Court File No. CV-23-00710795-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

-and-

2011836 ONTARIO CORP., JEFFERSON PROPERTIES LIMITED PARTNERSHIP, 1000162801 ONTARIO CORP., AMERCAN CORPORATION and 1000199992 ONTARIO CORP.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

SUPPLEMENTARY FACTUM OF THE APPLICANT

(Hearing December 21, 2023)

December 20, 2023

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PART I - OVERVIEW

1. The Applicant filed an initial Factum in support of the Application dated December 9th, 2023, for an Order under subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") and section 101 of the *Courts of Justice Act* (Ontario) ("**CJA**") to appoint Albert Gelman Inc. ("**AGI**"), as Receiver and Manager (in such capacity, the "**Receiver**"), without security, of all present and future property, assets and undertakings, including each of the real properties identified in Schedule "A" to the Notice of Application (collectively, the "**Property**") of 2011836 Ontario Corp., Jefferson Properties Limited Partnership, 1000162801 Ontario Corp. Amercan Corporation and 1000199992 Ontario Corp. (collectively referred to as the **"Debtors"**).

2. The Application was originally returnable on December 11, 2023, on short notice, based on the urgency described in the Affidavit of John David sworn December 6, 2023 (the "**Original David Affidavit**"). The hearing was adjourned to December 21st, 2023, to allow for the delivery of further materials and cross-examinations. The situation continues to be urgent, and the Applicant intends to seek the appointment of the Receiver against the Jefferson Properties and the corresponding owners of same, namely, 2011836 Ontario Corp. and Jefferson Properties Limited Partnership (the "**Jefferson Debtors**"). It is still intended that the remainder of the Application against the other parties and other property be adjourned.

PART II – FACTS

3. In addition to the facts as set out in the Applicant's preliminary Factum, subsequent conditions at the Jefferson Property site and subsequent issues with respect to the unpaid trades have developed, which continue to demonstrate the extreme urgency of appointing a Receiver over the Jefferson Properties, including, *inter alia*:

a) The Construction Manager, Core Constructors Ltd. ("**Core**") delivered a Notice of Default dated December 12th, 2023, detailing a number of defaults by the owner and the resulting delays to the Project, including the need to extend Core's contract by at least two months due to same;[1]

b) The circulation of communications amongst the trades indicating imminent liens;[2]

c) Communications from the kitchen contractor indicating an intention to lien the Project;[3]

d) Information from the Construction Manager that the Project is working on skeleton crews, that a number of suppliers have cut off supplies and indicating that every week of delay to the construction will result in three or more weeks of delay to the completion;[4]

e) A further report from the Cost Consultant, the Glynn Group dated December 13, 2023, confirming the deteriorating situation at the site;[5]

f) The outstanding payments demanded by the security company, which require immediate payment, failing which, they will vacate the site. Without a constant fire watch, the propane at the site will need to be turned off; [6]

g) The need to pay the propane supplier, failing which there will be no heat and interior finishes will be significantly damaged. Given the current onset set of winter weather, this

[1] Supplementary Affidavit of John David, sworn December 15th, 2023 ("**David Supplementary Affidavit**"), paragraphs 6 and 7

[2] Paragraph 9, David Supplementary Affidavit and Exhibit C thereto and Transcript from the examination of Frank Servello, Frank Servello 12-18-2023.pdf, December 18, 2023 ("Servello Transcript"), Q. 119-124, p. 27-29

[3] Paragraph 10, David Supplementary Affidavit and Exhibit D thereto

[4] Paragraph 11, David Supplementary Affidavit and Exhibit E thereto

[5] Paragraph 12, David Supplementary Affidavit and Exhibit F thereto

[6] Further Supplementary Affidavit of John David, sworn December 20, 2023 ("**Further David Affidavit**") paragraph 5 and Exhibits A and B; and Servello Transcript Q. 182-186, pp. 48-50 and Q. 195-196, pp. 51-52, Frank Servello 12-18-2023.pdf

propane is needed to maintain the interiors of the project at a minimum of 7 degrees Celsius to prevent damage;[7] and

h) The need for Hardcore Drilling Company to drill so that Enbridge can install a permanent gas line to heat the Project throughout the winter. [8]

4. The Respondents have not paid the October payables and have provided no evidence of a firm commitment from any lender to fund the completion of the Project and repay the outstanding indebtedness. Cameron Stephens has arranged for urgent interim funding to pay the security company but does is only able to obtain additional funding from the investors o a timely basis if the advances are made to a Receiver or Interim Receiver with an appropriate Borrowing Charge.[9]

5. The subsequent lender, Windsor Private Corporation, ("**WPC**"), has also advised the Respondents that they have lost confidence as a result of the material adverse changes to the Project and have declined to participate in the syndicated Additional Financing that was referenced in the Forbearance Agreement.[10]

6. If the Project is delayed in order to await a refinancing in the new year, there will be exponential delays to the completion, a multitude of liens and a loss of the trades and suppliers.[11]

7. The Debtors have been aware since at least November 29, 2023 that the Applicant would not be providing the Additional Financing requested to complete the Jefferson Project.[12]

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[7] Paragraph 5 of Further David Affidavit and Exhibits A and B and Servello Transcript Q. 182-186, pp. 48-50 and Q. 195-196, pp. 51-52
[8] Paragraph 6 of Further David Affidavit and Exhibit C
[9] Paragraph 7 and 8 of Further David Affidavit
[10] Paragraphs 21 and 22 of David Supplementary Affidavit and Exhibit H thereto
[11] David Supplementary Affidavit, Exhibit E, and Servello Transcript, Q. 201, pp. 53-54
[12] Paragraphs 22 and 23 of David Supplementary Affidavit and Exhibit H thereto

