SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-20-00649154-00CL **HEARING DATE:** **29 November 2022**

NO. ON LIST: **4**

TITLE OF PROCEEDING: CLEARFLOW COMMERCIAL FINANCE CORP. v. TRIGGER WHOLESALE, INC. ET AL

BEFORE JUSTICE: **MADAM JUSTICE KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
SIMPSON, JEFFREY (not appearing)	CLEARFLOW COMMERCIAL FINANCE CORP.	jsimpson@torkinmanes.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jason Squire	Trigger Wholesale, Inc., The En Cadre Group Inc., Mark Gdak and Jaimak Real Properties Inc.	jsquire@lerners.ca Tel: 416-867-3076
Ben Blay	Jaimee Lynn Gdak	bblay@scottpetrie.com Tel: 519-433-5310 ext. 223

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Roger Jaipargas	Court-appointed Receiver of Trigger Wholesale, Inc. and The En Cadre Group Inc.	Rjaipargas@blg.com Tel: 416-367-6266

ENDORSEMENT OF JUSTICE KIMMEL:

1. Grant Thornton Limited ("GTL") in its capacity as court-appointed receiver (the "Receiver") of all of the assets, undertakings and properties of Trigger Wholesale, Inc. ("Trigger") and The En Cadre Group Inc. ("En Cadre"), (collectively, the "Debtors") and of certain real property owned by each of Jaimak Real Properties Inc. ("Jaimak") or Jaimee Lynn Gdak ("Ms. Gdak"), seeks an order, among other things, approving:
    a. the ninth report of the Receiver dated November 9, 2022 (the "Ninth Report"), and the activities of the Receiver set out therein;
    b. the Receiver's interim statement of receipts and disbursements as at October 31, 2022;
    c. the fees and disbursements of the Receiver and its counsel; and
    d. a distribution to Clearflow Commercial Finance Corp. ("Clearflow") in the amount of $1,211,304.06 and a distribution to Canada Revenue Agency ("CRA") in the amount of $1,117.67 (the "Distributions") from the remaining net proceeds of the sale of 250 Lions Court, Waterloo, ON N2E 6M8 owned by Ms. Gdak (the "Lions Court Property"). The total net sale proceeds are $1,212,421.73.
2. The approval of the Distributions is the only aspect of the requested order that is out of the ordinary. It is unusual because the owner of the Lions Court Property, Ms. Gdak, is not one of the Debtors in receivership, although the Property was included in the assets over which the Receiver was appointed. Ms. Gdak herself may be insolvent in light of the court's rulings made since the commencement of these receivership proceedings, regarding her obligations under a guarantee of the Debtors, although no insolvency proceedings have been initiated in respect of her.
3. The Lions Court Property was purchased by and registered in the name of Mr. Gdak on December 16, 2005. Mr. Gdak transferred his interest in the Lions Court Property to Ms. Gdak on July 2, 2019. Ms. Gdak was the sole registered owner of that property when the Appointment Order (defined below) was granted more than a year later.[1]
4. Clearflow holds a first ranking security interest in all of Trigger's personal property assets. The amount owing to Clearflow by Trigger, as at the date of the Receiver's appointment, was $48,543,731.75 (the "Trigger Indebtedness"). Clearflow has advised that it agrees with the Receiver's calculation and the Gdaks have not disputed the Receiver's calculation. The Receiver has distributed $8,620,000.00 to Clearflow, pursuant to various orders issued by the court. The amount remaining owing to Clearflow by Trigger is therefore $39,923,731.75 (the "Remaining Trigger Indebtedness"), plus interest accrued and costs subsequent to the date of the Receiver's appointment. This Remaining Trigger Indebtedness was guaranteed by the Gdaks personally.
5. The following procedural history is relevant to the court's consideration of the proposed Distributions:

[1] Mr. Gdak divested himself of his legal ownership of the Lions Court Property more than a year prior to the Appointment Order. No submissions were made about any concerns regarding this transfer. I have not considered the implications of the proposed Distributions for Mr. Gdak's creditors on the basis that they have not been identified as having an interest in the Lyons Court Property or having any identified basis upon which to assert such an interest. If, upon receipt of this endorsement, counsel wish to make further submissions on this point, they may do so and hold off in taking out the formal order pending those further submissions.

