SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00705869-00CL **DATE:** October 18, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC V.TEN 4 SYSTEM LTD et. al

BEFORE JUSTICE: Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Doug Smith	RBC	dsmith@blg.com
Roger Jaipargas	RBC	rjaipargas@blg.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Manjit Singh	TEN 4 SYSTEM LTD	MSingh@MSinghLaw.ca

ENDORSEMENT OF JUSTICE OSBORNE:

Chronology

1. The Applicant, RBC, seeks an order appointing msi Spergel Inc. as receiver over the assets and properties of the Respondents/Debtors Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. pursuant to section 243(1) of the *BIA* and section 101 of the *CJA*.

2. The full Application Record was originally served September 13, 2023. At the first return date of September 20, 2023, I scheduled the hearing of the Application on the merits for October 11, 2023 at the request of the Respondents, Debtors, to give them their requested additional opportunity to fully respond and to file responding materials. I imposed a timetable that required the delivery of responding materials by October 2.

3. The Application was heard on the merits as scheduled on October 11, 2023.

4. While the matter was under reserve, counsel for the Respondents wrote to the Court unilaterally to advise that a funding commitment had been obtained. The Applicant objected to the unilateral communication, but requested a short case conference before the Court to address the matter. That case conference proceeded today.

5. Just prior to the case conference, the Respondents filed supplementary materials including, as discussed below, the late-breaking commitment referred to above.

6. The Applicant maintains its position that the appointment of a receiver is appropriate. The Respondent urges the Court to consider alternatives as further described below.

The Test for the Appointment of a Receiver

7. 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?

8. 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.

9. 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.

10. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

    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.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

11. 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).

12. The issue is whether a receiver should be appointed in the circumstances of this case.

The Facts and Application of the Relevant Factors

13. Many, and indeed almost all, of the material facts are not in dispute. The Applicant relies on the Affidavit of Tro DerBedrossian sworn September 12, 2023 together with Exhibits thereto, and the Reply affidavit sworn October 4, 2023 together with Exhibits thereto.

14. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

15. Ten 4 is an Alberta Corporation extra provincially registered in Ontario, primarily engaged in the business of shipping, transportation and logistics. The director of Ten 4 is Nasir Mahmood. The other two numbered company Respondents are essentially holding companies that hold title to real estate properties.

16. RBC made available to the Debtors credit facilities. Those included an RBC visa business card agreement. The obligations of Ten 4 to RBC were guaranteed by each of the two numbered company Respondents and by Mr. Mahmood. His guarantee is for a maximum amount of $2.5 million plus interest.

17. As security for the advances thereunder, the parties entered into three general security agreements; one from each of the Debtors. Each GSA gives RBC the contractual right to appoint a receiver. The guarantees were entered into also. Mortgages registered on title to real property and assignments of rents and insurance were also given.

18. The Debtors are in default of their obligations. RBC has delivered demands and section 244 Notices of Intention. The defaults are material and have not been waived. As of August 31, 2023, Ten 4 was indebted to RBC in amounts as set out in the Application materials of approximately CDN $5,200,000 and USD $453,000. The numbered company Respondents are indebted in the approximate amounts of CDN $4.2 million and CDN $5.3 million respectively.

19. The concern of RBC has been exacerbated by the fact, of which it has just recently learned, that a writ of execution has been filed against Ten 4 on August 10, 2023 in respect of a judgment in favour of BVD Capital Corporation in the amount of $1,099,763.44, the enforcement of which would erode the RBC security.

20. In addition, the Respondents have committed covenant defaults in that, for example, Ten 4 is required to report to the bank on a monthly and quarterly basis with respect to aged accounts receivable and quarterly financial statements, neither of which were received on either of May 15, 2023 or August 14, 2023, as required. In addition, monthly reporting of borrowing base certificate, aged accounts receivables, payables in priority payables was not provided on September 30 as required.

21. RBC has therefore demanded payment of the obligations which are clearly (and admitted to be) repayable on demand according to their contractual terms. As stated above, demands and section 244 Notices were delivered, all in August, 2023. No repayment has been made by any of the Debtors or the guarantors.

22. RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

23. The Respondents rely on the Affidavit of Mr. Mahmood affirmed October 2, 2023, together with Exhibits thereto, the Supplementary Affidavit sworn October 10, 2023 together with Exhibits thereto, the Further Supplementary Affidavit of October 17, 2023 and the Affidavit of Abdul Ishaq sworn October 17, 2023 together with the one Exhibit thereto. I pause to observe that the last two affidavits were filed yesterday, without leave, in advance of the case conference today.

24. The Respondents advance the position that the triggering event for RBC was the fact that one of the primary customers of Ten 4, Northwest Carrier Ltd., paid certain outstanding accounts in the amount of CDN $1.1 million by cheque, and certain of those cheques were returned as NSF. All of this resulted in a trickle-down effect on the liquidity of the Respondents and their inability to pay RBC. The Respondents emphasized that this event was out of their control.

25. In addition, the Respondents say that Northwest subsequently paid approximately two thirds of the amount owing (CAD $720,840.57) but the balance remains outstanding. RBC submits and the banking records show that the relationship and transactions with Northwest are more complicated than indicated. Numerous different cheques from two different entities were sent. The returned cheques were effectively replaced on August 9 and 10, 2023, with the deposit to accounts of Ten 4 of a further series of 69 checks, totaling over $3,500,000 in the aggregate from two other entities that RBC believes to be connected to the Respondents or their principal. All of those 69 cheques were also all subsequently returned NSF between August 11 and August 14, 2023. This resulted in the overdraft position referred to above.

