ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-24-00725055-00CL **DATE:** 16 September 2024

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TITLE OF PROCEEDING: ROYAL BANK OF CANADA v. AHM TRANSPORT INC. *et al*

BEFORE JUSTICE OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicant, RBC, seeks the appointment of msi Spergel Inc. as Receiver over the assets of AHM Transport Inc., Aishka Express 2016 Inc., Aishka Express Inc., Aishka Recycling Inc. and Tanush Transport Inc. (collectively, the "Debtors").

2. The appointment of the Receiver is opposed by the Debtors. It is supported by another senior creditor, the Business Development Bank of Canada (BDC). The Service List has been served with the materials.

3. The Applicant relies upon the Affidavit of Jan Oros sworn August 9, 2024, together with exhibits thereto and the consent of Spergel to act as Receiver.

4. The Respondents rely on the Affidavit of Punvanenthiran Jeyabalasingam, who is a director of Aishka 2016 and Tanush, sworn September 12, 2024, together with exhibits thereto, and a letter, uploaded to Caselines at not appended to any affidavit, dated September 13, 2024 from BVD Capital Corporation stating that BVD is considering a request from the Debtors to provide sufficient funding to pay out RBC.

5. Spergel, the proposed Receiver, is already acting as the Court-appointed Monitor and has submitted its First Report dated September 13, 2024.

6. Defined terms in this Endorsement have the meaning given to them in the Application materials and/or the First Report, unless otherwise stated.

7. At the outset of the hearing, the Respondents requested an adjournment of this receivership Application for one month. That adjournment was opposed by the Applicant and, counsel for the Applicant advised, BDC. The basis for the adjournment request was effectively the same as the basis for opposing the Application on the merits: while the Indebtedness, the events of default, the demands and the fact that the security documentation in respect of the Indebtedness expressly provided for the appointment of a Receiver in the event of default, the Respondents should be given "one final opportunity" to see if they could not arrange alternate financing to pay out the Applicant.

8. Since the basis for the adjournment request and the opposition to the Application on the merits was the same, argument was heard on both issues together.

9. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

10. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258 ("*Freure Village*")

11. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

12. As observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the

determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25):

a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

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 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 fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

13. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

14. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 24, 28-29. See also *Freure Village* at para. 10.

15. Where the conduct of the debtor has led directly to a receivership application, the Court should place limited to no weight on objections from the debtor as to whether a receivership is the best remedy for the secured creditor: *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co*., 2011 ONSC 3851 at para. 23.

16. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

17. In my view, it is.

18. The Debtors are *OBCA* corporations with registered head offices in Vaughan, Ontario. They are privately held. They are indebted to RBC in connection with the credit facilities as set out in the Notice of Application, (paragraph 2(h)) about which there is no dispute.

19. The total Indebtedness exceeds $8 million. It has not been repaid and no repayment arrangements have been made. Aishka is also indebted to a subsidiary of RBC, RCAP Leasing, in the amount of an additional $296,103.26. That has not been repaid either.

20. As security for their obligations to RBC, the Debtors provided general security agreements in favour of RBC. There are also guarantees and postponements of claim from the principals. Certain of the credit facilities are payable on demand, and one or more events of default, as defined in the credit facilities, has also occurred, including the failure by the Debtors to pay principal, interest or other amount when due, and the failure to comply with the reporting obligations to RBC. As noted above, the security documents expressly provide the consent of the Respondents to the appointment of a Receiver in the event of default.

21. Based on *PPSA* searches, RBC is the first registrant, other than as to consumer goods with respect to Aishka Recycling, Aishka 2016 and AHM. Other parties have also registered interests against the Debtors, including but not limited to the BDC, all as set out in the Affidavit on which RBC relies. With respect to Aishka, RBC has also obtained a priority agreement with BDC dated May 15, 2018 which, in substance, gives RBC priority over accounts and inventory and gives BDC priority over certain equipment of Aishka.

22. RBC made formal written demands and delivered section 244 *BIA* Notices on May 17, 2024, followed by additional demands on May 31, 2024.

23. The Debtors are no longer using the RBC accounts for their daily banking needs and new deposit accounts have now been opened with, and are being maintained at, another financial institution.

24. Efforts to resolve the matters have not borne fruit. Those have been ongoing in earnest since April, as outlined in the Application materials. On June 12, 2024, the Debtors engaged counsel and approached RBC to request a forbearance arrangement, in response to which RBC requested that an independent financial advisor be engaged to obtain additional information about the business of the Debtors. The debtors consented, and Spergel was appointed in that capacity. The record is to the effect that initial information requests were incompletely responded to and follow-up requests were made, to which there was no response or later, incomplete and inadequate responses.

25. This Application was originally returnable on August 21, 2024, at which time the Respondents sought an adjournment to either work out the terms of a forbearance agreement or file materials, and RBC opposed the adjournment. After having heard from the parties, Justice Steele adjourned the Application on terms, including the appointment of Spergel as Court-appointed Monitor. The Application was adjourned to September 16. On the 2024 and a timetable was imposed for materials, which required Responding materials by September 6, 2024, in addition to the provision of various information by the Debtors to RBC.