a. Even though the owner of the Lions Court Property (Jaimee Lynn Gdak) is not one of the primary Debtors, the Lions Court Property was included among the properties over which the Receiver was appointed pursuant to the October 22, 2020 order of McEwen J. (the "Appointment Order"). Technically, the definition of "Debtors" in the Appointment Order included Jaimee Lynn Gdak, although it is clear from the order that any assets owned by her over which the Receiver was appointed were limited to those properties identified in Schedule "A" (including the Lions Court Property).[2]
b. The Receiver was authorized and empowered pursuant to the Appointment Order to, *inter alia*, market and sell the Lions Court Property. The Appointment Order also contemplated that the Receiver would hold any net sale proceeds subject to further order of this court.
c. The Lyons Court Property was initially excluded from the court's subsequent order dated March 31, 2021 authorizing the Receiver to list, market and sell certain properties (pending the court's determination of the validity and enforceability of the guarantees), however the court did not agree to the request made at that time on behalf of Ms. Gdak for the removal of the Lyons Court Property from the receivership proceedings.
d. On May 26, 2021, Justice Dietrich released her Reasons for Decision (the "Guarantee Decision") which found Ms. Gdak liable on her personal guarantee.
e. Ms. Gdak appealed the Guarantee Decision, which appeal was dismissed by the Court of Appeal for Ontario on February 17, 2022. Ms. Gdak did not seek leave to appeal to the Supreme Court of Canada.
f. The Guarantee Decision declares that Mr. Gdak and Ms. Gdak are liable for Trigger's indebtedness to Clearflow.
g. After the Guarantee Decision confirmed Ms. Gdak's liability on her personal guarantee of Trigger's obligations, the court authorized the Receiver to list, market and sell the Lions Court Property by order of McEwen J. dated April 29, 2022. The court later approved the transaction by which the Lyons Court Property was sold by order of this court dated July 18, 2022.

6. It is as a result of prior orders that the Receiver has come into possession and control of the net proceeds from the sale of the Lyons Court Property owned by Ms. Gdak. If it were not for these prior orders, Ms. Gdak could distribute the sale proceeds to her creditors without the involvement of the court. However, the combination of the Appointment Order and Guarantee Decision in particular bring these sale proceeds within the purview of this receivership proceeding.
7. I am satisfied that it is appropriate to make the order with respect to the Distributions and that I have the jurisdiction to do so, having regard to the procedural history of this matter, and, in particular, the prior orders of the court that have put the proceeds from the sale of the Lyons Court Property into the hands of the Receiver and out of Ms. Gdak's control. Now, some order is required for them to be distributed.
8. The Receiver has identified the potential concern about a distribution of the net sale proceeds to one creditor of Ms. Gdak to the exclusion, or in preference over, other creditors and the need for equitable treatment of any other creditors of the owner of the Lyons Court Property beyond Clearflow.
9. Although Ms. Gdak has not made a voluntary petition into bankruptcy, and neither the Receiver nor Clearflow have yet attempted to petition her into bankruptcy, Ms. Gdak has provided a sworn Statutory Declaration (similar to what she would be required to provide a trustee in bankruptcy if she was a bankrupt) affirming that her only creditor, aside from Clearflow (who claims from her the Remaining Trigger Indebtedness of $39,923,731.75 under her guarantee), is the Canada Revenue Agency ("CRA") to whom she is indebted $36,837.56. Based on this aggregate indebtedness of $39,960,569.31, the Remaining Trigger Indebtedness comprises 99.908% and the CRA indebtedness comprises 0.092% of Ms. Gdak's total debt obligations.

[2] It was subsequently determined that four of the five properties were purchased with monies provided to Trigger byClearflow, but not the fifth (Lyons Court) property.

10. The Receiver proposes to distribute the proceeds from the sale of Lions Court to Clearflow and CRA on a *pro rata* basis. The lawyers for CRA (the only other known creditor of Ms. Gdak) were served and did not appear or indicate that the CRA had any objection to the proposed *pro rata* Distributions to Ms. Gdak's creditors.
11. The Receiver believes that this is the most expeditious and cost-effective manner to distribute the Lions Court Property net sale proceeds.
12. There is some precedent (by analogy to prior decisions relied upon by the Receiver) for the court to make an order permitting the Receiver to run a claims process for potential claims against Ms. Gdak or possibly even to appoint the Receiver in some capacity that would authorize it to file an assignment in bankruptcy on behalf of Ms. Gdak. See for example: The Order and Endorsement of Mr. Justice Morawetz dated January 26, 2018 *In the Matter of the Bankruptcy of MF Global Canada Co.*, at paras. 5-7 (a case in which a trustee in bankruptcy was authorized by the court to revive a dissolved company and initiate bankruptcy proceedings against that company to effectuate a distribution of surplus funds in the bankruptcy to the sole shareholder of the bankrupt).
13. However, the Receiver does not consider the cost of taking additional steps (such as a claims process or bankruptcy proceedings in respect of Ms. Gdak) to be justified in the circumstances of this case. The Receiver does not believe that a bankruptcy of Ms. Gdak would likely reveal any other creditors who could share in the Distributions beyond those identified in her Statutory Declaration. Ms. Gdak, while not objecting to the relief sought on this motion, may well oppose a bankruptcy petition given its other implications. A bankruptcy would add costs associated with the trustee in bankruptcy's fees and the Superintendent's Levy, which would reduce the amount distributed to Clearflow and the CRA. The Receiver believes that running a claims process *vis-à-vis* Ms. Gdak in the receivership proceedings would similarly add to the cost with no likelihood of revealing other creditors. Recently conducted execution searches against Ms. Gdak confirm that she has no registered writs of execution against her.
14. The Receiver therefore asks the court to rely upon its inherent jurisdiction to order the Distributions to creditors of Ms. Gdak (including Clearflow) from the proceeds of sale of the Lyons Court Property (even though Ms. Gdak has not been declared a bankrupt and there has not been a formal call for claims of creditors against her), on the basis that this is the most efficient, cost effective and practical way to satisfy Ms. Gdak's known debt obligations from the net sale proceeds while avoiding the incurrence of further additional costs that will be at the expense of her known creditors, including Clearflow.
15. This is an unusual situation for which there appears to be no precedent: the Receiver finds itself in possession of property of a debtor of the bankrupt estate, who may herself be insolvent, that the Receiver seeks to distribute under the auspices of the receivership. Granting the relief sought by this motion is said to be consistent with the court's invocation of its inherent jurisdiction to "fill legislative gaps" where there is no statutory basis for the relief sought but it is not contrary to any statute, when the requirements of justice demand it and it is considered to be just or equitable to do so. See *Urbancorp Cumberland I GP Inc., Re*, 2020 ONSC 7920, at paras. 34, 65-66.
16. I had occasion to consider the exercise of the court's broad inherent jurisdiction in another case recently (in which its use was found not to be appropriate to be used to take away existing rights under other statutes): *The Toronto-Dominion Bank v. Brad Duby Professional Corporation*, 2022 ONSC 6066, at paras. 33-41. At paragraph 33 it was observed that:

