

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF THE PROPOSAL TO CREDITORS
PROCEEDINGS OF DREXLER CONSTRUCTION LIMITED
AND FOLMUR CONSTRUCTION (2004) LIMITED,
CORPORATIONS INCORPORATED UNDER THE
ONTARIO *BUSINESS CORPORATIONS ACT***

MOVING PARTIES' FACTUM
(approval of financing facilities)
(returnable April 29, 2022)

April 26, 2022

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companies, Drexler Construction Limited and
Folmur Construction (2004) Limited

1. This is a motion by Drexler Construction Ltd. and Folmur Construction (2004) Ltd. (together, the “**Companies**”) for an order authorizing the Companies to enter into financing facilities with (i) Mitsubishi HC Capital Canada, Inc. substantially on the terms contemplated in a statement of interest and financing proposition dated March 24, 2022,¹ and (ii) Reciprocal Opportunities Inc. substantially on the terms contemplated in a loan offer dated March 24, 2022² (together, the “**New Facilities**”). A draft order is provided at tab 3 (page 64) of the Companies’ motion record, filed.
2. Albert Gelman Inc. in its capacity as trustee to both Companies’ proposal (in such capacity, the “**Proposal Trustee**”) recommends the relief sought.³ Counsel are not aware of opposition.

I. FACTS

3. Folmur Construction (2004) Ltd. is a fully owned subsidiary of Drexler Construction Ltd. The herein proceedings have been administratively consolidated in this court file by order dated April 16, 2021.⁴
4. The Companies are in the construction industry. Their proposals have been accepted by their creditors and approved by this court in orders respectively dated November 12, 2021 and February 16, 2022.⁵

¹ A copy of which is Exhibit “A” (tab 2A, page 13 of the moving parties’ motion record (the “**MR**”)) to the affidavit of Rodney Davis sworn on April 19, 2022 (tab 2, page 7 of the MR) (the “**Davis Affidavit**”).

² A copy of which is Exhibit “B” (tab 2B, page 20 of the MR) to the Davis Affidavit.

³ Fifth report of Albert Gelman Inc. in its capacity as proposal trustee dated April 25, 2022, tab 1 (page 1) of the Proposal Trustee’s motion record dated April 26, 2022 (the “**Fifth Report**”), paras. 6, 7 and 23.

⁴ [This is a link to the April 16, 2021 order](#) available on the Proposal Trustee’s website.

⁵ Davis Affidavit, para. 5; Fifth Report, para. 2. [This is a link to the November 12, 2021 order](#) and [this is a link to the February 16, 2022 order](#) available on the Proposal Trustee’s website.

5. The proposals are in good standing and payments are being made by the Companies to the Proposal Trustee on a monthly basis per the proposal terms.⁶
6. The Companies' pre-filing institutional lender was fully repaid during the restructuring proceeding, including through court-approved debtor-in-possession (DIP) financing. The Companies then sought a new, long-term banking partner to repay the DIP lender and service credit needs going forward. They located a refinancing opportunity with Canadian Equipment Finance & Leasing ("CEFL") and entered into a non-binding term sheet and equipment finance proposal dated August 25, 2021 (the "CEFL Facility").⁷ The purpose of the CEFL Facility, was to fully repay the DIP lender and secure working capital to fund ongoing operations. This court approved the CEFL Facility and authorized the Companies to enter into final documentation by order dated September 10, 2021.⁸ The order sought on this motion is identical to the September 10, 2021 order regarding the CEFL Facility.
7. The non-binding term sheet for the CEFL Facility contemplated chattel and land security. However, it appeared to the Companies and CEFL that it would be simpler and preferable to streamline the CEFL Facility into two distinct facilities, one built around chattel security and the other around land security, including because each is a specialized form of financing with its own applicable market terms and rates. Indeed, despite best efforts, upon completion of the review contemplated in the CEFL Facility's non-binding term sheet, CEFL could not commit to the stated interest rate for a global facility. CEFL's role therefore changed from potential lender to, essentially, broker, and with CEFL's assistance,

⁶ Davis Affidavit, para. 6; Fifth Report, paras. 21, 22.