26. The First Report reflects that the majority of information requested by the Monitor from the Debtors in July was not provided, as a result of which this Application is brought back on by RBC. Some information was provided immediately prior to the appointment of the Monitor and additional information was provided thereafter.

27. The Monitor requested additional information on August 30, 2024, and thereafter met with an accounting manager (Ms. Sanji) and an external consultant Mr. Small, who are working with the Debtors. There is no

affidavit from either of them. They advised that the Debtors are expecting and HST refund from the CRA, subject to audit, and the Debtors have accounts receivable as of August 16, 2024 of just over $1.304 million. The Debtors do not have an accounting system in place and record their accounting on Excel spreadsheets, as a result of which it is very difficult for them to produce current and timely financial information. The Debtors are factoring certain of their receivables to fund ongoing operations.

28. The Monitor has requested and received certain additional information, but such was not sufficient for the Monitor report on the ability of the Debtors to make monthly payments or indeed any payments to RBC and/or BDC. That was confirmed in Court today. No information was provided by the Debtors with respect to any sale or refinancing efforts, as a result of which the Monitor requested additional information on September 9.

29. On September 11, Mr. Small advised by email that the Debtors' financial statements for fiscal 2023 were not complete and such would take additional time, and year-to-date internal financial statements for the current fiscal year are not available due to the unavailability of an accounting system, as a result of all of which the Monitor cannot comment on the ability of the Debtors to make payments to RBC and/or BDC. The cash flow forecast provided by the Debtors does not provide underlying assumptions or the documents necessary to support such assumptions.

30. The Respondents' affidavit of Punvanenthiran Jeyabalasingam states that the new operating accounts at another financial institution were established because the Respondents were not given any notice by RBC that holds would be placed on cheques, as a result of which they established the new accounts to maintain business operations.

31. The affidavit also states that the Respondents have offered to grant RBC security over to additional properties that have significant equity, but the Applicant has declined. I observe that the Affidavit on behalf of the Respondents states that the aggregate equity value of those properties is approximately $5 million, such that I observe that even if accurate, it is insufficient to pay out even RBC, let alone BDC as well (see paragraphs 10 and 11).

32. The affidavit states that the Respondents are in active discussions with BVD in order to obtain refinancing to repay the indebtedness. As noted above, the Respondents have also filed a letter from BVD, although not properly appended to an affidavit, about that commitment. It is not actually a commitment to fund, however, and states that "following up [sic] our recent discussion, our credit committee is reviewing in considering your request to provide sufficient funding to pay out the Royal Bank's position in full. We will revert with an update at our earliest opportunity."

33. Accordingly, the challenge for me today is that no responding materials were delivered by the deadline set by Justice Steele, on consent, or at all until last week. Information requests made by the Monitor, including as to current accounts receivable and accounts payable summaries, remain outstanding. No payment plan has been proposed. The Respondents have been working on a repayment plan (to be based on a refinancing commitment from a new lender) since April. Nothing has transpired, and indeed there is no evidence in the record of any commitment from any new lender or source of financing whatsoever until the BVD letter dated last Thursday, September 12. Nothing was filed by the deadline fixed by Justice Steele even as an interim update as to progress. There is limited visibility. Even today, there is limited transparency for the Applicant and for the Court-appointed Monitor, as to the financial condition of the Debtors and their ability to repay the Indebtedness, and if so on what terms.

34. Moreover, and even accepting the BVD letter, it is clearly and unequivocally not a commitment (conditional or otherwise) for financing. Nor does it even disclose when BVD was asked to make the commitment, and/or whether any information requests from DVD remain outstanding or have been

satisfied, and whether any commitment, even if made, would be conditional. The result is that I am unable to access the likelihood of any commitment actually being made in an amount sufficient to pay out RBC or the timing thereof.

35. For all of these reasons, in my view, it is just or convenient that the Receiver be appointed today. Accordingly, I denied the adjournment request and allowed the Application. Upon being advised of my decision in this regard, counsel for the Respondents then submitted that it would be appropriate to grant the receivership order, but suspend its operation and effect for a period of one week, to allow sufficient time for the Respondents to attempt to firm up a commitment from BVD.

36. I declined to do so. The receivership should be effective immediately. I do observe, however, that the first steps to be undertaken by the Receiver will be the receipt and analysis of additional financial information and transparency. While a sales process might ultimately be recommended and brought before this Court for approval, that is certainly not going to occur within one week, with the result that there is no reason why discussions with BVD cannot and should not continue in any event. Moreover, BVD is well aware of this proceeding, such that the proposed pending receivership has not been sufficiently chilling so as to dissuade it from considering a new and significantly larger financing transaction in any event.

37. If a firm commitment for refinancing is made that would see existing secured creditors paid out in full, that development would be received favourably by those creditors. The Receiver will of course cooperate with respect to information flow regarding any commitment, and if it materializes, the receivership can be shorter in duration and narrower in scope. I reminded the parties that the proposed order contains the usual seven-day comeback clause, and if necessary, I would hear the parties pursuant thereto.

38. The draft order is consistent with the Model Order of the Commercial List and is appropriate in these particular circumstances. Counsel are making minor clerical edits and will resubmit for my signature.

39. Order to go in accordance with this Endorsement which, when signed, will be effective immediately and without the necessity of issuing and entering.