Court File No. CV-19-00627936-00

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

PACE SAVINGS & CREDIT UNION LIMITED

Applicant

-and-

692536 ONTARIO LIMITED

Respondent

FACTUM OF THE APPLICANT, PACE SAVINGS & CREDIT UNION LIMITED

September 27, 2019

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PART I – THE APPLICATION

The Applicant, Pace Savings & Credit Union Limited ("**Pace**") seeks the following Order, substantially in the form attached as Schedule "A" (the "**Appointment Order**") to the Notice of Application:

a) An order (the "**Appointment Order**") substantially in the form attached hereto as Schedule "A", *inter alia,* appointing Grant Thornton Limited ("**GTL**"), as Receiver (the "**Receiver**"), without security, of all of the assets, undertakings and properties of the Respondent, 692536 Ontario Limited (the "**Debtor**") acquired for, or used in relation to a business or businesses carried on by the Debtor, and of the real property described at Schedule "A" to the Appointment Order (collectively, the "**Property**");

b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,

c) Such further and other relief as to this Honourable Court may seem just.

<u>The Position of Pace</u>

1. It is Pace's position that the present circumstances are an appropriate case for the appointment of a Receiver, including the following (all capitalized terms as defined herein):

a) The Debtor is insolvent, and no further credit is available from Pace. The Debtor is in default of the Financing, and all applicable statutory notice periods have expired;

b) The principal of the Debtor, Bordo, is deceased, and the Debtor will be unable to continue in operation or to satisfy its obligations to Pace and other stakeholders absent the appointment of a Receiver.

c) The terms of Pace's Security provide Pace with the power to appoint a Receiver over the real and personal property of the Debtor on such default;

d) The residents of the Brighton Property will suffer significant prejudice should the Debtor suddenly cease to operate. The appointment of a Receiver is necessary in order to deal with both the unionized and non-unionized employees of the Debtor, and to ensure that the residents of the Brighton Property receive adequate services pending the intended sale of the Debtor; and,

e) The appointment of a Receiver is also necessary to allow for the orderly sale of the Brighton Property.

PART II – FACTS/OVERVIEW

1. The Debtor is a company incorporated pursuant to the laws of the Province of Ontario with its head office located in Toronto. The Debtor carries on business as an operator of a retirement residence known as Applefest Lodge in Brighton, Ontario. The Debtor owns the real property and premises from which Applefest Lodge operates, municipally known as 120 Elizabeth Street, Brighton, Ontario (the "**Brighton Property**"), and legally described

as:

> PT LT 34 CON A BRIGHTON PARTS 2, 3, 4, 7, 8 & 9, 38R1753; S/T & T/W NC210067; BRIGHTON (PIN 51166-1052 LT)

Reference: **Affidavit of Lorraine Hensberger, sworn September 20, 2019, at para 2 and Exhibits "A" and "B" thereto (the "Hensberger Affidavit").**

2. Stephen Bordo ('**Bordo**") was the sole officer and director of the Debtor, and is deceased as of July 6, 2019. Bordo died intestate and without designating a personal or property power of attorney. All shares of the Debtor are held in a family trust, of which Bordo was the trustee. This trust contains no provisions for the replacement of the trustee.

Reference: **Hensberger Affidavit, at para 3.**

Proposed Receiver's Report of Grant Thornton Limited dated September 23, 2019, at para 14. (the "Pre-Receivership Report").

The Brighton Property

3. The Brighton Property is a commercial building of approximately 4,460 square meters, which is currently utilized as a retirement residence. The Brighton Property contains 67 suites, of which 59 are currently occupied by residents. Approximately 31 of the above 67 suites were added as part of an expansion and addition to the Brighton Property undertaken circa 2010 (the "**Expansion**").

Reference: **Hensberger Affidavit, at para 5.**

Pre-Receivership Report, at para 9.

4. The Debtor employs 23 people at the Brighton Property, of whom 19 are unionized employees represented by the Service Employees International Union ("**SEIU**"), and 4 are non-unionized managers. The Debtor's collective agreement with SEIU expired on December 31, 2018 and SEIU has indicated that they will seek to negotiate a new collective bargaining agreement.

Reference: Hensberger Affidavit, at paras 6-7.

Pre-Receivership Report, at para 10.

<u>Financial Advisor</u>

5. GTL has been engaged by Pace as a financial advisor to assess the financial position of the Debtor pursuant to an Engagement Letter dated August 29, 2019. Pace is seeking the further appointment of GTL as Receiver in the within application.

Reference: Hensberger Affidavit, at para 8.

Pre-Receivership Report, at para 4.

<u>The Financing and Pace's Security</u>

6. As of August 29, 2019, the Debtor was indebted to Pace in the amount of $6,351,640.15, plus accruing interest and Pace's continuing costs of enforcement (the "**Obligations**"), in respect of financing initially advanced to the Debtor pursuant to the terms of a Commitment Letter dated July 28, 2016 and amended by way of Commitment Letter dated August 22, 2016 (collectively, the "**Letter Agreement**"), which consists of:

   a) <u>Facility # 1 – Corporate Fixed Rate Mortgage:</u> in the sum of $6,500,000 for a two (2) year term, which matured on August 30, 2018 (the "**Financing**").

