Court File No. CV-22-00683684-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

-and-

MAIN INFRASTRUCTURE LTD., KSTONE INVESTMENT CORPORATION, and 2666492 ONTARIO LTD.

Respondents

APPLICATION UNDER section 243(1) 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 THE APPLICANT
(Application Returnable July 21, 2022)

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INDEX

TAB NO.

FACTUM OF THE APPLICANT

PART I – OVERVIEW

1. This is an application by Royal Bank of Canada ("RBC" or the "Bank") 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"). 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.
2. The Bank holds judgments against the debtors (and their principal, Paula Soares ("Ms. Soares")) dated June 16, 2022, totaling an aggregate of $1,203,337.25 plus accruing interest and costs on a substantial indemnity scale. The judgments also provide for possession of the personal property of all of the Debtors pursuant to the general security agreements and perfected security interests thereunder held by the Bank. The appeal period has expired, and the Debtors and Ms. Soares have not complied with the judgments. Main and Kstone have continued to operate, but Main has accumulated HST arrears in excess of $860,000.00.
3. This application was originally returnable on short notice on July 11, 2022, and was adjourned on the Debtors' request to provide additional time for them respond and to find alternative financing. The Debtors have made no progress in finding alternative financing, and have been completely opaque about their financial situation, to the extent of redacting all relevant financial details from documents filed with the court. They claim to be making monthly payments to Canada Revenue Agency ("CRA") but do not disclose

how much. They claim to have several active contracts, but provide no evidence of what the margins in those contracts are, the current status of the contracts, or when they expect to be paid. They hope to "…obtain financing within the coming months…" to pay RBC, but have provided no tangible evidence of the likelihood of obtaining such financing. In fact, the only vague evidence provided of potential financing is inadequate to pay out CRA and RBC.

4. RBC has the right to appoint a receiver under its security. A court-appointed receiver would be accountable as a fiduciary to all of the creditors, and would operate under the supervision of the court. It is just and convenient to appoint the Receiver, and RBC asks that the court do so.

Part II – The Facts

5. RBC loaned money through various facilities to Kstone and Main. Those companies guaranteed each other's obligations, and 266 guaranteed both. All 3 Debtors provided general security agreements that were perfected by registration under the *Personal Property Security Act ("PPSA").* Ms. Soares gave unsecured guarantees of both Kstone's and Main's obligations. The particulars of the loans and security are detailed in the affidavit of Philip O'Gorman sworn July 6, 2022, and the general security agreements all provide for the appointment of a receiver ("O'Gorman Affidavit" - Page A35)
6. RBC demanded payment from the Debtors and Ms. Soares nearly a year ago (O'Gorman Affidavit, Exhibit "M", page A310; Exhibit "V", page A437) and obtained summary judgment on June 16, 2022 in two proceedings against the Debtors and Ms. Soares. ("Gambacorta J. Judgment" – Page A481). The Gambacorta J. judgment provides for

payment of the aggregate sum of $1,203,337.25 plus accruing interest, plus delivery of possession of all of the debtors' personal property to the Bank (pages A487-A490).

7. The judgments have not been appealed, and the Debtors and Ms. Soares have failed to comply with them.

8. Justice Gambacorta released her reasons awarding substantial indemnity costs to RBC totaling $27,846.43 on July 15, 2022 ("Gamabacorta J. Costs Endorsement" – Attached as Appendix "A" to this Factum). In those reasons, Justice Gambacorta stated at para. 7:

> While I did not find that the Defendants' actions in defending the matter were 'scandalous', I did find they alleged bad faith on the part of the Plaintiff and pursued that defence <u>where the evidence revealed the opposite to be true</u>. Therefore, the Defendants knew they contracted (in nine separate agreements) and agreed to indemnify the Bank for any/all legal fees associated with enforcing the contracts, and they engaged in frivolous litigation anyway, putting the Bank to the very expense they do not want to pay. Further, I find it to be ironic that the Defendants highlight the 'overarching principle of reasonableness' on costs after pursuing a defence that was without evidentiary support on the record. [emphasis in original]

9. The Debtors proposed to pay RBC by December 31, 2021, and there is no evidence that they ever made any effort to obtain financing to enable themselves to do so (O'Gorman Affidavit, para. 36, p. A43). Indeed, the only evidence of refinancing efforts is Exhibit "B" to the affidavit of Paula Soares sworn July 14, 2022 ("Soares July 14 Affidavit"), p. B-1-66.

