Court File No. CV-22-00691422-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

- and -

RATNAS PROPERTY INVESTMENT INC. and RATNAS GAS INC.

Respondents

FACTUM OF THE APPLICANT

(Returnable December 21, 2022)

December 17, 2022

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PART I - OVERVIEW

1. The Applicant, National Bank of Canada (the "**Bank**") seeks an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, appointing Grant Thornton Limited ("**Grant Thornton**") as receiver and manager (in such capacity, the "**Receiver**"), without security, of all of the assets, undertakings and properties of each of the Respondents including, but not limited to, the lands and premises of Ratnas Property Investment Inc. ("**Property**") municipally known as 369 Ontario Street, Port Hope, in the Province of Ontario (the "**Real Property**"), and more specifically described as: PIN51078-0300(LT): PT LT 2 E/S ONTARIO ST, 3 E/S ONTARIO ST PL 11 PORT HOPE AS IN

PH53811; MUNICIPALITY OF PORT HOPE, and authorizing the Receiver to carry out a sale process in respect of the Property.

PART II - THE FACTS

2. The facts relevant to the relief sought by the Applicant are set out in greater detail in the Affidavit of Alexandre Cyr sworn December 7, 2022 (the "**Cyr Affidavit**") and the First Report of the Proposed Receiver dated December 14, 2022 (the "**First Report**"), as are summarized below.

Background

3. Terms used herein and not otherwise defined shall have the meanings assigned to them in the Cyr Affidavit.

4. The Respondents are privately owned and operated Ontario companies. Kalasius Anthonipillai and Mary Kalasius (collectively, the "**Personal Guarantors**") are directors and officers of each of the Respondents.

5. Several commercial enterprises operate on the Real Property, including a Shell-branded gas station.[1]

6. The Bank extended certain credit facilities (collectively, the "**Credit Facilities**") to the Respondents pursuant to the following offers of financing: (i) with respect to Property, a Letter of Offer dated October 27, 2017, as amended by letter dated November 15, 2017;

[1] First Report of the Proposed Receiver dated December 14, 2022 (the "**First Report**") at para 9.

and (ii) with respect to Ratnas Gas Inc. ("**Gas**"), a Letter of Offer dated February 6, 2018 (collectively, the "**Offers of Financing**").[2]

7. As at December 7, 2022, the Borrowers were indebted to the Bank in the total amount of $2,136,354.42 (the "**Indebtedness**") plus accruing interest, legal fees and disbursements incurred by the Bank.[3]

8. As security for their obligations to the Bank, the Respondents have each granted security in favour of the Bank over the Real Property and their personal property, including pursuant to separate General Security Agreements each dated January 8, 2018, and a Charge/Mortgage and a General Assignment of Rents and Leases each registered on title to the Real Property on January 18, 2018 (collectively, the "**Security Documents**").[4]

9. In addition, as detailed in the Cyr Affidavit:

(a) Gas delivered to the Bank an unlimited guarantee dated January 8, 2018 of the indebtedness and obligations of Property to the Bank; and

(b) the Personal Guarantors executed and delivered to the Bank limited joint and several personal guarantees dated January 8, 2018 and February 20, 2018, respectively, of the obligations of each of the Respondents to the Bank.[5]

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[2] Affidavit of Alexandre Cyr sworn December 7, 2022 (the "**Cyr Affidavit**") at paras 8 & 12, Application Record of the Applicant ("**ARA**"), Tab 2 at pgs 3 & 4.

[3] Cyr Affidavit at para 16, ARA Tab 2 at pg 5.

[4] Cyr Affidavit at paras 17 & 18, ARA Tab 2 at pgs 5 & 6.

[5] Cyr Affidavit at paras 18 – 20, ARA Tab 2 at pgs. 5 & 6.