⁷ A copy of which is Exhibit "D" (tab 2D, page 45 of the MR) to the Davis Affidavit.

⁸ Davis Affidavit, para. 7; Fifth Report, paras. 15, 16. [This is a link to the September 10, 2021 order](#) available on the Proposal Trustee's website.

the Companies located the New Facilities as their preferred option in the circumstances. The purpose of the New Facilities is the same as was the purpose of the CEFL Facility: to fully repay the DIP lender (the current balance owing is \$2.5M) and secure working capital to fund ongoing operations.⁹

8. Unless noted below, the New Facilities are either on the same terms or substantially the same terms as the CEFL Facility already approved, or less onerous for the Companies.¹⁰

| Term | CEFL Facility | Mitsubishi Facility | ROI Facility |
|---------------------|--|--|--|
| Collateral/Security | <ul style="list-style-type: none"> ➤ Chattel (general security agreement) ➤ Land* (mortgages over 5270 Wellington Road and 183 Catherine Street in Guelph) | <ul style="list-style-type: none"> ➤ Chattel (general security agreement) ➤ No land security | <ul style="list-style-type: none"> ➤ Chattel (general security agreement) ➤ Land* (mortgages over 5270 and 5274 Wellington Road in Guelph) |
| Credit limit | \$3,500,000 | \$1,824,625** | \$1,700,000 |
| Interest | 4.5-6.25% | BA rate + 8.24% (i.e. 9.11% as of March 24, 2022) | The greater of 10% or prime + 7.05% |

* All land stated is owned by the Drexler group of companies.

** Reflects the precise percentage of appraised value contemplated by the Mitsubishi Facility, since obtained.

II. ISSUES AND LAW

9. The issue is whether the court should approve the New Facilities.
10. Court approval of the New Facilities is likely required. This is for the same reasons as court approval of the CEFL Facility was likely required (and obtained), i.e. because it involves

⁹ Davis Affidavit, para. 8; Fifth Report, paras. 15 and 17.

¹⁰ Davis Affidavit, para. 9; Fifth Report, para. 18.

the granting of security interests over the Companies' assets, which is possibly a form of disposition outside of the ordinary course of business by companies in respect of which proposals were filed, the whole within the meaning of section 65.13 of the *Bankruptcy and Insolvency Act* (the "**BIA**").

11. For avoidance of doubt, the relief sought does not include any form of vesting (such as under BIA s. 65.13(7)) or priority charge, which is not contemplated to be necessary at this time. The relief sought is only the court's authorization, under BIA s. 65.13(1) and (4), of the Companies' entering into final contractual and security documentation with respect to the New Facilities. Any security interests contemplated by the New Facilities will then be created, dealt with and take rank under normal provincial law.¹¹
12. BIA s. 65.13(4) sets out non-limitative criteria guiding the court's approval. Those criteria more obviously pertain to typical sales of assets and are not applicable to the approval of going concern, long-term financing facilities without adaptation. They are nevertheless reproduced below with comments as to their satisfaction, for completeness.
 - a. Whether the process leading to the proposed disposition was reasonable in the circumstances and whether the Proposal Trustee approved it – Yes. It was the continuation of the process, initiated by the Companies and supervised by the Proposal Trustee throughout, which led to locating the CEFL Facility, was approved by this court through the September 10 order, and now allowed locating the New Facilities.¹²

¹¹ Davis Affidavit, para. 3.

¹² Fifth Report, paras. 14-19.