10. In Exhibit "B" to the Soares July 14 affidavit, RBC notes the following:

    a) The e-mail from the prospective lender, Firm Capital, was sent a month ago, on June 17, 2022 (p.. B-1-66);

    b) The debtors were seeking $2 million in financing, plus the possibility of refinancing existing debt of $4.2 million, for a total potential loan of $6.2 million (page B-1-68);

c) The Debtors' agent sent a "financing deck" to Firm Capital, which has not been produced (page B-1-67);

d) Firm Capital was interested in lending on real estate by way of 65% LTV (loan to value) financing (page B-1-66); and,

e) The e-mail from Mr. Kerkhof refers to the Firm Capital e-mail as "another positive response from a lender", but no other such responses have been produced (page B-1-66).

11. No prospective lender has issued a term sheet or commitment letter. The known debts of the Debtors total approximately $6,336,000 as follows:

a) RBC – Approximately $1.25 million (Gambacorta J. Judgment; Gambacorta J. Costs Endorsement);

b) First mortgage to 2468778 Ontario Inc. on Kstone Keele Street Property - $4.2 million (Soares July 14 Affidavit, page B-1-68);

c) CRA for Main HST arrears to December 31, 2021 – approximately $862,000 (O'Gorman affidavit, Exhibit "Z", page A496);

d) Municipal tax arrears for 2022 on Kstone Keele Street Property – approximately $24,000 (Affidavit of Charlotte K. Walton sworn July 15, 2022, Exhibit "A", page A602)

12. For the financing suggested by Firm Capital to even be feasible, the Debtors would need to own or control real property worth approximately $10 million, based on 65% loan-to-value. There is no evidence that they hold such assets.

13. Ms. Soares says at para. 17 of her original affidavit sworn July 8, 2022 (the "Soares July 8 Affidavit") that "…it is true that Main and Kstone are indebted to Canada Revenue

Agency…" (page B-1-16). While RBC and the court are aware of the amounts owing by Main for HST because it was served with a requirement to pay, the Debtors have provided no particulars of the nature of the indebtedness (HST, corporate tax, source deduction arrears, etc.) owed by Kstone, nor the amount of such indebtedness. Furthermore, although they allege that they are "…currently paying the debts owed to the CRA pursuant to a monthly payment plan…" (Soares July 14 Affidavit, para. 13, p. B-1-55), no details or corroborating evidence of that plan, or whether it is in good standing, have been provided.

14. The Debtors could have produced an unredacted version of the detailed financial application made to CRA to lift the requirement to pay, but instead chose to produce a copy that is of no assistance to the court, as all of the relevant financial information has been redacted (Soares July 14 Affidavit, Exhibit "A", pages B-1-59 to B-1-64). The court is entitled to infer from this omission of information that it would not have been helpful to the Debtors.

15. The Debtors claim to have "several active contracts" totaling in excess of $10 million, but have provided no evidence as to what the anticipated profit margins (if any) are for these contracts, or when the Debtors expect to be paid (Soares July 14 Affidavit, para. 21, page B-1-56).

16. Grant Thornton Limited is a licensed insolvency trustee and has consented to be appointed as Receiver if so ordered by the court (Consent to Act, page A524). On the evidence, it is both just and convenient to appoint the Receiver.

Part III – Law and Argument

17. Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as am. (*"BIA"*) provides as follows:

> **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.

Ref: https://canlii.ca/t/7vcz#sec243

18. The Debtors are each an "insolvent person" under the *BIA*, which is defined in section 2 as follows:

> **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; (*personne insolvable*)

Ref: https://canlii.ca/t/7vcz#sec2

19. The test for the appointment of a receiver is simply whether it is "just or convenient" to do so. In this case, there can be no dispute that RBC is a secured creditor that has the right to privately appoint a receiver under its security. In *Bank of Montreal v. Carnival National Leasing Limited et al.*, 2011 ONSC 1007 ("*Carnival Leasing"*), Justice Newbould followed an earlier decision of Justice Blair in *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ONSC), stating at para. 27 as follows:

> [27] In *Bank of Nova Scotia v. Freure Village on Clair 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 was essentially whether it was preferable to have a court appointed receiver rather than a private appointment. He stated:
>
> 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 argue that a Court appointed receiver will be more costly than a privately appointed one, eroding their interests in the property.
>
> 12. While I accept the 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

Ref: https://canlii.ca/t/2fqm3#par27

20. In *Carnival Leasing*, Justice Newbould held at para. 13 that "On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand.

Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days.” In the present case nearly a full year has passed since demand, and it has already been more than 30 days since judgments were granted.

Ref: https://canlii.ca/t/2fqm3#par13

21. Also in *Carnival Leasing*, Justice Newbould held at para. 13 that “In argument, Mr. Tayar said that Carnival needs just a little more time to obtain financing to pay out the BMO loans. From a legal point of view Carnival has been provided more time than is required. From a practical point of view, it is very unlikely that Carnival will be able in any reasonably foreseeable period of time to pay out BMO.” In the present case, the Debtors contemplate “months” before RBC would be paid out, and there is no likelihood that even that would happen. Apart from one e-mail a month ago, there is no evidence of any effort by the Debtors to obtain financing, and no evidence that they have any operating loan facilities now. The Debtors in this case are also starting in an $863,000 hole before they have any funds available to pay RBC, because they were financing their operations using the funds they had collected from their customers as HST, in breach of their statutory trust obligations to Her Majesty. Kstone has also failed to pay municipal property taxes in 2022, incurring a new $24,000 priority obligation.

Ref: https://canlii.ca/t/2fqm3#par16

22. RBC does not hold mortgage security on the real property owned by Kstone at 10495 Keele Street in Maple, Ontario (the “Keele Street Property”) (O’Gorman Affidavit, paras. 28 and 38, pages. A42 and A44. The mortgagee on the Keele Street Property has been served with this application and has not opposed the appointment of the Receiver.

The operations of Keele and Main are "conjunctive", and carried out from the Keele Street Property, and if there is any equity in the Keele Street Property, any proceeds from a sale would be subject to the terms of the GSA held by the Bank from Kstone. For those reasons, it will be important for the Receiver to have control over the Keele Street Property.

23. It is both just and convenient that the Receiver be appointed without delay. RBC has requested that the Receiver be empowered, in its discretion, to assign any of the Debtors into Bankruptcy. Based upon the redacted and opaque financial information produced by the Debtors, RBC is concerned that the additional investigative powers of a trustee in bankruptcy under the *BIA* may be required or desirable, should the Receiver determine that such powers are needed and asks that such power be included pursuant to clause 243(1)(c) of the *BIA.* The order sought is otherwise substantially in the form of the standard order, and a blackline version is found as Schedule "A" to the Notice of Application at page A17, and an updated draft order will be uploaded to CaseLines before the hearing.

PART IV – ORDER SOUGHT

24. The Bank respectfully asks that the court grant the order appointing Grant Thornton Limited as receiver and manager, without security, of all of the property and undertakings of the Debtors, in the form filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2022.

