Court File No. CV14-10766-00CL

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

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

FACTUM OF TRISURA GUARANTEE INSURANCE COMPANY

(Appointment of Receiver)

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

ROGER JAIPARGAS
Tel: (416) 367-6266
Fax: (416) 361-7067
Email: rjaipargas@blg.com
LSUC# 43275C

ANDREW HODHOD
Tel: (416) 367-6290
Fax: (416) 361-2799
Email: ahodhod@blg.com
LSUC# 66314K

Lawyers for Trisura Guarantee Insurance Company

Court File No. CV14-10766-00CL

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

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

PART I – THE MOTION

1. Pursuant to the Order of Justice Newbould dated November 26, 2014 (the "**Interim Receivership Order**"), Grant Thornton Limited ("**GTL**") was appointed as the interim receiver (the "**Interim Receiver**") of the assets, property and undertaking (the "**Property**") of Ebersole Excavating Inc. ("**Ebersole**") and D & S Railway Construction Inc. ("**D&S**", and together with Ebersole, the "**Debtors**") pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* ("**BIA**") and section 101 of the *Courts of Justice Act* ("**CJA**"). Trisura Guarantee Insurance Company ("**Trisura**"), now seeks the appointment of GTL as national receiver of the Property of the Debtors pursuant to section 243(1) of the BIA and section 101 of the CJA.

2. Trisura issued certain performance and labour and material bonds (collectively, the "**Bonds**") whereby the Debtors are the principals under the Bonds.

3. Pursuant to an Indemnity Agreement dated March 4, 2008 (the "**Indemnity Agreement**") in favour of Trisura by the Debtors, Darrell Ebersole and Sandra Ebersole (collectively, the "**Indemnitors**"), the Indemnitors have agreed to indemnify Trisura against any and all losses, charges, expenses, costs, claims, demands and liabilities of whatsoever kind or nature which Trisura may sustain or incur by reason of, *inter alia*, having executed or procured the execution of the Bonds.

4. As security for the payment and performance of the obligations under the Indemnity Agreement, the Indemnitors provided security to Trisura pursuant to the provisions of the Indemnity Agreement.

5. The Indemnitors are in default of their obligations to Trisura. Furthermore, events of default have occurred under the Indemnity Agreement. Trisura has demanded payment from the Indemnitors and, through its counsel, Borden Ladner Gervais LLP ("**BLG**"), delivered a Notice of Intention to Enforce Security ("**NITES**") under the BIA, to each of the Indemnitors.

6. Due to the significant and imminent risk that the value of the Property would be eroded if a receiver was not immediately appointed to preserve and protect the Property of the Debtors, Trisura sought and obtained the Interim Receivership Order on November 26, 2014. Trisura now seeks the appointment of GTL as national receiver of the Property of the Debtors, in order to continue to preserve and protect the Property for Trisura and the other stakeholders and to gather information and report back to such stakeholders and the Court.

PART II – FACTS

7. The facts relevant to this motion are set out in the Affidavit of Stuart Detsky sworn November 24, 2014 in connection with the application for the appointment of the Interim Receiver over the Property of the Debtors (the "**Detsky Affidavit**"). Those facts are not repeated in detail in this Factum.

8. Capitalized terms used in this Factum which are not otherwise defined herein shall have the meanings ascribed to them in the Detsky Affidavit.

PART III – THE ISSUE

9. The issue raised on this motion is whether it is just and convenient for this Honourable Court to appoint a national receiver over the Property of the Debtors pursuant to section 243(1) of the BIA and section 101 of the CJA?

PART IV – THE LAW

A. The Test for the Appointment of a National Receiver

10. Pursuant to section 243(1) of the BIA the Court may appoint a receiver over the inventory, accounts receivable or other property of an insolvent person where it considers it to be just or convenient to do so. Section 243(1) 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.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, [*BIA*] at s. 243(1).**

11. The term "secured creditor" is defined in section 2(1) of the BIA to mean, among other things, a "person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor..."

***BIA* at s. 2(1).**

12. The term "insolvent person" is also defined in section 2(1) of the BIA to mean, among other things, "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 who is for any reason unable to meet his obligations as they generally become due…"

> ***BIA* at s. 2(1).**

13. The test for the appointment of a receiver under 101 of the CJA is also whether such appointment would be just or convenient:

> **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.
>
> ***Courts of Justice Act*, R.S.O. 1990, c. C.43, s.101(1) [*CJA*].**

14. In deciding whether to appoint a receiver, the Court must have regard to all the circumstances, but in particular to the nature of the property and the rights and interests of all parties in relation thereto.

