Court File No.: CV-14-10766-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

-and-

EBERSOLE EXCAVATING INC. and D&S RAILWAY CONSTRUCTION INC.

Respondents

FACTUM OF TRISURA GUARANTEE INSURANCE COMPANY
(Receiver's Distribution Motion – May14, 2015)

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Court File No.: CV-09-8247-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

-and-

EBERSOLE EXCAVATING INC. and D&S RAILWAY CONSTRUCTION INC.

Respondents

FACTUM OF THE APPLICANT TRISURA GUARANTEE INSURANCE COMPANY

PART I – OVERVIEW

1. This factum is filed on behalf of the applicant, Trisura Guarantee Insurance Company ("**Trisura**"), with respect to the motion brought by the Receiver for various relief, including an order authorizing and directing the Receiver to distribute certain funds in its possession consisting of the proceeds of the sale of certain assets of the respondents by Maynards Industries Ltd. ("**Maynards**") pursuant to a court-authorized auction.

2. The assets in question were ostensibly the property of the respondents Ebersole Excavating Inc. ("**Ebersole**") and D&S Railway Construction Inc. ("**D&S**") (together, the "**Debtors**"). However, as set forth below, certain of the assets were in fact owned personally by Mr. Darrell Ebersole, a principal of the Debtors.

3. Trisura is a secured creditor of the Debtors and holds security over the business assets of both Debtors as well as over the personal assets of the Debtors' principals Darrell Ebersole ("**Darrell**") and Sandra Ebersole ("**Sandra**"), pursuant to an Indemnity Agreement described in paragraph 6 below. Trisura claims that its security interest extends to the proceeds of sale of the assets in question now held by the Receiver and that it has a first priority security interest in those proceeds superior to any claim to those proceeds by Maynards or any other party.

PART II – FACTS

4. Prior to the insolvency of the Debtors, Ebersole was engaged in the construction business of site preparation, excavating, grading and related services. D&S was in the business of railway construction and repair in Ontario.

5. Trisura issued a surety bonding facility for each of the Debtors pursuant to which Performance Bonds and Labour and Material Payment Bonds ("**Bonds**") were issued. Under the Performance Bonds, Trisura guaranteed to the owner of a project (the "**Obligee**") that the Debtor would perform its contract with the Obligee. Under the Labour and Material Payment Bonds, Trisura guaranteed to the Obligee that the Debtor's suppliers and subcontractors would be paid.[1]

6. Ebersole, D&S, Darrell and Sandra all executed an Indemnity Agreement dated March 4, 2008 in favour of Trisura (the "**Indemnity Agreement**") whereby they indemnified Trisura for any obligations or liability it might incur to Obligees under the terms of the Bonds. As security for that indemnification the Indemnity Agreement granted to Trisura a security interest in the indemnitors' assets.[2]

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[1] Detsky affidavit, Receiver's Motion Record (M.R.), Part 1, Tab2, para.s 8-11
[2] Indemnity Agreement, Receiver's M.R., Part 1, Tab 2, p.87

7. Trisura's security interest was perfected by registration under the Ontario *Personal Property Security Act* ("**PPSA**") in March, 2014. The Receiver, in its previous capacity as Interim Receiver, obtained an independent legal opinion confirming that Trisura's security interest is valid and enforceable.[3]

8. In mid-June, 2014 Ebersole filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* ("**BIA**"). Around the same time the Debtors caused various events of default under the Indemnity Agreement. Accordingly, on June 30, 2014 Trisura demanded payment from D&S, Darrell and Sandra pursuant to the Indemnity Agreement.[4]

9. On or about November 12, 2014, Trisura learned that substantially all of the assets of Ebersole and/or D&S had been sold to Maynards. Trisura had not received any prior notice of the sale and it came as a complete surprise.[5] Maynards was not a secured creditor of either Debtor. It was apparently Maynards' intention to purchase the assets and resell them at auction, presumably at a profit.

10. Trisura subsequently learned that the sale to Maynards had been completed around the end of October, 2014, pursuant to a written purchase and sale agreement between D&S as vendor and Maynards as purchaser, for a total cash purchase price of $1,350,000 (the "**Maynards Purchase Agreement**").[6]

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[3] Receiver's M.R., Part 2, Tab 3, p.410 (para. 17), pp. 544 and 560
[4] Detsky Aff., Receiver's M.R., Part 1, Tab 2, p. 61, para.s 14-17
[5] Detsky Aff., Receiver's M.R., Part 1, Tab 2, p. 63, para.s 22-23
[6] Receiver's M.R., Part 1, Tab 2, p.279

11. As a result of these developments, and following additional defaults by the Debtors, on November 19, 2014 Trisura delivered to the Debtors, Darrell and Sandra a demand for payment and a Notice of Intention to Enforce Security under the Indemnity Agreement.[7]

12. Shortly thereafter, in order to protect its security interest in the Debtors' assets, Trisura commenced these proceedings seeking, among other things, the appointment of an interim receiver. By order dated November 26, 2014, the Honourable Mr. Justice Newbould issued an order appointing Grant Thornton Limited ("**GTL**") Interim Receiver of the Debtors' assets.[8]

13. At the time of the issuance of the Interim Receivership Order, all interested parties agreed that it would be advisable to monetize the assets in issue by permitting Maynards to conduct an auction of the assets on the condition, among other things, that all proceeds from the auction, after payment of an agreed-upon commission to Maynards, be paid to the Interim Receiver to be held on certain terms pending further order with respect to their distribution. The Interim Receivership Order so provided.[9]

14. The auction sale was completed on or about December 4, 2014 and the net proceeds were paid to the Interim Receiver. The net proceeds, referred to by the Interim Receiver as the "Remaining Funds", amounted to approximately $1,474,000.

Maynards Purchase Agreement

15. As noted above, the Maynards Purchase Agreement was between D&S as vendor and Maynards as purchaser. Neither Ebersole nor Darrell or Sandra were parties. However, a large portion of the assets purportedly included in the sale consisted of vehicles whose ownership was

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[7] Detsky Aff., Receiver's M.R., Part 1, Tab 2, p. 62, para. 19
[8] Receiver's M.R., Part 1, Tab 1, p. 39
[9] Receiver's M.R., Part 1, Tab 1, p.50

registered with the Ontario Government. The Government records indicated that Darrell personally – and not D&S – was the owner of those vehicles.[10] Those assets were subject to Trisura's security interest in the assets of Darrell.

16. Prior to completing the Maynards Purchase Agreement, Maynards conducted a search under the PPSA under the Debtors' names. The search disclosed several secured parties, including Bank of Montreal, Caterpiller and Trisura. Maynards ignored the Trisura registration but ensured that sufficient purchase funds (approximately $729,000) were directed to Bank of Montreal to obtain a discharge of the Bank's security. (There were no funds owing to Caterpiller.) Trisura received none of the sale proceeds and its security remained registered.

17. A portion of the balance of the sale proceeds found their way into the trust account of Sandra's lawyers, the Dunnet Law Professional Corporation ("**DLPC**"). On the consent of the interested parties, those funds, referred to by the Receiver as the "DLPC Funds," totaling $396,242, have also been transferred to the Receiver to be held pending a distribution order. Trisura claims that its security interest attaches to the DLPC Funds as they represent the proceeds from the original sale of Trisura's collateral pursuant to the Maynards Purchase Agreement.

Current Status of Debtors

18. By an order dated December 23, 2014 the Interim Receiver was appointed as Receiver.[11] That order authorized the Receiver to assign the Debtors into bankruptcy and that was done effective January 2, 2015. GTL was appointed as Trustee in Bankruptcy of the Debtors.

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[10] Receiver's M.R., Part 2, Tab 3, p.411, para.s 28-29 and p.452
[11] Receiver's M.R., Part 2, Tab 4

PART III – ISSUES and LAW

19. The primary issue on this motion insofar as Trisura is concerned is whether Trisura's security interest in the Debtors' assets continued to remain perfected as against the Remaining Funds and the DLPC Funds in priority to all other claimants, including Maynards, notwithstanding the purported sale by D&S to Maynards pursuant to the Maynards Purchase Agreement. Maynards may assert other issues, in which case they will be dealt with in Trisura's Reply Factum.