10. The Bank registered its personal property security interest in Ontario against each of the Respondents on January 11, 2018, pursuant to the *Personal Property Security Act* (Ontario), in each case over all classes of collateral, except "consumer goods".[6]

11. It is a term of the Security Documents that the Bank may appoint a receiver upon default by the Respondents in their obligations to the Bank.[7]

Default Letters, Demand Letters and Notice to Tenants

12. The Respondents did not utilize the Credit Facilities in the manner contemplated by the Offers of Financing. Among other things, the Respondents:

(a) failed to pay the agreed upon amounts (including principal and interest) towards the outstanding balance on the Credit Facilities;

(b) failed to comply with their commitments to pay all taxes and source deductions;

(c) incurred unauthorized overdrafts; and

(d) failed to provide financial statements and other financial reporting to the Bank despite repeated requests from the Bank.[8]

13. In March 2020, the Bank became concerned with Property's financial position as a result of, among other things, the failure by the company to comply with its commitment to pay taxes and source deductions and the excessive amount of overdrafts on its bank account.[9]

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[6] Cyr Affidavit at para 22, ARA Tab 2 at pg 6.

[7] Cyr Affidavit at para 19, ARA Tab 2 at pg 6.

[8] Cyr Affidavit at para 24, ARA Tab 2 at pg 7.

[9] Cyr Affidavit at para 25, ARA Tab 2 at pg 7.

14. By letters dated March 9, 2020, September 11 and 30, 2020, November 12, 2020, July 2, 2021 and April 19, 2022, all as detailed in the Cyr Affidavit, the Bank provided the Respondents with notice that they were in default of their respective obligations to the Bank pursuant to the Offers of Financing.[10]

15. In addition, by letter dated November 12, 2020 (the "**November Default Letter**"), the Bank informed the Respondents that it was prepared to forebear from exercising its rights and remedies provided, among other things, the Respondents agreed to resume payments on the Credit Facilities and transfer all banking operations to another financial institution by June 30, 2021 (the "**Forbearance Agreement**").[11]

16. On or around December 15, 2020, Gas repaid in full and canceled the Gas Credit Facilities.[12]

17. By letter dated July 2, 2021 (the "**July Default Letter**"), the Bank also agreed to extend the forbearance period from June 30, 2021 to July 31, 2021 on the same terms as the November Default Letter (the "**Forbearance Extension**").[13]

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[10] Cyr Affidavit at paras 26 – 36, ARA Tab 2 at pgs 7 – 10.

[11] Cyr Affidavit at para 30, ARA Tab 2 at pg 9.

[12] Cyr Affidavit at para 31, ARA Tab 2 at pg 9.

[13] Cyr Affidavit at para 32, ARA Tab 2 at pg 9.

18. Despite agreeing to the terms of the November Default Letter and the July Default Letter, the Respondents failed to remedy the defaults or refinance the Indebtedness prior to the expiry of the Forbearance Agreement and the Forbearance Extension.[14]

19. On July 27, 2022, the Bank issued demands to the Respondents and the Personal Guarantors, requiring repayment in full of the Indebtedness, and delivered therewith Notices of Intention to Enforce Security pursuant to Section 244 of the BIA (collectively, the "**Demands and BIA Notices**").[15]

20. Shortly after issuing the Demands and BIA Notices, the Bank became aware that a lien in the amount of $73,313 (the "**Lien**") had been registered in favour of the Minister of National Revenue against the Real Property.[16]

21. By letter dated August 5, 2022 (the "**Lien Letter**"), counsel to the Bank informed the Respondents that the registration of the Lien constituted a further default under the Offers of Financing. Counsel to the Bank informed the Respondents that the 10-day statutory deadline under the BIA Notices was imminently expiring and the Bank would be in a position to realize on its security, and further requested that the Respondents contact the Bank prior to August 11, 2022 to discuss a resolution.[17]

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[14] Cyr Affidavit at para 33, ARA Tab 2 at pg 10.

[15] Cyr Affidavit at para 38, ARA Tab 2 at pg 11.

[16] Cyr Affidavit at para 40, ARA Tab 2 at pg 11.

[17] Cyr Affidavit at para 41, ARA Tab 2 at pg 11 & 12.

22. The Respondents did not reply to the Lien Letter by the August 11, 2022 deadline or at all.[18]

23. On November 11, 2022, as a result of the Respondents' failure to remedy the defaults, the Bank issued notice to the tenants of the Real Property directing them to pay rents to the Bank pursuant to the Assignment of Rents Agreement granted to the Bank in respect of the Real Property.[19]

24. The 10-day statutory deadline for the repayment of the Indebtedness set out in the Demands and BIA Notices expired on August 6, 2022, and the Bank is entitled to immediately enforce its rights and remedies under the Security Documents.