> ***Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]), para. 24.**
>
> ***Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), para. 11.**

15. The factors to be considered in determining whether it is appropriate to appoint a receiver include, among others:

(a) whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed);

(b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

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

(h) the effect of the order upon the parties;

(i) the conduct of the parties

(j) the potential cost of the receivership;

(k) the relationship between the debtor and the creditors;

(l) the likelihood of maximizing the return on and preserving the subject property; and

(m) the best way of facilitating the work and duties of the receiver.

> ***Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, 60 C.B.R. (5th) 142 , para, 25.**
>
> ***Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, 67 C.B.R. (5th) 97, para. 50.**
>
> ***Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242, 67 C.B.R. (5th) 88, para. 13.**

16. In addition to the "just, appropriate and convenient" test, there is a threshold notice requirement that must be met on an application to appoint a receiver under section 243(1) of the BIA. The court must be satisfied that either: (i) the insolvent person received ten days prior notice under section 244(1) of the BIA of the moving party's intention to enforce its security, (ii) the insolvent person consented to the appointment of a receiver prior to the expiry of the ten day period, or (iii) it is otherwise appropriate to order the appointment prior to the expiry of the ten day notice period.

> ***BIA* at s. 243(1.1).**

B. It is Just and Convenient to Appoint a National Receiver in Respect of the Debtors

17. Trisura has demanded payment from the Debtors under the Indemnity Agreement. Trisura also delivered a Notice of Intention to Enforce Security under section 244(1) of the BIA to the Debtors in respect of the secured obligations under the Indemnity Agreement, for which

the ten day statutory notice period has now expired. As such, all of the necessary threshold requirements for the appointment of a national receiver have been met.

18. There is significant work remaining to be completed by the Receiver, if so appointed by the Court, which will include but will not be limited to:

a) collecting accounts receivable;

b) reconciling the results of the auction and the amount due to Maynards Industries Ltd. in respect of the buyers' premium;

c) holding the balance of the proceeds of the auction until further order of the Court;

d) holding the GIC until further order of the Court;

e) determining the location of the funds purportedly transferred by Sandra Ebersole to Darrel Ebersole;

f) realizing upon the Unsold Assets, as defined in the First Report of the Interim Receiver dated December 15, 2014 (the "**First Report**");

g) locating and securing the balance of the Unreconciled Assets, as defined in the First Report; and

h) continuing the investigation into the affairs of the Debtors, including investigating any preferential transactions or transactions at undervalue.

First Report at para. 62.

19. A national receiver will be in the best position to continue to preserve and protect the Property for the benefit of Trisura and all other stakeholders.

20. The relief which Trisura is requesting is in the same form as other orders which have issued by this Honourable Court for the appointment of a national receiver subsequent to the appointment of an interim receiver.

***Ingalls & Snyder LLC v. The Medipattern Corporation*, Order and Endorsement of Justice Wilton-Siegel dated May 7, 2013 in Court File No. CV-13-10078-00CL.**

PART V – ORDER REQUESTED

21. Trisura respectfully requests an Order appointing GTL as national receiver of all of the assets, property and undertaking of the Debtors pursuant to section 243(1) of the BIA and section 101 of the CJA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 15, 2014

Roger Jaipargas, of Counsel to Trisura Guarantee Insurance Company

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5^{th}) 300 (Ont. S.C.J. [Commercial List])
2. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List])
3. *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, 60 C.B.R. (5th) 142
4. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, 67 C.B.R. (5th) 97
5. *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242, 67 C.B.R. (5th) 88
6. Order and Endorsement of Justice Wilton-Siegel dated May 7, 2013 in Court File No. CV-13-10078-00CL

SCHEDULE "B"

LEGISLATION

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.**

2. . . .

"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;

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.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Court File No. CV14-10766-00CL

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 47 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

TRISURA GUARANTEE INSURANCE COMPANY

Applicant

- and -

EBERSOLE EXCAVATING INC. AND D&S RAILWAY CONSTRUCTION INC

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

FACTUM OF TRISURA GUARANTEE INSURANCE COMPANY
(Appointment of Receiver)

BORDEN LADNER GERVAIS LLP
40 King Street West
Toronto, Ontario
M5H 3Y4

ROGER JAIPARGAS
Tel: (416) 367-6266
Fax: (416) 361-7067
Email: rjaipargas@blg.com
LSUC# 43275C

ANDREW HODHOD
Tel: (416) 367-6290
Fax: (416) 361-2799
Email: ahodhod@blg.com
LSUC# 66314K

Lawyers for Trisura Guarantee Insurance Company