20. Trisura obtained a security interest in the assets of the Debtors (as well as those of Darrell and Sandra) pursuant to the Indemnity Agreement.

21. Trisura's security interest was perfected by registration pursuant to the PPSA prior to the Maynards Purchase Agreement and has remained perfected continuously since then. The Receiver has confirmed the validity and enforceability of that security interest.

22. The assets purportedly sold pursuant to the Maynards Purchase Agreement therefore constituted Trisura's collateral under the PPSA.

23. It is not disputed that the Maynards Purchase Agreement transaction was out of the ordinary course of the Debtors' business. There is therefore no "ordinary course of business" exception available to Maynards as a purchaser of assets subject to a perfected security interest. Trisura's security interest therefore continued to attach to the collateral and any interest in the assets Maynards may have obtained pursuant to the Maynards Purchase Agreement remained

subject to Trisura's security interest. Trisura's security interest was not extinguished by the D&S sale to Maynards.[12]

24. At the time of the court-approved auction of the Debtors' assets those assets therefore still comprised Trisura's collateral. Pursuant to subsections 25(1)(b), (2) and (3) of the PPSA Trisura's security interest extends to the proceeds of sale of the collateral arising from the auction.[13] The PPSA provides as follows:

> 25. (1) Where collateral gives rise to proceeds, the security interest therein,
>
> > (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and
> >
> > (b) extends to the proceeds.
>
> (2) Where the security interest was perfected by registration when the proceeds arose, the security interest in the proceeds remains continuously perfected so long as the registration remains effective or, where the security interest is perfected with respect to the proceeds by any other method permitted under this Act, for so long as the conditions of such perfection are satisfied.
>
> (3) A security interest in proceeds is a continuously perfected security interest if the interest in the collateral was perfected when the proceeds arose.

25. Accordingly, Trisura's perfected security interest in the Debtors' assets extends to the Remaining Funds held by the Receiver and, it is submitted, those funds should be distributed in full to Trisura.

26. In addition, as a result of the foregoing provisions of the PPSA, Trisura's security interest extends to the DLPC Funds as they constitute proceeds of the original sale of Trisura's collateral

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[12] *Bank of Nova Scotia v. IPS,* 2010 ONSC 2101; 101 O.R. (d) 352; *GE Canada v. ING Insurance,* 2009 ONCA 171
[13] *P.P.S.A., ss. 25(1)(b), (2) and (3)* – Schedule "B" hereto

pursuant to the Maynards Purchase Agreement. The DLPC Funds ought therefore to be distributed to Trisura as well.

PART IV – ORDER SOUGHT

27. Trisura seeks an order authorizing and directing the Receiver to distribute the Remaining Funds and the DLPC Funds to Trisura in priority to all other claimants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2015.

"JOHN D. MARSHALL"

John D. Marshall

Roger Jaipargas

Lawyers for Trisura Guarantee Insurance Company

<u>**SCHEDULE "A"**</u>

AUTHORITIES

Bank of Nova Scotia v. IPS, 2010 ONSC 2101; 101 O.R. (d) 352; *GE Canada v. ING Insurance,* 2009 ONCA 171

SCHEDULE "B"

LEGISLATION

Personal Property Security Act (Ontario)

25. (1) Where collateral gives rise to proceeds, the security interest therein,

(a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and

(b) extends to the proceeds.

(2) Where the security interest was perfected by registration when the proceeds arose, the security interest in the proceeds remains continuously perfected so long as the registration remains effective or, where the security interest is perfected with respect to the proceeds by any other method permitted under this Act, for so long as the conditions of such perfection are satisfied.

(3) A security interest in proceeds is a continuously perfected security interest if the interest in the collateral was perfected when the proceeds arose.

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FACTUM OF
TRISURA GUARANTEE INSURANCE COMPANY (RECEIVER'S DISTRIBUTION MOTION)

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