PART III - THE ISSUE

25. The two issues on this application are:

(a) whether it is just and convenient for the Court to appoint Grant Thornton as Receiver on the terms of the proposed Receivership Order; and

(b) whether the Court should approve the proposed Sales Process.

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[18] Cyr Affidavit at para 42, ARA Tab 2 at pg 12.

[19] Cyr Affidavit at para 43, ARA Tab 2 at pg 12.

PART IV - LAW & ANALYSIS

A. THE RECEIVER SHOULD BE APPOINTED

(i) Jurisdiction to Appoint the Receiver

26. Pursuant to Section 243 of the BIA, the Court may, on application by a secured creditor, appoint a receiver to take control of an insolvent person's property if it is just or convenient to do so:

> ***Court may appoint receiver***
>
> *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.

27. Section 101 of the CJA provides for the appointment of a receiver when "it is just or convenient" to do so.

> 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.

28. The Security Documents charge the property of the Respondents as security for the Respondents' obligations under the Loan. The Bank is therefore a "secured creditor" within the meaning of the BIA.[20]

29. The Respondents have failed to repay the Credit Facilities notwithstanding the defaults and the issuance of the Demand Letters and the BIA Notices and therefore are unable to meet their obligations as they become due. The Respondents are "insolvent persons" within the meaning of the BIA.[21]

30. Courts have considered the following factors, among others, when determining whether it is just or convenient to appoint a receiver:

(a) the existence of a debt and a default;

(b) the quality of the security;

(c) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(d) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(e) the likelihood of maximizing the return to the parties; and

(f) the risk to the security holder.[22]

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[20] Cyr Affidavit at paras 17 & 18, ARA Tab 2 at pgs. 5 & 6; *BIA*, s. 2.

[21] Cyr Affidavit at paras 25 – 39, ARA Tab 2 at pgs. 7 - 11; *BIA*, s. 2.

[22] See for example: *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 (Commercial List) at para 22; *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (Commercial List) at para 28; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007

31. The fact that a secured creditor has a right under its security documentation to appoint a receiver is of central importance. In cases where the security documentation provides for the appointment of a receiver, the analysis is focused on a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. As noted by Justice Morawetz (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

> ...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties (emphasis added).[23]

32. It is not necessary for a creditor whose security documentation provides for the appointment of a receiver to demonstrate that it will suffer irreparable harm if the appointment is not granted by the court.[24]

(ii) It is Just and Convenient to Appoint the Receiver in the Circumstances

33. The Bank submits that it is just and convenient to appoint the Receiver in the circumstances and therefore the statutory test for the appointment of a receiver is satisfied for the following reasons:

(a) the Respondents have repeatedly defaulted in their obligations to the Bank under the Credit Facilities. The Bank has accommodated the Respondents on multiple

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(Commercial List) at paras 24 and 27 [***Carnival Leasing***]; and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para 25.

[23] *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Commercial List) at para 27.

[24] *Carnival Leasing, supra* note 23 at paras 24-28.

occasions since March 2020 by tolerating certain of these defaults, including granting the Forbearance Agreement and the Forbearance Extension, but is no longer prepared to do so given the complete loss of confidence in the Respondents and their principals, and the continuing risk to the Bank's security;

(b) as a result of the defaults, which constitute an Event of Default under the Offers of Financing, the Bank is contractually entitled under the Security Documents to seek the appointment of Grant Thornton as Receiver of the Property of the Respondents;

(c) the 10-day notice period set out in the BIA Notices has expired; and

(d) the Property is operated as a gas station and there are potential safety and environmental concerns.