Reference: Hensberger Affidavit, at paras 10-11 and Exhibit "C" thereto.

7. Pace holds, *inter alia*, the following security over the property of the Debtor as security for the Financing:

   a) Charge/Mortgage, in the principal sum of $6,500,000, receipted as instrument no. ND138168 on September 1, 2016 over the Brighton Property (the "**Mortgage**"), as governed by Standard Charge Terms No. 200033 (the "**Standard Charge Terms**") and by a Schedule of Additional Provisions (Commercial Mortgages) (the "**Additional Charge Terms**");

b) General Security Agreement from the Debtor dated August 29, 2016 (the "**GSA**"); and

c) General Assignment of Leases and Rents registered on title to the Brighton Property on September 1, 2016 as instrument no. ND138169 (the "**Assignment of Leases and Rents**").

(collectively, the "**Security**")

Reference: Hensberger Affidavit, at para 12 and Exhibits "D" to "H" thereto.

<u>Pace's Security Interest in The Brighton Property</u>

8. Pace's interest in the Brighton Property is secured by the Mortgage, as governed by the Standard Charge Terms and the Additional Charge Terms, and the Mortgage is a first charge upon the Brighton Property.

Reference: Hensberger Affidavit, at paras 13-16, and Exhibits "E" and "F" thereto.

<u>Pace's Security Interest in The Personal Property of the Debtor</u>

9. The GSA secures all personal property of the Debtor.

Reference: Hensberger Affidavit, at para 17 and Exhibit "G" thereto.

10. Pace has registered Financing Statements against the Debtor pursuant to the provisions of the *Personal Property Security Act* (Ontario) (the "**PPSA**") to perfect its security interest in the personal property of the Debtor secured under the GSA and the Assignment of Leases and Rents, as against both the Debtor's corporate name and its business name

of “Applefest Lodge”. There is one additional secured creditor of the Debtor, who has been served with this application.

Reference: Hensberger Affidavit, at paras 18-19 and Exhibits “I” and “J” thereto.

Operational Issues and Demand

11. As stated above, Bordo is deceased as of July 6, 2019. The Debtor currently has no officers or directors, and no mechanism available at this time to appoint same. There is currently no person with signing authority for the Debtor. The Financing is matured and due in full.

Reference: Hensberger Affidavit, at paras 20-21.

Pre-Receivership Report, at paras 14-16.

12. The Debtor has experienced severe cash flow/profitability challenges in 2019, suffering significant monthly losses. The Debtor’s profitability challenges are driven primarily by insufficient occupancy, and by continuing financial instability as a result of construction delays and financing associated with the Expansion.

Reference: Hensberger Affidavit, at para 22.

Pre-Receivership Report, at paras 9, 11.

13. The Debtor has been temporarily kept in operation via the injection of capital by a private investor, which investor is a significant secured creditor of the Debtor, in second priority to Pace. The Debtor is in fact insolvent and will soon be unable to meet operational costs, including payroll obligations to employees.

Reference: Hensberger Affidavit, at para 23.

Pre-Receivership Report, at paras 12-13, 14-16.

14. The Debtor's collective agreement with SEIU is expired, and there is currently no mechanism in place to allow the debtor to deal with SEIU.

Reference: Hensberger Affidavit, at para 24.

15. The above-noted events constitute defaults under the Financing (collectively, the "**Default**"). As a result of the above-noted Default, Pace did deliver to the Debtor a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act*, each dated August 29, 2019 (collectively, the "**Demand**"). The time period under the Demand has expired.

Reference: Hensberger Affidavit, at paras 25-26.

The Appointment of a Receiver

16. The Obligations due pursuant to the Demand have not been paid. The ten (10) day period under section 244 of the BIA has expired. Pace is in a position to appoint a receiver over the assets and property of the Debtor as secured by Pace's Security, pursuant to section 243 of the BIA.

Reference: Hensberger Affidavit, at para 27.

The Brighton Property

17. The Additional Charge Terms grant Pace the power to appoint a Receiver over the Brighton Property as a result of the Defaults.

Reference: Hensberger Affidavit, at para 28 and Exhibit "F" thereto.

Personal Property

18. The GSA grants Pace the right to appoint a Receiver over the personal property of the

Debtor secured thereunder, as a result of the Defaults of the Debtor.

Reference: Hensberger Affidavit, at para 30 and Exhibit "G" thereto.

<u>Pace's Position</u>

19. The Debtor is in default of the Financing. No further credit is available to the Debtor from Pace.

Reference: Hensberger Affidavit, at paras 30-33.