26. With respect to property taxes, the Respondents asserted, and subsequently filed supplementary materials confirm, that real property taxes had in fact been paid.

27. The Respondents stated that the accountant for Ten 4 was out of the country between July and September for vacation with the result that the company could not provide its August and September reports to RBC. In my view, it is not an answer to a contractual commitment to provide formal reports on the agreed-upon terms and by the agreed-upon deadlines, to say that an accountant was on vacation for some three months.

28. Concerningly to RBC, however, the Respondents disclosed for the first time in their responding materials filed just prior to the hearing of the Application that they are currently in the process of removing a charge registered by a non-party (Pride Truck Sales Ltd.) but encumbering the property of the Respondents in the amount of $6 million.

29. The Respondents maintain, however, that the $6 million charge against title to the property was registered in error, and that in fact it was supposed to be registered in a maximum amount of $3 million and moreover, the debt outstanding that is secured by the charge totals significantly less than that, and in any event, counsel for the Respondents advises that the Respondents are "in the process of settling that dispute". There is, however, no evidence in the Record beyond the admitted fact of the $6 million charge.

30. Finally, the Respondents submitted an appraisal report of the Property dated October 10, 2023 reflecting a current value with the result, the Respondents submit, that the bank is not at risk since there is ample equity in the property to pay out all indebtedness to RBC, even if that became necessary.

31. At the hearing of this Application on October 11, 2023, counsel for the Respondents advised that while the Respondents had no firm commitment for refinancing or a buyout, they were in active negotiations with third parties. No commitment was in the record.

32. As noted above, following the hearing, counsel to the Respondents wrote to the Court unilaterally to advise that commitment had in fact been obtained, resulting in the case conference today at the request of the Applicant. Also as noted above, further affidavit evidence was filed without leave yesterday, but I have considered it nonetheless.

33. As part of that evidence is what was represented by the Respondents to be a commitment letter which would fully satisfy the obligations to RBC. That commitment letter, dated October 12, 2023, is attached as Exhibit "A" to the affidavit of Abdul Ishaq.

34. However, and as submitted by counsel for the Applicant, the commitment letter is problematic in a number of ways:

    a. it contemplates first mortgage financing for the numbered company Respondents over the Property;

    b. the commitment, from Toronto Wire Solutions Corp., contemplates the numbered company Respondents as borrowers and a number of other parties, including Nasir Mahmood, to be joint and several guarantors;

    c. it contemplates a loan amount of $23,600,000 "in favour of [existing properties]", interest at 9% per annum payable monthly on account of interest-only in the amount of $177,000 per month or a one year term;

    d. it contemplates an advance date of January 16, 2024; and

    e. it includes various express conditions precedent to which the obligation to advance funds are expressly subject, including appraisals, inspections, surveys, "up-to-date Environmental Reports, satisfactory to the lender in its sole discretion" and other conditions.

35. In short, and having considered the commitment letter notwithstanding the manner and timing of its filing, it does not get the Respondents where they need to be. The commitment is highly conditional, and even if the conditions were met, it does not provide for funding until January next year. It simply does not answer the problem, let alone do so in any timely way.

36. I am satisfied that, considering all of the relevant factors in the circumstances of this case, that the appointment of a receiver is appropriate. Not only have the parties contractually agreed the appointment of a receiver in an event of default, which has clearly occurred here, but I am satisfied that it would otherwise be appropriate in any event.

37. The indebtedness is outstanding and payments are not being made. A receivership will provide for stability, transparency and orderly conduct under the supervision of a court-appointed officer that is necessary here. It may well be that the receiver negotiates a firm, unconditional and more expedient source of alternative funds, either with the proposed lender referred to in the commitment letter discussed above, or any other investor or lender. I would expect the receiver to investigate and explore all available options.

38. If those options bear fruit in the sense that there is a binding and unconditional commitment that will generate funds sufficient to pay out RBC inclusive of all indebtedness, fees, interest and costs, I would expect that the receivership could be terminated relatively quickly. But unless and until that occurs, a receivership is appropriate here.

39. There is considerable uncertainty about the status and amount of possibly competing claims. There is uncertainty about whether the value of the Property, even if accurate as reflected in the appraisal report, would be sufficient to pay out all claims. The fact that the mortgage is currently registered in the amount of $6 million (in addition to the security of RBC) suggests that there may not be a material surplus, if indeed there is any at all.

40. A receivership will allow for the orderly exploration, investigation and analysis of those claims, and the available assets, all in circumstances where potential chaos of competing claims, and the ensuing expensive litigation, can be avoided or minimized. It will also allow for the avoidance of further chaos and an analysis of the receivables and payables of the Debtors.

41. Counsel for the Respondents urges that the Court considered creative or more flexible relief, such as a standstill agreement and an order imposing terms that no further encumbrances could be placed on the Property of the Debtors without consent or order of the Court, and that the indebtedness to Pride secured by the mortgage is in question referred to above in the aggregate sum of $6 million, be limited to an amount of $2 million in the aggregate.

42. Even if I had the jurisdiction to impose such terms, which I am far from certain I do, I would decline to do so in the circumstances of this case. Such would amount to rewriting of the agreements between the Debtors and counterparties which are not represented here and in which in my view would not be appropriate in any event.

43. For all of these reasons, I am satisfied that the appointment of a receiver is not only just or convenient, as is the test, but indeed that it is just *and* convenient in the circumstances.

44. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Addendum: This Endorsement was amended on the consent of all parties on October 26, 2023 to remove a dollar figure in para. 30 per endorsement of that date. No other changes made.