B. THE SALES PROCESS SHOULD BE APPROVED

(i) Overview of the Sales Process

34. As set out in greater detail in the First Report, Grant Thornton seeks Court approval of the Sales Process in conjunction with the appointment of the proposed Receiver. The purpose of the Sales Process, as structured, is to market and sell the assets of the Respondents on an "as is, where is" basis on the best terms possible. The key terms of the Sales Process are summarized below:[25]

(a) **Notice and Solicitation of Interest**. As soon as reasonably practicable following Court approval (if granted), the Proposed Receiver will commence a broad marketing strategy that will include publishing notice of the Sales Process in a

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[25] First Report, paras 19 – 26.

national Canadian newspaper. In addition, the Teaser Letter and NDA will be provided to all Potential Purchasers;

(b) **Potential Purchasers**. Any party who wishes to participate in the Sales Process must provide an executed NDA and a deposit to allow the Proposed Receiver to make a determination as to the financial ability of such party to consummate a transaction. On executing the NDA, Potential Purchasers will be proved access to the Data Room;

(c) **Solicitation of Bids**. The Proposed Receiver will solicit offers and expressions of interest from Potential Purchasers. Potential Purchasers that wish to make a formal offer to purchase the secured assets of the Respondents must submit a bid by the deadline to be set at the completion of Phase I of the Sales Process (the "**Bid Deadline**"); and

(d) **Evaluation and Selection of Successful Bid**. Following the Bid Deadline, the Proposed Receiver will evaluate and assess the Bids to determine the offer that represents the best offer. The Proposed Receiver will reserve the right to ask some or all Potential Purchasers to re-submit offers in subsequent rounds of bidding.

(ii) Jurisdiction and Legal Principles

35. The test for approval of a sales process in a receivership proceeding was set out by Brown J. (as he then was) of this Court in *CCM Master Qualified Fund v. blutip Power Technologies*.[26] When reviewing a sales and marketing process proposed by a receiver, the Court should assess the following:

[26] *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 at para 6 [***CCM***].

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

36. The foregoing factors are based on, and should be assessed in light of, the factors for the approval of a proposed sale transaction set out by the Ontario Court of Appeal in *Royal Bank v. Soundair*.[27]

(iii) The Sales Process should be Approved

37. The Applicant is of the view that the proposed Sales Process satisfies the test set out in *CCM* and should therefore be approved for the following reasons:

(a) **Marketing process.** The marketing process under the Sales Process was designed by the Proposed Receiver to reach as many parties who may be interested in evaluating and completing a transaction;

(b) **Timing**. The proposed timeline under the Sales Process was designed to provide sufficient runway to canvass the market and secure the best offer for the secured assets. The Proposed Receiver has projected a 60-day due diligence period to provide all interested parties with an opportunity to fully assess the secured assets;

(c) **Best option to maximize value**. The Bank, in its business judgment, is of the view that the proposed Sales Process is fair, transparent, and represents the best option

[27] *Ibid*; *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ONCA).

in the circumstances to maximize the value of the secured assets. The Proposed Receiver's option to request that Potential Purchasers resubmit offers in subsequent rounds will ensure the offer selected represents the best terms for the final sale agreement.

(d) **Highest and best use.** The Proposed Receiver anticipates that the highest and best use of the Premises is its current use as a gas station with tenanted space and that the purchaser would continue to operate it as such, which will result in the best commercial outcome.

PART V - RELIEF REQUESTED

38. For all of the foregoing reasons, the Applicant requests that this Honourable Court grant an Order substantially in the form of the draft Order located at Tab 3 of its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December.

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SCHEDULE "A"
LIST OF AUTHORITIES

No.	Case Law
1	*Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007
2	*CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750
3	*Central 1 Credit Union v. UM Financial*, 2011 ONSC 5612
4	*Elleway Acquisitions Limited v. The Cruise Professional Limited*, 2013 ONSC 6866
5	*Graceway Canada Co., Re.*, 2011 ONSC 6403
6	*Maple Trade Finance Inc. v CY Oriental Holdings Ltd.*, 2009 BCSC 1527
7	*Mustang GP Ltd., Re*, 2015 ONSC 6562
8	*RMB Australia Holdings Limited v. Seafield Resources Ltd.* 2014 ONSC 5205
9	*Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727

SCHEDULE "B"
LIST OF STATUTORY AUTHORITIES

<u>Bankruptcy and Insolvency Act, R.S.C., 1985, c. b-3</u>

Section 2: Interpretation

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> **(c)** the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

> **(a)** a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
>
> **(b)** any of
>
> > **(i)** the vendor of any property sold to the debtor under a conditional or instalment sale,
> >
> > **(ii)** the purchaser of any property from the debtor subject to a right of redemption, or
> >
> > **(iii)** the trustee of a trust constituted by the debtor to secure the performance of an obligation,
>
> if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

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