Court File No. CV-23-00004340-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF 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

B E T W E E N:

CANADIAN WESTERN BANK

Applicant

and

20 CALDARI DEVELOPMENT INC.

Respondent

FACTUM OF THE APPLICANT
(*Application returnable on December 5, 2023, at 10a.m*)

November 29, 2023

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PART I – OVERVIEW

1. The Applicant, Canadian Western Bank ("**CWB**"), applies for the appointment of Ernst & Young Inc.("**EY**"), as receiver and manager of the property, assets and undertakings of the respondent, 20 Caldari Development Inc. (the "**Debtor**"), including, without limitation, the property known municipally as 20 Caldari Road, Vaughan, Ontario (the "**Property**"). The Property is improved with a commercial industrial building which is divided into units and occupied by several tenants.

2. The Debtor is indebted to CWB in connection with a secured loan which has been in default since August 22, 2022 and matured on June 30, 2023. CWB has been more than patient, and accommodated the Debtor's requests for additional time to obtain financing. Notwithstanding CWB's accommodations, the Debtor has failed to repay its indebtedness to CWB.

3. On September 29, 2023, CWB issued to the Debtor a demand for payment and a notice of intention to enforce its security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 as amended (the "***BIA***"). As of September 28, 2023, the Debtor owed $8,431,306.98 to CWB, not including legal and other costs.

4. CWB holds first – ranking security on all of the Debtor's property. CWB's security agreements with the Debtor include a contractual right to appoint a receiver on default.

5. There is an ongoing dispute and deadlock between the Debtor's two equal shareholders and directors, and CWB has lost confidence in the Debtor's ability to repay its loan.

6. In addition to its secured indebtedness to CWB, the Debtor owes arrears of realty tax to the City of Vaughan and arrears of HST to Canada Revenue Agency, which claims are secured by statutory liens and trusts on the Debtor's assets.

7. In the above circumstances, it is just and convenient to appoint a receiver to manage the Property, conduct a fair and transparent sale process, and distribute the proceeds of realization among the stakeholders in accordance with the priorities approved by the Court.

PART II – SUMMARY OF FACTS

A. Background

8. The Debtor is an Ontario corporation with its registered office located at Ontario.[1]

9. The shares of the Debtor are owned equally by Jay Khanna ("**Khanna**") and Nakul Aurora.[2]

B. Loan and Security

10. CWB advanced a secured loan in the principal amount of $8,640,000.00 to the Debtor pursuant to a commitment letter dated August 26, 2021 (the "**Loan Agreement**").[3]

11. As security for the Debtor's obligations under the Loan Agreement, the Debtor granted to CWB, among other security, a first-ranking mortgage over the Property in the original principal amount of $13,120,000.00, a related General Assignment of Rents, and a first-ranking security interest in all of the Debtor's present and future personal property and undertakings pursuant to a General Security Agreement dated November 24, 2021.[4]

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[1] The affidavit of Tyson Hartwell sworn October 19, 2023 (the "**Hartwell Affidavit**") at para 5, Tab 2 of the application record of Canadian Western Bank dated November 21, 2023 (the "**AR**"), p 25.
[2] The Hartwell Affidavit at para 6, Tab 2 of the AR. p 25.
[3] The Hartwell Affidavit at para 8, Exhibit A, Tab 2 of the AR, pp. 26 and 30-26.
[4] The Hartwell Affidavit at paras 9 and 11, Tab 2 of the AR, p. 26.

C. Default

12. On August 26, 2022, CWB sent a formal Notice of Default to the Debtor to confirm the Debtor's default under the Loan Agreement as a result of a lack of financial reporting by the Debtor to CWB. Notwithstanding the delivery of the Notice of Default, the Debtor failed to cure the default in financial reporting required under the Loan Agreement.[5]

13. In December 2022, Khanna commenced an Application in the Ontario Superior Court of Justice (court file No. CV-22-00692176-0000) against Nakul Aurora and the Debtor, claiming relief pursuant to sections 207 and 248 of the Ontario Business Corporations Act, including, among other remedies, the appointment of a receiver and a winding up order (the "Oppression Application").[6]

14. It appears from Khanna's Affidavits sworn in the Oppression Application that the Debtor has never prepared or remitted any income tax returns, and has not paid any income tax or HST. In addition, it appears from the real property tax statement issued in respect of the Property that arrears of realty taxes in the approximate amount of $166,422 are owing to the City of Vaughan in respect of the Property as at June 12, 2023.[7]

15. In March 2023, CWB agreed to extend the maturity date of the Mortgage until June 30, 2023. Notwithstanding the extension, the Debtor failed to repay its indebtedness to CWB by June 30, 2023.[8]

16. Given the lack of transparency into the Debtor's financial position resulting from the Debtor's ongoing default in financial reporting, CWB informed the Debtor that it could no longer continue to offer its support and requested that the Debtor make alternative financing arrangements and repay its indebtedness in full by no later than September 28, 2023.[9]

17. Notwithstanding CWB's indulgence and continued accommodation of the Debtor, the Debtor failed to repay its indebtedness as required by September 28, 2023. On September 29,

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[5] The Hartwell Affidavit at para 13, Exhibit G, Tab 2 of the AR, p. 27.
[6] The Hartwell Affidavit at para 14, Exhibit H and I, Tab 2 of the AR, p. 27-28.
[7] The Hartwell Affidavit at paras 14-15, Tab 2 of the AR, p. 28.
[8] The Hartwell Affidavit at paras 16-17, Tab 2 of the AR, p. 28.
[9] The Hartwell Affidavit at para.17, Tab 2 of the AR, p. 28.