> Section 183 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") grants the Ontario Superior Court of Justice (among other specific provincial superior courts) with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by the *BIA*. So too has s. 243 of the *BIA*, pursuant to which the court appointed the Receiver, been interpreted to provide supervising judges with the broadest possible mandate in insolvency proceedings.

17. In discussing the scope of the court's inherent jurisdiction under s. 183 of the *BIA* in the case of *In the Matter of the Proposal to Creditors of Conforti Holdings Limited*, 2022 ONSC 3264, leave to appeal refused, 2022 ONCA 651, Cavanagh J. canvassed various appellate authorities on this topic, including *Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)*, 2006 ABCA 293, 65 Alta. L.R. (4th) 32, where the Court of Appeal of Alberta, at paras. 20 and 21, addressed the Bankruptcy Court's inherent jurisdiction at law and in equity under s. 183(1) of the *BIA*:

> Inherent jurisdiction is not without limits, however, it cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Cooperative Ltd.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at 480; *Wasserman Arsenault Ltd. v. Sone* (2002), 2002 CanLII 41494 (ON CA), 33 C.B.R. (4th) 145 (Ont. C.A.).

18. I find this to be an appropriate case in which to exercise the court's inherent jurisdiction to achieve a fair, equitable and proportionate outcome of having the Receiver already in possession of the assets of the guarantor, Ms. Gdak, distribute them proportionately to her creditors, one of whom is a significant creditor of the Debtors whose obligations she has guaranteed, saving the cost and delay of intermediary steps that would in all likelihood lead to the same outcome. The Receiver is uniquely situated in this case to facilitate this outcome because of the previous orders that gave the Receiver control over the Lions Court Property and authorized it to sell that property. The approval of the Distributions is the next logical step in the realization of this asset to satisfy now judicially confirmed obligations of the guarantors of the Debtors (under the Guarantee Decision), is not objected to by any of the directly impacted parties (Ms. Gdak or the CRA), has been presented on a basis that is consistent with what the court would need to be satisfied of if the intermediary step of a bankruptcy of Ms. Gdak had been taken, and is not contrary to any statutory or regulatory provision that has been identified.
19. In addition to the invocation of the court's inherent jurisdiction to authorize the use of the Lions Court Property sale proceeds to make the proposed Distributions, the court also must be satisfied, as I am, that the general requirements for the approval of the Distributions in the context of this receivership have been satisfied: (a) Clearflow's security is valid and enforceable, and Ms. Gdak's guarantee in favour of Clearflow in particular has been held to be valid and enforceable; (b) paying down the Debtors' debts will result in interest savings; and (c) the Receiver will maintain a reserve to ensure liquidity of the Debtors after the Distributions. See: *Re Abitibibowater Inc.*, (2009) 2009 CarswellQue 14224 (QCSC), at paras. 70-75. The proposed distributions have been recommended by the Receiver on the basis of, and appear to be consistent with, the identified and applicable priorities of known creditors.
20. For the foregoing reasons, the Distributions are approved.
21. In terms of the other aspects of the relief sought,
    a. The Receiver's activities were carried out in accordance with the authority and mandate it was granted under the Appointment Order and subsequent orders of this court and the summary statement of receipts and disbursements in the receivership appears reasonable and consistent with the activities described; and
    b. The professional fees for which approval is sought are commensurate with the activities described in the Receiver's Ninth Report and supported by the filed fee affidavits. They are fair, reasonable and appropriate in the circumstances;

23. Order dated November 22, 2022 to go in the form signed by me today (reflecting the changes requested by the court).

Kimmel J.

KIMMEL J.

NOVEMBER 29, 2022