- b. Whether the trustee filed with the court a report stating that in their opinion the disposition would be more beneficial to the creditors than a disposition under a bankruptcy – This is inapplicable because going concern financing facilities such as the New Facilities would not be contemplated in a bankruptcy/liquidation scenario. As discussed below however, the New Facilities are intended to finance activities so as to fund the proposals and avoid bankruptcy, which is more beneficial to all stakeholders than a bankruptcy – as evidenced by the creditors’ and the court’s approval of the proposals.
- c. The extent to which the creditors were consulted – The motion for approval of the CEFL Facility was returnable on September 10, 2021 and was, as this motion is, on notice to a service list established by the Proposal Trustee and the Companies including all known creditors and registrants. The former motion preceded two motions for approval of the proposals and was unopposed; indeed, no other party was present at any of those hearings. The Proposal Trustee has duly reported to creditors on the CEFL Facility and the New Facilities. Counsel are not aware of any potential opposition to this motion. The creditors were thus consulted and no creditor concern is known.¹³
- d. The effects of the proposed sale or disposition on the creditors and other interested parties – The total credit limit under the New Facilities is only about \$25,000 more than under the CEFL Facility, which is only about 0.7% of the total available credit contemplated. The approval of the New Facilities is therefore not meant to increase

¹³ See the Fifth Report, para. 19.

the Companies' borrowing ability to any significant degree.¹⁴ Moreover, as discussed below, approval of the New Facilities is in the interest of stakeholders because the New Facilities will provide the credit necessary to allow the Companies to take jobs and generate returns, which will in turn fund the proposals and the Companies' return to solvency.

- e. Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value – this is applicable to sales but largely not to financing facilities. To the extent that it can be tied to interest rates, while the New Facilities provide for higher interest rates than the CEFL Facility, the reality is that CEFL, upon completion of the review contemplated in the CEFL Facility's non-binding term sheet, could not commit to the terms initially considered for a global facility. The interest rate under the New Facilities reflects, including in the opinion of the Proposal Trustee, the market-correct rates considering *inter alia* the type of assets involved, the Companies remaining under proposal process, and the applicable credit limits.¹⁵

13. The intent behind entering into the New Facilities is the same as stated at the time of approval of the CEFL Facility: the New Facilities will be used to repay the DIP lender, fund ongoing operations, continue in business and generate cashflow, so as to, in turn, perform the proposals and exit creditor protection as a going concern. The whole is in the

¹⁴ See the Davis Affidavit, para. 10, and the Fifth Report, para. 18.

¹⁵ Davis Affidavit, para. 11; Fifth Report, paras. 17, 18, 21.

interest of all stakeholders – as evidence by the creditors’ and the court’s approval of the Companies’ proposals.¹⁶

14. In other words, it is not contemplated that the New Facilities will be used or necessary to fund the proposal directly. Such funding will rather come from operations allowed by the New Facilities.¹⁷
15. Without the New Facilities, the cashflow on present projects may not allow the Companies to fully self-finance their ability to take on future jobs on a medium- or long-term basis. This is typical in the construction industry. The nature of larger scale construction work of the type performed by the Companies is that a substantial investment is typically required at the outset of a job for labour and materials, with monetization and revenues being achieved on completion or later in the project. Relatedly, the timing of receipt of the Companies’ accounts receivable is in many cases after expenditures are required. Therefore, it is necessary for the Companies to access credit to enable them to take on jobs and generate returns.¹⁸
16. The cashflow projections for the 12-month period ending March 23, 2023, prepared by the Companies in consultation with the Proposal Trustee, show that the Companies’ cashflow, assuming utilization of the New Facilities, will be sufficient to repay the DIP facility (the current balance owing is \$2.5M) and finance capital obligations and ongoing disbursements (including proposal payments).¹⁹

¹⁶ Davis Affidavit, para. 12.

¹⁷ Davis Affidavit, para. 13.

¹⁸ Davis Affidavit, para. 13; Fifth Report, paras. 14-16.

¹⁹ Fifth Report, paras. 20-22 and Appendix “F”.

17. The approval of the New Facilities and the implementation of the same will be a significant landmark in the Companies' return to normal operations.
18. For those reasons, the sought approval of the New Facilities is within this court's jurisdiction to make and is fair, reasonable, and in the interest of stakeholders.

III. NATURE OF THE ORDER SOUGHT

19. The Companies therefore seek an order in the form of the suggested draft order filed at tab 3 (page 64) of their motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2022.

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SCHEDULE A – LIST OF AUTHORITIES

n/a

SCHEDULE B – RELEVANT STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#)

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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Estate No. 35-2721716

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced in LONDON

MOVING PARTIES' FACTUM
(approval of financing facilities)
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