clear that 568's default is not new, and that it has had an ongoing opportunity to remedy that default and rectify the deficiencies at the Property over a significant length of time, albeit after years of making payments to the applicant. Although 568 does not bear the onus in this proceeding, the evidence it has put before me does not constitute a detailed plan as to how it will remedy its default, comply with the City's order, and render the Property habitable within any reasonable period of time. As such, I am not confident that it will do so,

despite its efforts to date and its familiarity with the neighbourhood in which the Property is located.

[20] I accept that, if appointed, the receiver would review and assess the Property and prepare a plan to maximize returns for the parties, perhaps by selling the Property. The receiver would not act, however, without a court order. This is so because a court-appointed receiver and manager is an officer of the court and acts in a fiduciary capacity with respect to all interested parties. Moreover, it is not subject to the control and direction of anyone except the court (*Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82, at para. 22). In other words, the receiver would be required to report to the court and interested parties with respect to its efforts.


[21] I have also considered the balance of convenience, which in my view favours the applicant. This is so particularly given that prior to filing this application it pursued foreclosure proceedings under the mortgage, which did not result in the sale of the Property.

[22] Last, I note that although the costs of a receivership can be significant, because those costs are subject to court approval, I can deny any unreasonable or unnecessary amounts that may be incurred.

CONCLUSION

[23] I am satisfied that the appointment of a receiver and manager is both just and convenient in all of the circumstances of this case. The application is granted and MNP Ltd. is appointed as receiver and manager of 568 on the terms requested by the applicant. The City will be added to the service list in this matter.

DATE November 24, 2023


J.

Copies of this Endorsement have been sent to counsel on the 24th day of November 2023.