8. The Forbearance term expired October 31, 2023. Cameron Stephens funded one addition month of payables thereafter while it awaited the consultant's reports however, there was no further obligation to fund any additional advances under the defaulted Loan.[13]

9. Fanseay Wang was always made aware that the draft Commitment Letter required investor approval and was subject to syndication. The funding was ultimately denied due to a loss of confidence in the borrower's accounting; the inability to predict and control costs; the escalating budgeted costs to complete; and frustration with the manner and timing of the Borrower's decision making.[14]

PART III - LAW AND ARGUMENT

The Timing of the Notice to the Debtor

10. Section 243(1.1)(b) BIA provides that a court may appoint a receiver before the expiry of the notice period if it considers it appropriate. Furthermore, an insolvent debtor can consent to an earlier appointment of a receiver under s. 243(1.1)(a). These provisions evidence Parliament's intention to provide secured creditors with a remedy capable of adapting to the often dramatic circumstances of insolvency. [15]

11. In Lamare, Justice Orsborn noted at paragraph 44 of his decision that, "the court's appointment of a receiver over the property of a person is an extraordinary order". He went on to state:

[13] Paragraphs 17 and 18 of Further David Affidavit and Forbearance Agreement at Exhibit "P" to Original David Affidavit
[14] Paragraphs 19-22 of Further David Affidavit
[15] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (CanLII), [2015] 3 SCR 419, at para 87

> "The extraordinary and intrusive nature of the order must inform what is considered to be just and convenient, although as I will point out, this aspect assumes less importance when a party already has a contractual right to appoint a receiver."[16]

12. In cases where a notice has not been sent in accordance with s. 244 of the *BIA* or the notice period has not yet expired, the Applicant seeking appointment of a receiver pursuant to s. 243 must also show that it is "appropriate" to appoint a receiver before the expiry of that 10 day notice period, in accordance with s. 243(1.1)(b).

13. In *Pandion*, the British Columbia Supreme Court addressed the factors that might be considered in determining whether it is appropriate to abridge the notice period under s. 244, stating:

> " In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to [the creditor] resulting from the requirement, and the possibility of prejudice to [the debtor] if it is waived."[17]

14. The discretion conferred under s. 243(1.1)(b) is broad. An inquiry into whether it is "appropriate" to appoint a receiver before the 10-day notice period has elapsed is necessarily a wide-ranging inquiry. There is nothing in the language of s. 243(1.1)(b) to suggest that the inquiry is confined by the possibility of an interim receiver under s. 47. [18]

In Lamare, the court stated,

"[45} The purpose of the 10-day notice requirement is to provide a debtor company with the opportunity to negotiate and reorganize its affairs before a receiver is appointed. Provision is made in subsection (1.1)(b) for the 10-day period to be abridged

[16] *Lemare Lake Logging Ltd v 3L Cattle Company Ltd.*, 2014 SKCA 35 (CanLII), at para 45
[17] *Pandion Mine Finance Fund LP v Otso Gold Corp.*, 2022 BCSC 136, at 46
[18] *Pandion*, at para 44

> because there may be circumstances in which immediate appointment is appropriate. An obvious example is where there is an immediate risk of dissipation of assets. Parliament has not circumscribed the possible circumstances with limiting language. It has left it to the court's discretion.
>
> [46] In my view, important considerations bearing on the exercise of my discretion under s. 243(1.1)(b) are the extent to which the purpose of the 10-day notice requirement is engaged in this case, the possibility of prejudice to [the creditor] resulting from the requirement, and the possibility of prejudice to [the debtor and the majority shareholder of the debtor] if it is waived."[19]

15. In *Pandion,* the court truncated the 10-day notice requirement in circumstances where the debtor was in no position to pay the creditor and would not have been in a position to repay had the creditor given it notice under s. 244 more than 10 days before the application was heard. The court concluded that "In the circumstances of this case, compliance with the 10-day notice requirement would serve no practical purpose. It would just be a formality." [20]

PART IV - CONCLUSION

16. For the foregoing reasons, it is respectfully submitted that the relief requested should be granted and AGI ought to be appointed as Receiver of the Jefferson Debtors and the Receiver's Charge ought to be granted, on the terms of the Order sought.

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[19] Lemare, at paras. 44 and 45
[20] Pandium, at para 50

PART V - ORDER REQUESTED

17. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 20, 2023

Wendy Greenspoon-Soer
Lawyers for the Applicant

SCHEDULE "A" – AUTHORITIES CITED

1. *Lemare Lake Logging Ltd v 3L Cattle Company Ltd.*, 2014 SKCA 35 (CanLII)

2. *Pandion Mine Finance Fund LP v Otso Gold Corp.*, 2022 BCSC 136

3. *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 (CANLII)

SCHEDULE “B” – LEGISLATION CITED

***Bankruptcy and Insolvency Act*, R.S.C., 1985, C. B-3, as amended**

Section 243(1)

Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

> (a) 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;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
>
> (c) take any other action that the court considers advisable.

Section 243(1.1)

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a Receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a Receiver before then.

Section 243(6)

(6) If a Receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the Receiver that it considers proper, including one that gives the Receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the Receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Section 244

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

> (a) the inventory,
>
> (b) the accounts receivable, or
>
> (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

> (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
>
> (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a Receiver in respect of the insolvent person.

***Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended**

Section 101

(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a Receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

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Proceeding commenced at Toronto

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