2023, CWB, through its counsel, made formal demand for repayment of the Debtor's indebtedness and delivered a Notice of Intention to Enforce Security pursuant to Section 244 of the BIA.[10]

18. In light of the Debtor's continuing defaults under the Loan Agreement, and the ongoing dispute and deadlock between the Debtor's two equal shareholders, and directors, CWB has lost confidence in the existing management of the Debtor and is concerned that the Debtor's financial position will deteriorate further as time passes and the interest and penalties imposed by the taxing authorities continue to increase.[11]

PART III – THE ISSUE

19. The sole issue on this application is whether it is just or convenient for the court to appoint EY as receiver on the terms of the proposed receivership order.

PART IV – LAW AND ARGUMENT

D. EY Should be Appointed as Receiver and Manager

i. Test to Appoint a Receiver

20. Pursuant to section 243(1) of the BIA and section 101 of the Courts of Justice Act R.S.O. 1990,c. C43, as amended, the Court may appoint a receiver and manager where it is "just or convenient" to do so.

21. In determining whether it is just and convenient to appoint a receiver, this Court must have regard to "all of the circumstances, but in particular the nature of the property and the rights and interest of all parties in relation thereto". The applicant need not establish that it will suffer irreparable harm if the proposed receiver is not appointed.[12]

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[10] The Hartwell Affidavit at para.18, Tab 2 of the AR, pp. 28-29.
[11] The Hartwell Affidavit at para.19, Tab 2 of the AR, p. 29
[12] *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 at paras 24 and 28.

22. Where a debtor has expressly agreed to appoint a receiver in the event of a default, the court should not ordinarily interfere with the contract between the parties.[13]

23. It is well established that the extraordinary nature of a receiver "is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements." The appointment of a receiver "becomes even less extraordinary when dealing with a default under a mortgage".[14]

24. Where, as here, an applicant is seeking to enforce a term of an agreement assented to by the parties, the inquiry as to whether it is just and convenient to appoint a receiver "requires the court to determine whether it is in the interests of all concerned to have the receiver appointed". In making this determination, courts have been informed by the following factors, among others:[15]

(a) the need to preserve and maximize the return on the subject property;

(b) the relationship between the debtor and its creditors;

(c) the risk of the lender's security deteriorating; and

(d) loss of confidence in the debtor's management.

ii. It is Just and Convenient to Appoint Ernst & Young Inc. As Receiver and Manager

25. Having regard to the foregoing considerations, in the case at bar it is just and convenient to appoint EY, as receiver and manager given that:

(a) the Loan matured on June 30, 2023 without repayment;

(b) notwithstanding the issuance of demand, and the section 244 BIA notice, the Debtor has failed to repay the Loan;

(c) the statutory notice period under the BIA has expired;

(d) the Mortgage and GSA contain contractual entitlements to appoint a receiver upon default;

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[13] *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 at para 16.
[14] *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.* 2020 ONSC 1953 at paras 43-44.
[15] *BCIMC Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at para 45.

(e) there is an ongoing deadlock between the Debtor's two equal shareholders and directors;

(f) CWB has lost faith in the ability of the Debtor's management to turn the situation around. None of their efforts to refinance the Loan or sell the Property have yielded any tangible results;

(g) there are arrears of realty tax and HST owing to the municipal and federal governments which are secured by statutory liens and trusts over the Debtor's property, assets, and undertakings; and

(h) a Court-appointed receiver will ensure that the interests of all of the Debtor's stakeholders are considered and facilitate a fair and transparent marketing and sale process for achieving a sale of the Debtor's business and Property, and a distribution of the proceeds of sale to the Debtor's stakeholders in accordance with their legal priorities.

PART V – ORDER REQUESTED

26. For the reasons set out above, CWB respectfully requests an order appointing EY as receiver and manager of the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 29th day of November, 2023.

Lisa S. Corne

Dickinson Wright LLP
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of Montreal v Carnival National Leasing Limited,* 2011 ONSC 1007.

2. *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640.

3. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953.

4. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, 2020 ONSC 1953.

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.

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Injunctions and receivers
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).

Terms
(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2)

CANADIAN WESTERN BANK Applicant	-and-	20 CALDARI DEVELOPMENT INC. Respondent

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PROCEEDING COMMENCED AT
BRAMPTON

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