



**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

ENDORSEMENT

COURT FILE NO.: CV-24-00712796-00CL

DATE: February 9 2024

REGISTRAR: T. COLEMAN

NO. ON LIST: 1

TITLE OF PROCEEDING: C & K MORTGAGE SERVICES INC. et al v. 11282751 CANADA
INC. et al

BEFORE JUSTICE: P. OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
George Benchetrit Laura Culleton	C & K Mortgage Services Inc.	George@chaitons.com Laurac@chaitons.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jeffery Frymer	Larden Investments Inc. 2489876 Ontario Inc. Steven Gallen & Debra Gallen	Jhfrymer@ynlclaw.com

For Other Parties:

Name of Person Appearing	Name of Party	Contact Info
Jake Harris	Suncor Energy Products Partnership	Jake.harris@blakes.com

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Plaintiffs move for the appointment of a receiver in this action.
2. The Service List, which includes for greater certainty the Debtors and the subsequent ranking lenders, has been served, although service was short.
3. As further set out below, I would have been prepared to consider an adjournment request, but counsel for all parties in Court today were clear that none was requesting an adjournment.
4. In the circumstances, and notwithstanding the short service, the Plaintiffs seek the appointment of a receiver today.
5. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.
6. The relevant Property is located at 170 Burton Ave., Barrie, Ontario. Until recently, the Debtors ran a Petro Canada gas station and associated convenience store on the Property under the banner “Neighbours”.
7. C&K is a mortgage broker and lender in the Toronto area. Canadian Western Trust Company is a Canadian financial institution. Those two parties together are the Lenders.
8. 11282751 Canada Inc. is a federally incorporated company and is the Borrower. Its principal, Gazi Belayet Hossain, personally guaranteed the indebtedness of the Borrower to the Lenders.
9. The Lenders have a first position mortgage in the amount of \$4,400,000 as well as a GSA. The GSA contains the contractual covenant to the effect that upon an event of default, the Lenders are entitled to appoint a receiver.
10. The Loan matured on January 1, 2024. The Record discloses that current indebtedness to the lenders is \$4,626,699.74 as of December 12, 2023 with interest continuing to accrue. Sporadic payments were made until last December; there have been no payments since January, 2024.
11. It appears that the Borrower and its principals have abandoned the premises. When representatives of the Lender inspected the property to ascertain status on December 12, 2023, they found that it had been abandoned. The gas station was not operating, and nor was the convenience store. Inventory in the convenience store had been stripped out. It has not operated since that time. This heightens, and the submission of the Plaintiffs, the necessity of the appointment of a receiver to preserve assets, and the urgency of this motion.
12. There is a subsequent mortgage in favour of Suncor Energy Inc., postponed to the charge of the Lenders. Suncor appears today represented by Mr. Harris and fully supports the appointment of a receiver and the relief sought by the Plaintiffs, with a view to preserving the assets and maximizing recovery for the benefit of all stakeholders.
13. Mr. Frymer appears today representing the Gallens who also hold a subsequent mortgage which he advises is a collateral mortgage to secure debt on an unrelated property. If that other property is sold, the indebtedness under that mortgage would be in the order of approximately \$150,000. The numbered company 2489876 Ontario Inc. also has a mortgage registered against the Property, also postponed to the Charge of the Lenders.
14. Mr. Frymer opposes the relief sought. I specifically inquired as to whether he was seeking an adjournment, and he candidly advised that he was not, and did not require a further opportunity to file responding materials, and made submissions today. He submits that a receivership will be unnecessarily expensive, and the Property should simply be sold. Indeed, his clients apparently caused the Property to be listed for sale pursuant to power of sale terms in their mortgage, in December, 2023. In the alternative, he submits

that if a receiver is appointed, its powers should be limited at least at this point to those of an investigative receiver, again to minimize costs.

15. 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?
16. 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.
17. 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.
18. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.
19. As 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.
20. 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).
21. 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.
22. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case? If so, on what terms?
23. In my view, it is not only just *or* convenient, but in fact just *and* convenient to appoint a receiver here. There is no dispute about the indebtedness (some \$4.6 million) to the Lenders, their contractual right to appoint a receiver in the event of default, the delivery of demands for payment and section 244 *BIA* notices in, December 2023 and the other facts set out above.
24. The Borrower appears to have walked away and abandoned the Property completely. Neither the Borrower nor the principals thereof have responded in any way whatsoever to the demands, to the Statement of Claim which was personally served on the Defendants, or to this motion. They appear to have simply cleared out the inventory from the convenience store and fled.
25. In the circumstances, I am satisfied that the appointment of a receiver will be to the benefit of all stakeholders in that the receiver can get into the property, determine what is there and what is not, and determine next steps to maximize recoveries.
26. Mr. Frymer advises that the gas station is relatively new, and that the tanks, pumps and equipment are relatively new and in good condition. In my view, a receiver can consider whether or not the parties can find a buyer who will operate the business as a going concern, which may very well provide a more favourable outcome to an asset sale. Such a going concern outcome is automatically precluded by the refusal to appoint a receiver and, by implication, by the power of sale listing already begun. In my view, it is premature to preclude that possibility, this point. It should be explored, and the receiver can and should make a recommendation as to the most advantageous path forward.
27. In the circumstances, it is equally important that a receiver be appointed as soon as possible, since the gas station is effectively abandoned at this point in time. It is best preserved by someone managing the Property, and that person should be the receiver under the supervision of this Court.
28. In my view, there is no basis to restrict the powers of a receiver to those necessary for investigation only.
29. I acknowledge Mr. Frymer’s concerns about controlling expenses, and the receiver will engage in a dialogue with all stakeholders as part of its considerations of the path forward.

30. I observe that the draft order includes at paragraph 33, and in a manner consistent with the Model Order of the Commercial List, the usual seven day comeback clause. If any affected party feels that the advice and directions of this Court, or other relief, is required, it may return to Court and seek that relief.
31. Rosen Goldberg Inc. is a well-qualified receiver and consents to being so appointed here.
32. The terms of the draft order are consistent with the Model Order of the Commercial List. While that is not determinative of the issue of whether receiver should be appointed, and what terms may be appropriate, it does in this case provide me with additional comfort.
33. Rosen Goldberg Inc. is appointed as receiver.
34. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.
35. The Plaintiffs will ensure that the full Service List is provided with a copy of this Endorsement and the receivership order. For greater certainty, that will include the Borrower and the principals thereof, including the personal guarantor.

Ozawa, J.