SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: **CV-22-00683684-00CL** **DATE:** **JULY 21ST, 2022**

NO. ON LIST: **5**

TITLE OF PROCEEDING: **RBC V MAIN INFRUSTRUCTURE LTD**

BEFORE JUSTICE: **CAVANAGH,**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
J.Ross Macfarlane	Royal Bank of Canada	jrmacfar@flettbeccario.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Sara Mosadeq	Main Infrastructure LTD, Kstone Investment Corporation & 2666492 Ontario LTD	sara@rarlitigation.com
Jake Wiebe	Grant Thornton Limited, Proposed Receiver	Jake.wiebe@ca.gt.com
Sanjeev Mitra	Proposed Receiver	smitra@airdberlis.com

ENDORSEMENT OF JUSTICE CAVANAGH:

[1] This is an application by Royal Bank Canada ("RBC") to appoint Grant Thornton Limited as receiver and manager (in such capacities, the "Receiver") in respect of the property and business undertakings of the respondent corporations (collectively, the "Debtors"), Main Infrastructure Ltd. ("Main"), Kstone Investment Corporation ("Kstone"), and 2666492 Ontario Ltd. ("266").

Factual Background

[2] Main operates as a road maintenance and construction company. Kstone holds title to the property from which Main operates and supplies rental equipment. 266 does not carry on business.

[3] RBC holds judgments (the "Judgments") against the Debtors (and their principal, Paula Soares) dated June 16, 2022 totaling an aggregate of $1,203,337.25 plus accruing interest and costs on a substantial indemnity scale.

[4] The Judgments also provide that "[t]he Company [Main Infrastructure Ltd.], 266 and Kstone, shall forthwith deliver to the Plaintiff possession of their respective personal property in accordance with the general security agreements ...".

[5] The time for the Debtors to appeal the Judgments has expired.

[6] The Debtors have not complied with the Judgments by forthwith delivering to RBC possession of their personal property. They did no seek a stay of the Judgments. The Debtors have been in default of this obligation since June 16, 2022. If the Debtors were to comply with the Judgments (as they must), Main and Kstone would not be able to continue to operate. They have only been able to do so by failing to comply with the Judgments. And, on this application, they ask me to allow this state of affairs to continue to that they can continue to carry on business.

[7] Main also has accumulated HST in arrears of in excess of $860,000.

[8] This application was first returnable on July 11, 2022, on short notice. The application was adjourned to today at the request of the Debtors.

[9] In her affidavit, Ms. Soares states that the debtors have been in discussions and negotiations with the Canada Revenue Agency ("CRA") for several months and are currently paying the debts owed to CRA pursuant to a monthly payment plan. She states that the debtors are working with the CRA to bring their accounts into good standing.

[10] Ms. Soares states in her affidavit that the debtors are in the process of locating financing to pay the Judgements. Ms. Soares appends to her affidavit email correspondence from Mr. Brad Kerkhof who was assisting the debtors with locating alternate financing. Mr. Kerkhof sent an email dated July 8, 2022, to Dennis Solanki of Main, and copied to Ms. Soares, in which he forwarded an email from a representative of Firm Capital Inc. responding to his inquiry concerning the opportunity to provide financing to the debtors.

[11] In this email, the representative of Firm Capital states:

> We would look lending on the real estate, in this market I would offer up to 65% LTV first mortgage financing. Rate would be 8+2

[12] No other evidence of available financing was provided.

Analysis

[13] Section 243 (1) of the *Bankruptcy and Insolvency Act* provides:

> 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.

[14] RBC is a secured creditor and has the right under its security to privately appoint a receiver. In *Bank of Montreal v. Carnival National Leasing Limited et al*., 2011 ONSC 1007, Newbould J. stated, at para. 27:

> [27] in *Bank of Nova Scotia v. Freure Village on Claire Creek*, Blair J. dealt with an argument similar to the one advanced by Carnival and stated that the extraordinary nature of the remedy sought was less essential where the security provided for a private or court-appointed receiver and the issue is essentially whether it was preferable to have a court-appointed receiver rather than a private appointment. He stated:
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>> 11. The Defendants and the opposing creditor argue that the Bank can perfectly effectively exercise its private remedies and that the Court should not intervene by giving the extraordinary remedy of appointing a receiver when it has not yet done so and there is no evidence its interest will not be well protected if it did. They also court-appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
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>> 12. While I accept as a general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court-appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of

course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[15] The Debtors submit that if a receivership order is made, they will not be able to carry on business, employees will lose their jobs, and contracts with municipalities will not be fulfilled. The Debtors ask me to take these factors into account, and delay the appointment of a receiver to allow the Debtors additional time to try to find new financing.

[16] The consequences that the Debtors seek to delay and avoid would not follow from a receivership order. They follow from the Judgments.

[17] Demands for payment and notices of intention to enforce security under s. 244 of the BIA were sent to Main, Kstone, 266, and the guarantors on July 30, 2021. As a result of the Debtors failure to pay the amounts demanded, the civil actions that resulted in the Judgments were commenced.

[18] The Debtors have had ample time to seek new financing to satisfy the indebtedness owed to RBC. They have not been able to do so. The time to do so was before the Judgments were made. It is not open to the Debtors to ask the court to exercise its equitable jurisdiction and delay the appointment of a receiver in circumstances where they have chosen not to comply with the Judgments.

[19] It is just and convenient for an order to be made appointing a receiver of all of the assets, undertakings and properties of Main, Kstone, and 266 acquired for or used in relation to their businesses. The operations of Main and Kstone are conjunctive and, although RBC does not have mortgage security on the real property owned by Kstone, the mortgagee has been given notice of this application and has not appeared to oppose. Any proceeds of sale in excess of amounts needed to pay the mortgage debt are subject to RBC's personal property security. I am satisfied that the receivership order should allow the Receiver to have control over the real property on Keele Street owned by Kstone.

[20] I am satisfied that the investigative powers of a trustee in bankruptcy under the BIA may be required and, should the Receiver determine that such powers are needed, that the Receiver be empowered, in its discretion, to execute an assignment in bankruptcy in respect of any of the Debtors.

[21] Order to issue in form of Order signed by me today.

Digitally signed by
Mr. Justice Cavanagh