20. The Debtor is insolvent. The Demand has expired and Pace is in a position to seek the order appointing the Receiver. Bordo is deceased, and the Debtor is unable to operate, or to make payments or fulfill its other obligations pursuant to the terms of the Financing, as a result thereof.

Reference: Hensberger Affidavit, at para 34.

21. The residents of the Brighton Property will suffer significant prejudice should the Debtor suddenly cease to operate. The appointment of a Receiver is necessary in order to deal with both the unionized and non-unionized employees of the Debtor, and to ensure that the residents of the Brighton Property receive adequate services pending the sale and/or wind-up of the Debtor.

Reference: Hensberger Affidavit, at para 35.

Pre-Receivership Report, at para 20.

22. The appointment of a Receiver is also necessary to allow for the orderly sale of the Brighton Property.

Reference: Hensberger Affidavit, at para 35.

Pre-Receivership Report, at para 21.

23. It is Pace's position that the appointment of the Receiver is just and equitable and is necessary for the protection of the estates of the Debtor, and the interests of Pace, as secured creditor, and other stakeholders.

24. Pace proposes that GTL be appointed as Receiver, without security, over all of the assets, undertakings, and properties of the Debtor, including the Brighton Property.

25. GTL has consented to act as Receiver should this Honourable Court so appoint it, and is currently operating as financial advisor to Pace in relation to the Debtor's financial position.

PART III – ISSUES, LAW AND ARGUMENT

Issues

26. This application raises the following issues:

a) Should GTL be appointed as Receiver over the Property?

The Appointment of a Receiver

27. Section 243(1) and (1.1) of the *BIA* provide as follows:

> (1) **Court may appoint receiver –** 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) **Restrictions on appointment of receiver –** 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.

Reference: Section 243 (1) and (1.1) of the *BIA*, Applicant's Book of Authorities, Tab 1.

28. The Debtor is in default of its obligations to Pace pursuant to the terms of the Financing, and is unable to continue in operation due to the death of Bordo absent the appointment of a Receiver. The 10-day period under s. 243 of the *BIA* has expired, and the Debtor has consented to the appointment of a Receiver.

29. Section 101 of the *Courts of Justice Act* R.S.O. 1990, c. C.43 (the "***Courts of Justice Act***") provides as follows:

> 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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Reference: Section 101 of the *Courts of Justice Act*, Applicant's Book of Authorities, Tab 2.

30. The Court has the power to appoint a receiver where it is just or convenient to do so. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.

Reference: *Bank of Montreal v. Carnival National Leasing Ltd.* (2011) 74 C.B.R. (5th) 300 at paragraph 24, Applicant's Book of Authorities, Tab 3.

31. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

Reference: ***Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated*** **(1995), 30 C.B.R. (3d) 49 at paragraph 28, Applicant's Book of Authorities, Tab 4.**

32. This Court must undertake an examination of all of the circumstances, including the potential costs, the relationship between the debtor(s) 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 or receiver-manager.

Reference: ***The Bank of Nova Scotia v. Freure Village on Clair Creek,*** **1996 CarswellOnt 2328 at paragraph 13, Applicant's Book of Authorities, Tab 5.**

Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited**, (2007), 27 C.B.R. (5th) at paragraph 11, Applicant's Book of Authorities, Tab 6.**

33. It is respectfully submitted that the present circumstances are an appropriate case for the appointment of a Receiver, including the following:

a) Pace holds a security interest over the Property in the form of the Mortgage and the GSA;

b) The Debtor is in default of the terms of the Financing;

c) The Debtor is insolvent, and no further credit is available to the Debtor from Pace. The Demand has expired and Pace is in a position to seek the order appointing the Receiver;

d) Pace's Security provides Pace with the right to appoint a Receiver over the Property on default of the Debtor;

e) Bordo is deceased, and the Debtor is unable to operate, or to make payments or fulfill its other obligations to the Bank and other creditors and stakeholders as a result thereof;

f) The residents of the Brighton Property will suffer significant prejudice should the Debtor suddenly cease to operate. The appointment of a Receiver is necessary in order to deal with both the unionized and non-unionized employees of the Debtor, and to ensure that the residents of the Brighton Property receive adequate services pending the sale and/or wind-up of the Debtor; and,

g) The appointment of a Receiver is also necessary to allow for the orderly sale of the Brighton Property.

34. It is respectfully submitted that the appointment of a receiver is just and equitable and is necessary for the protection of the estate of the Debtor and the interests of Pace and other stakeholders.

PART IV – RELIEF REQUESTED

35. Pace respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2019

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Montreal v. Carnival National Leasing Ltd.* (2011) 74 C.B.R. (5th) 300.
2. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.
3. *Bank of Nova Scotia v. Freure Village on Clair Creek,* [1996] OJ No. 5088, 1996 CarswellOnt 2328 (OCJ – Gen. Div [Commercial List]).
4. *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, (2007), 27 C.B.R. (5th).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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.

Restriction on appointment of receiver

(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.

Courts of Justice Act, RSO 1990, c C-43.

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory 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.

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