No. S-205095
Vancouver Registry



**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

– AND –

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, C. 57, AS AMENDED

– AND –

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

**NOTICE OF APPLICATION**

**Names of applicants:** Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

**To:** The Service List

TAKE NOTICE that an application will be made by the applicants to Madam Justice Fitzpatrick at the courthouse at 800 Smithe Street Vancouver BC V6Z 2E1 on May 13, 2022 at 10:00 a.m., by MS Teams, for the orders set out in Part 1 below.

**Part 1: ORDER(S) SOUGHT**

1. An Order substantially in the form attached as **Schedule A** hereto, providing for the following relief:

(a) abridging the time for service of this notice of application, to the extent necessary;

(b) approving interim financing from Mandate Management Corporation ("**Mandate**") in the amount of $20 million as provided for in a commitment letter dated April 19, 2022 with security over all the Petitioners' assets in priority all other security interests, trusts, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**"), in favour of any person, save and except those claims contemplated by section 11.8(8) of the CCAA and the Administration Charge (to a maximum of $100,000);

(c) authorizing the Petitioners upon drawing upon the interim financing facility from Mandate to repay all borrowings from Domain Mortgage Corp. ("**Domain**");

(d) extending the stay of proceedings to and including September 30, 2022; and

(e) such further and other relief as this Honourable Court may deem just.

**Part 2: FACTUAL BASIS**

1. The Petitioners, Evergreen House Development Limited Partnership and its general partner, Port Capital Development (EV) Inc., own the **"Terrace House Project"**. The Terrace House Project consists of an ongoing development of a high-rise luxury residential strata development in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

2. On May 29, 2020, the Applicants obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The Initial Order included approval of a Sale and Investment Solicitation Process (the "**SISP**") and appointed Ernst & Young, Inc. as monitor (the "**Monitor**") in these proceedings.

3. At the comeback hearing on June 8, 2020 the Applicants obtained an Amended and Restated Initial Order (the "**ARIO**"). The ARIO included approval of an interim financing facility provided by Desjardins Financial Security Life Assurance Company ("**Desjardins**").

4. Pursuant to the SISP, the Court approved a Bid Offer Agreement between the Applicants and Bosa Properties (OC) Inc. on December 1, 2020. The transaction contemplated by that agreement did not complete.

5. On February 24, 2021, the Court approved an increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

6. Pursuant to the SISP, the Court approved the break fee contained in a Purchase and Sale Agreement between the Applicants and Landa Global Acquisitions Ltd. on April 16, 2021, which agreement included a provision that the Monitor engage in a final marketing phase.

7. On June 15, 2021, the Court dismissed the application of 1296371 B.C. Ltd. ("**129**") seeking a refinancing of the within proceeding in preference to a sale of the Applicants' assets, and instead approved a sale by way of reverse vesting order of the Petitioners' assets and undertakings to Solterra Acquisitions Corp.

8. The following day the Court approved a further increase in the Desjardins interim lending facility and an extension of the stay of proceedings.

9. 129 sought and obtained leave to appeal from the Court's June 15, 2021 orders.

10. On October 20, 2021, the Court of Appeal granted 129's appeal, and issued an order (the "**Refinancing Order**") which among other things:

(a) approved the proposed refinancing transaction between the Applicants and the New Lenders (as defined therein);

(b) authorized the payout of the Desjardins interim facility;

(c) authorized a purchase and assignment of the loan and security of CMLS Financial Ltd. ("**CMLS**") by Domain; and

(d) upon completion of the previous steps, reduced the Administration Charge under the ARIO and made certain other amendments to the ARIO; and

(e) extended the stay of proceedings herein to and including April 30, 2022.

11. Later in October 2021, the transactions authorized by the Refinancing Order took place.

12. On February 15, 2022, the Court granted the Further Amended and Restated Initial Order ("**FARIO**") and approved an additional $1.8 million tranche of the Domain facility to provide working capital to the Petitioners for this proceeding.

*Update on the Proceeding*

13. Since February 15, 2022, the Petitioners have taken the following steps to advance a restructuring of the Terrace House project:

(a) the Petitioners have identified a development partner, Enso Holdings Ltd. ("**Enso**"), who has agreed with the Petitioners' parent to co-develop the Terrace House project as the majority general partner, and whose covenant will support the necessary construction financing to exit this proceeding;

(b) the Petitioners and Enso have advanced discussions towards securing pricing for a construction contract with a general contractor for the balance of construction;

(c) the Petitioners have developed the key economic terms of a Plan of Arrangement and together with Enso have discussed the intended terms with Aviva and with a number of key unsecured trade creditors;

(d) the Petitioners have obtained from Petitioners' counsel a draft form of Restructuring Support Agreement, which they intend to use to validate that the terms of the Plan of Arrangement would garner sufficient support to succeed if put to a vote of stakeholders;

(e) the Petitioners, in conjunction with Enso, have negotiated a commitment for interim financing in the amount of $20 million from Mandate which, if approved, would be used to repay Domain and to provide working capital for an extended stay period through to the end of August 2022 with the objective of putting a Plan of Arrangement to a vote, securing a sanction order, and exiting the CCAA proceeding upon new construction financing being available;

(f) the Petitioners and Enso have engaged in the process of satisfying the conditions for the Mandate financing, and Enso has provided Mandate with a deposit; and

(g) the Petitioners have discussed with Domain and Aviva the proposed Mandate interim financing and the need for an extension of the stay of proceedings.