J. ROSS MACFARLANE
Digitally signed by J. ROSS MACFARLANE
Date: 2022.07.19 16:27:28 -04'00'

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APPENDIX "A"

CITATION: RBC v. Main Infrastructure Ltd. et al, 2022 ONSC 4152
COURT FILE NO.: CV-21-00013668-0000 and CV-21-00013669-0000
DATE: 2022-07-15

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Royal Bank of Canada, plaintiff

AND: Main Infrastructure Ltd., Kstone Investment Corporation, 2666492 Ontario Ltd. and Paula Alexandra Esteves Soares, defendants

AND RE: Royal Bank of Canada, plaintiff

AND: Kstone Investment Corporation, Main Infrastructure Ltd., 2666492 Ontario Ltd. and Paula Alexandra Esteves Soares, defendants

BEFORE: The Honourable Madam Justice Gambacorta

COUNSEL: J. Ross Macfarlane for the plaintiff; R. Petrovski for the defendants

ENDORSEMENT

[1] The Plaintiff, Royal Bank of Canada ("the Bank"), asks for substantial indemnity for costs of $13,524.11 and $14,322.32 in connection with its two successful motions for summary judgment. See: *RBC v. Main Infrastructure Ltd. et al*, 2022 ONSC 3556.

[2] Counsel for the parties have agreed the amounts claimed for costs are not in dispute. The only issue for me to decide is whether the Plaintiff is entitled to costs on a substantial indemnity scale or a partial indemnity scale.

[3] The Plaintiff submits that the multiple credit facility agreements and guarantees between the parties in both actions entitle the Bank to full recovery of legal fees. Further, the Plaintiff contends that, even with all contracts aside, the Defendants made baseless allegations of bad faith in defending the action which militates in favour of holding them to their contractual obligations to pay them or justifies substantial indemnity costs.

[4] The Defendants submit that, irrespective of the Plaintiff's success on the motions, the Plaintiff should not be entitled to anything more than the standard partial indemnity rate where the Defendants conduct in defending the matter was honest and reasonable and did not rise to the standard of 'reprehensible, scandalous or outrageous' conduct.

[5] I have reviewed the various agreements between the parties in both actions and find they contain provisions for the Defendants to indemnify the Bank for all of its legal fees in enforcing the agreements. I found that the entire terms of the contracts were

known and understood by the Defendants and executed by Paola Soares after review and advice from her advisory board (made up of accountants).

[6] The various agreements between the parties in both actions contain provisions for the Defendants to indemnify the Bank for 'all of its legal fees' in enforcing the agreements and/or contain language to do so on a 'solicitor and own client basis'.

[7] While I did not find that the Defendants' actions in defending the matter were 'scandalous', I did find they alleged bad faith on the part of the Plaintiff and pursued that defence <u>where the evidence revealed the opposite to be true</u>. Therefore, the Defendants knew they contracted (in nine separate agreements) and agreed to indemnify the Bank for any/all legal fees associated with enforcing the contracts, and they engaged in frivolous litigation anyway, putting the Bank to the very expense they do not want to pay. Further, I find it to be ironic that the Defendants highlight the 'overarching principle of reasonableness' on costs after pursuing a defence that was without evidentiary support on the record.

[8] While I am aware that substantial indemnity costs are to be awarded sparingly, I find this to be an appropriate case to hold the Defendants to their contractual obligation. As set out by Lane J. in *Aegon Canada Inc. v. ING Canada Inc.,* 2003 CanLii 31788 (ONSC) at paras. 6-9, relying on *Bosse v. Mastercraft Group Inc.* (1995) 1995 CanLII 931 (ONCA), 123 D.L.R. (4th) 161, 178 (Ont. C.A.), courts will normally uphold a contracting party's right to substantial indemnity costs unless there are reasons not to enforce the contracting language. In applying the two-part inquiry mandated by *Bosse*, I am satisfied the Plaintiff has not conducted itself in a way so as to disentitle itself to the court's assistance in enforcing the indemnification sections of the contracts, and that there is no special circumstance that makes it unfair or unduly onerous to require the Defendants to pay.

[9] In the result, I award the Plaintiff substantial indemnity costs on the basis of the language in the nine agreements, and in the absence of any reason not to enforce the relevant sections.

[10] I order the Defendants to make substantial indemnity for costs in the amount sought forthwith.

G.B. Gambacorta J.

Date: 2022-07-15

ROYAL BANK OF CANADA
Applicant

-and-

MAIN INFRASTRUCTURE LTD, et al
Respondents

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