14. Domain agreed to being repaid later than April 30, 2022 in order to afford Aviva time to consider the proposed Mandate interim financing.

15. On April 29, 2022 the Court granted an extension of the stay of proceedings to and including May 13, 2022 to enable Aviva more time to consider the Mandate financing.

16. In conjunction with the Monitor, the Petitioners have developed a cashflow which indicates that the Petitioners can meet obligations through to and including September 30, 2022 with the proceeds of the Mandate financing after repayment of Domain.

17. The Petitioners seek an extension of the Stay of Proceedings to and including September 30, 2022, being the approximate anticipated timeframe within which the Petitioners expect to have presented a Plan of Arrangement to their stakeholders, received sanction from the Court, and obtained construction financing required to exit these proceedings.

18. As set out in the Eleventh Report of the Monitor, the Cash Flow Forecast prepared by the Petitioners for the period of May 13, 2022 to September 30, 2022 projects that the authorized borrowings under the Mandate facility are sufficient to pay obligations anticipated to arise over the proposed extension of the Stay of Proceedings.

19. The extension of the Stay of Proceedings to September 30, 2022 is necessary to permit the Petitioners to maintain operational control and to preserve the Terrace House Project while advancing this proceeding towards an intended restructuring.

20. The Petitioners have acted and continue to act in these proceedings in good faith and with due diligence.

**Part 3: LEGAL BASIS**

1. The Petitioners rely on the CCAA, the Supreme Court Civil Rules and the inherent jurisdiction of this Honourable Court.

***Interim Financing***

2. On notice to those secured creditors likely to be affected by the charge, the court may order that all or part of the property of the debtors be subject to a charge in a priority determined by the

court, in an amount the court considers appropriate, in favour of a person who agrees to lend to the debtor company an amount approved by the court (s. 11.2(1) of the CCAA).

3. In deciding whether to make an order pursuant to s. 11.2(1) – (2) of the CCAA, the court is to consider, among other things: (a) the period during which the company is expected to be subject to the CCAA proceedings, (b) how the company's business and financial affairs are managed during the proceedings, (c) whether the company's management has the confidence of its major creditors, (d) whether the loan would enhance the prospect of a viable compromise or arrangement being made, (e) the nature and value of the company's property, (f) whether any creditor would be materially prejudiced as a result of the security or charge.

4. The facility from Mandate is essential to permit the Applicants to continue operations and to effectively allow them to restructure their business and affairs in the context of these CCAA proceedings. The Applicants are not aware of any creditors that would be materially prejudiced as a result of the order approving the facility from Mandate sought despite the overall increase in superpriority borrowings.

5. The Applicants have a critical and immediate need for additional financing. Accordingly, the Monitor is of the view that the Applicants' request for approval of the facility from Mandate is required and reasonable in the circumstances.

6. It would be convenient to amend the FARIO to reflect the obligations in respect of the interim financing on the terms usually contained in the Model Order.

7. Having regard to all the circumstances and the conditions outlined in s. 11.2 of the CCAA, approval of the Mandate financing is reasonable and appropriate.

***Repayment of Domain***

8. When the Court approved an extension to the Domain financing on February 14, 2022, it did so pursuant to s. 11.2 of the CCAA.

9. The Court has the discretion under ss. 11 and 11.2 of the CCAA to approve the repayment of a prior interim financing in conjunction with the approval of a new interim financing.

10. Although some of the indebtedness under the Domain facility arose pre-filing and was then assigned to Domain after the Restructuring Order, this Court has in any event a discretion to approve the repayment of the full indebtedness: *Re Mountain Equipment Co-Operative*, 2020 BCSC 1586 at paras. 47-52.

***Stay Extension***

11. Pursuant to s. 11.02(3) of the CCAA, the Court may extend the stay of proceedings for any period that the Court considers necessary provided that:

(a) the extension sought is appropriate in the circumstances; and

(b) the Petitioners have acted and are acting in good faith and with due diligence.

12. Since the Initial Order was pronounced on May 29, 2020, the Petitioners have acted and continue to act and operate in good faith and with due diligence.

13. The extension of the stay of proceedings is necessary permit the Petitioners to maintain operational control and to preserve the Terrace House Project while advancing this proceeding towards an intended restructuring.

14. Having regard to all the circumstances and the conditions outlined in s. 11.02(3) of the CCAA, the extension of the Stay of Proceedings to and including September 30, 2022 is reasonable and appropriate.

**Part 4: MATERIAL TO BE RELIED ON**

1. At the hearing of this Application, the Petitioners will rely on:

(a) The Affidavit #6 of Tobi Reyes sworn April 27, 2022;

(b) The Affidavit #1 of Danielle Hendry, sworn May 11, 2022;

(c) The Tenth Report of the Monitor;

(d) The Eleventh Report of the Monitor, to be filed;

(e) Such further material as counsel may advise and the Court permits.

The applicants estimate that the application will take 1 hour.

☒ This matter is not within the jurisdiction of a master. Madam Justice Fitzpatrick is seized of this proceeding.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: May 11, 2022

Signature of David E. Gruber
Lawyer for the Applicants

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for the applicants, File No. 090034.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [gruberd@bennettjones.com]

***To be completed by the court only:***

Order made

☐ in the terms requested in paragraphs ____________ of Part 1 of this notice of application

☐ with the following variations and additional terms:

Dated: ____________________________

____________________________________
Signature of ☐ Judge ☐ Master

## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

**THIS APPLICATION INVOLVES THE FOLLOWING:**

*[Check the box(es) below for the application type(s) included in this application.]*

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts