Court File No. CV-24-00713253-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

- and -

WEST EGLINTON MEDICAL CENTRE LTD.

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO 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

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PART I – OVERVIEW

1. This Application is made by DUCA Financial Services Credit Union Ltd. ("**DUCA**") for an Order under subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") and section 101 of the *Courts of Justice Act* (Ontario) ("**CJA**") appointing msi Spergel Inc. ("**Spergel**") as receiver (in such capacity, the "**Receiver**"), without security, of all the assets, undertakings, and properties (the "**Property**") of West Eglinton Medical Centre Ltd. ("**West Eglinton**" or the "**Debtor**").

2. DUCA seeks the appointment of Spergel as Receiver over the Property of the Debtor in order to: (1) protect the Property and have same turned over to the Receiver to deal with the Property in an orderly manner, subject to further Orders of the Court; and (2) maximize value for the benefit of all of the stakeholders.

3. The appointment of Spergel as Receiver is just and convenient in the circumstances and granting the charge in favour of the Receiver over the Property is appropriate (the "**Receiver's Charge**").

PART II – FACTS

4. The relevant facts in connection with this Application are more fully set out in the Affidavit of Ivan Bogdanovich, sworn January 25, 2024 (**"Bogdanovich Affidavit"**). All capitalized terms herein not otherwise defined shall have the same meaning ascribed to them in the Bogdanovich Affidavit.

PART III – ISSUES

5. This Application requires a resolution of the following issues:

(a) Should this Court make an Order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing Spergel as the Receiver over the Property of the Debtor?

(b) Should this Court make an Order pursuant to subsection 243(6) of the BIA granting the Receiver's Charge?

PART IV – LAW and ARGUMENT

1. THE TEST FOR THE APPOINTMENT OF A RECEIVER

6. This Court has the power to appoint a receiver or a receiver and manager under subsection 243(1) of the BIA and section 101 of the CJA.[1]

7. Pursuant to subsection 243(1) of the BIA, the court may appoint a receiver where it considers it to be just or convenient to do so. Subsection 243(1) provides:

> 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:

[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended [**BIA**], s. 243(1), Schedule B; *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended [**CJA**], s. 101, Schedule B.

> (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.[2]

8. As a threshold issue, where an appointment is to be made under section 243 of the BIA, the court must be satisfied that either: (i) the insolvent person received ten days' notice under section 244 of the BIA of the moving party's intention to enforce its security, (ii) the insolvent person consented to the appointment of a receiver prior to the expiry of the ten day period, or (iii) it is otherwise appropriate to order the appointment prior to the expiry of the ten day notice period.[3]

9. Similarly, the test for the appointment of a receiver under section 101 of the CJA is also whether such appointment would be just or convenient. Subsection 101(1) of the CJA provides as follows:

> 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.[4]

10. In deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular to the nature of the property and the rights and interests of all parties in relation thereto. Typically, the issues for a court to determine on a receivership application include the following:

(a) the existence of a debt and default;

(a) the quality of the security; and

(b) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return

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[2] BIA, s. 243(1), Schedule B.
[3] BIA, ss. 243(1) & 244, Schedule B.
[4] CJA, s. 101(1), Schedule B.

to the parties, the costs associated with the appointment, and any need to preserve the property pending realization.[5]

11. Additionally, whether the applicant has a right under its security documentation to appoint a receiver is an important factor to be considered. While the appointment of a receiver is generally viewed as an extraordinary remedy, in cases where the security documentation of the applicant provides for a private or court-appointed receiver, the burden on the applicant is reduced. Where the security document provides for the appointment of a receiver on default, the applicant is merely seeking to enforce a contractual term of the agreement between the parties and the issue is reduced to a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. This involves an examination of, *inter alia*, (i) the potential cost of the receivership, (ii) the relationship between the debtor and the creditors, (iii) the likelihood of maximizing the return on and preserving the subject property, and (iv) the best way of facilitating the work and duties of the receiver.[6]

12. Where a creditor's security documentation provides for the appointment of a receiver, it is not necessary for the creditor to demonstrate that it will suffer irreparable harm if the appointment of a receiver is not granted by the court.[7]

13. Furthermore, courts will not regard the appointment of a receiver as being an extraordinary remedy where the security documentation permits the appointment. In such case, the applicant is merely seeking to enforce a term of the agreement.[8]

14. In determining whether it would be just, appropriate, or convenient to appoint a receiver, Canadian courts have historically considered a number of factors, including, but not limited to, whether:

(i) the applicant has the power to appoint a receiver under its security instrument;

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[5] *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 [***Carnival Leasing***] at para. 24; *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) [***Freure Village***] at para. 11; *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 (Commercial List) [***UM Financial***] at para. 22.

[6] *Carnival Leasing*, *supra* at para. 27; *Freure Village*, *supra* at para. 13.

[7] *Carnival Leasing*, *supra* at para. 28; *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List]) Applicant's Book of Authorities ("**BOA**"), Tab 1 at para. 28.

[8] *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 at para. 27.

(ii) the security held by the applicant is or may become insufficient to secure the indebtedness;

(iii) the debtor has broken or otherwise failed to carry out its obligations;

(iv) an appointment is necessary to protect the security from existing or realistically perceived jeopardy or danger;

(v) the debtor has failed to account;

(vi) the applicant will suffer irreparable harm or injury if a receiver is not appointed;

(vii) there is demonstrated urgency for the appointment of a receiver;

(viii) the cost to the parties of making the appointment is justified relative to the expected realization to be achieved from the appointment;

(ix) the balance of convenience favours the appointment; and

(x) the proposed appointee is capable of carrying out the purpose for which the appointment is sought.[9]

2. THE APPOINTMENT OF A RECEIVER IS JUST AND CONVENIENT

15. The appointment of a Receiver is just and convenient in this case. The general security agreement granted by West Eglinton (the "**GSA**") contractually provides DUCA with the right to appoint a receiver. The GSA secures all obligations of West Eglinton to DUCA, which includes all obligations arising under the Revolving Demand Credit Facility Agreement dated July 11, 2017 (the "**2017 Credit Agreement**") and Commitment Letter dated October 14, 2021 (the "**2021 Commitment Letter**").[10]

[9] *Standard Trust Co. v. Pendygrasse Holdings Ltd.*, 1988 CarswellSask 27 (Sask. K.B.), BOA, Tab 2 at para. 10; *RBC v. Ten 4 System Ltd. et. al.*, Ont. S.C.J. [Commercial List], CV-23-00705869-00CL, October 18, 2023 (unreported endorsement of Justice Osborne J), BOA, Tab 3 at para. 10; aff'd 2023 ONCA 839.
[10] General Security Agreement dated November 9, 2021 ("**GSA**"), Application Record ("**AR**"), Tab 2F, p. 76 at s. 13.

16. The terms of the 2021 Commitment Letter also provides DUCA with the right to appoint a receiver.[11]

17. West Eglinton is in default of its obligations under the credit documents. Specifically:

(a) West Eglinton entirely failed to comply with its reporting covenants and ignored DUCA's annual review of the credit facilities extended to West Eglinton;

(b) West Eglinton failed to pay property tax in the amount of $112,717.97 in respect of its real property (the "**Property Tax Arears**"); and

(c) A construction lien was been registered on West Eglinton's real property pursuant to the *Construction Act*, R.S.O. 1990 (the "**Construction Lien**").[12]

18. Section 12.01 of the GSA provides:

> The Secured Party, in its sole discretion, may declare all or any part of the Indebtedness which is not by its terms payable on demand, to be immediately due and payable without demand or notice of any kind, in the event of default, or if the Secured Party in good faith believes and has commercially reasonable grounds to believe that a material adverse change has occurred in the financial and business position of the Debtor. […][13]

19. On December 12, 2023, DUCA, through its counsel, demanded payment of all outstanding indebtedness in the amount of $6,613,547.65, being the aggregate of all amounts advanced pursuant to the 2017 Credit Agreement and 2021 Commitment Letter (the "**Indebtedness**").[14]

20. To date, West Eglinton has not fully repaid the Indebtedness, which constitutes a further event of default under the GSA.[15]

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[11] Commitment Letter dated October 14, 2021 ("**Commitment Letter**"), AR, Tab 2E, p. 57 at p. 15.
[12] Affidavit of Ivan Bogdanovich, sworn January 24, 2024 at paras. 16-17, AR, Tab 2, p. 14; Letter from DUCA to West Eglinton dated May 4, 2023, AR, Tab 2L, p. 122; Letter from DUCA to West Eglinton dated November 17, 2023, AR, Tab 2M, p. 124; Property Tax Certificate dated November 10, 2023, AR, Tab 2N, p. 127; Instrument No. AT6207859 dated October 24, 2022, AR, Tab 2O, p. 130.
[13] GSA, AR, Tab 2F, p. 76 at s. 12.01.
[14] Demand letter from Borden Ladner Gervais LLP to West Eglinton attaching Notice of Intention to Enforce Security dated December 12, 2023 ("**West Eglinton Demand Letter**"), AR, Tab 2P, p. 132; Demand letter from Borden Ladner Gervais LLP to Dr. Ciro Adamo attaching Notice of Intention to Enforce Security dated December 12, 2023 ("**Adamo Demand Letter**"), AR, Tab 2Q, p. 138.
[15] GSA, AR, Tab 2F, p. 76 at s. 11.01(a).

21. In any event, the 2017 Credit Agreement provides for a revolving demand facility. By accepting the 2017 Credit Agreement, West Eglinton agreed that notwithstanding compliance with the covenants and terms of the 2017 Credit Agreement, the facility was repayable on demand.[16]

22. Where a demand for payment is made under a demand facility, the debtor must be allowed a reasonable amount of time to raise the funds necessary to repay the debt. A reasonable amount of time for repayment following a demand is a finite amount of time measured in days, not weeks, and not approaching a month.[17]

23. By accepting the 2021 Commitment Letter, West Eglinton agreed that in the event that it did not perform or comply with any of the provisions of the 2021 Commitment Letter or GSA, such non-performance would constitute a default and that DUCA would have the right to immediately demand payment of any amounts advanced, together with interest.[18]

24. The defaults that have occurred are material and have not been waived by DUCA.[19] As a result of the defaults, DUCA was entitled to accelerate the full amount of the Indebtedness and did so.

25. DUCA has delivered demands and notices of intention to enforce its security (**"NITES"**) and the ten-day period under the NITES has passed without the Indebtedness being paid.

26. DUCA is under no obligation, legal or otherwise, to continue to support West Eglinton. DUCA is contractually entitled to seek the appointment of a Receiver by the Court, and it is just and equitable for a Receiver to be appointed.

27. In deciding whether it is just or convenient to appoint a receiver, the court will consider matters including the preservation and protection of the property and the balance of convenience.[20]

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[16] Revolving Demand Credit Facility Agreement Agreement dated July 11, 2017, AR, Tab 2B, p. 30.
[17] *Carnival Leasing*, *supra* at para. 13.
[18] Commitment Letter dated October 14, 2021, AR, Tab 2E, p. 57.
[19] West Eglinton Demand Letter, AR, Tab 2P, p. 132; Adamo Demand Letter, AR, Tab 2Q, p. 138.
[20] *Citibank Canada v. Calgary Auto Centre*, 58 DLR (4th) 447, 98 AR 250 (Alta. K.B.) at para. 31.

28. A court-appointed receiver is an officer of the court and acts in a fiduciary capacity with respect to all interested parties.[21]

29. The aforementioned breaches have eroded and threaten to further erode DUCA's security. The Property Tax Arears may continue to accrue, and in the event that the Construction Lien is perfected, DUCA's priority in respect of its security will be severely prejudiced.

30. Accordingly, it is only by appointment of a receiver that the Property of West Eglinton can be dealt with in an orderly fashion, having regard to the interests of all stakeholders.

3. THE TERMS OF THE REQUESTED ORDER ARE APPROPRIATE

31. Subsection 243(6) of the BIA provides as follows with respect to granting a receiver's charge:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.[22]

32. In this case, it is appropriate for the Court to grant the Receiver's Charge over the Property to ensure that the Receiver and its counsel are able to recover any fees and disbursements owed to them.

33. DUCA is agreeable to the Receiver's Charge being granted. Furthermore, all secured creditors have been given notice of this Application and have been provided with an opportunity to make representations.

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[21] *Ravelston Corporation Limited (Re)*, [2007] OJ No 414 (QL) at paras. 62-63; *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.) at para. 6.
[22] BIA, s. 243(6), Schedule B.

PART V – CONCLUSION

34. For the foregoing reasons, it is both just and convenient to appoint Spergel as Receiver over the Property of the Debtor and to grant the Receiver's Charge.

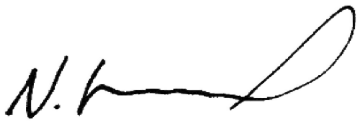
35. It is respectfully submitted that the relief requested by DUCA should be granted and Spergel ought to be appointed as Receiver over the Property of West Eglinton and the Receiver's Charge ought to be granted, on the terms of the Order sought.

PART VI – ORDER REQUESTED

36. The Applicant requests that this Court issue an Order substantially in the form attached at Tab 3 to the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 4, 2024



Doug Smith / Nick Hollard
Lawyers for the Applicant

SCHEDULE "A" – AUTHORITIES CITED

1. *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007
2. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] OJ No 5088 (Gen. Div. [Commercial List])
3. *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 (Commercial List)
4. *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*, 1995 CarswellOnt 39 (Ont. Gen. Div. [Commercial List])
5. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866
6. *Standard Trust Co. v. Pendygrasse Holdings Ltd.*, 1988 CarswellSask 27 (Sask. K.B.)
7. *RBC v. Ten 4 System Ltd. et. al.*, Ont. S.C.J. [Commercial List], CV-23-00705869-00CL, October 18, 2023 (unreported endorsement of Justice Osborne J)
8. *RBC v. Ten 4 System Ltd. et. al.*, 2023 ONCA 839
9. *Citibank Canada v. Calgary Auto Centre*, 58 DLR (4th) 447, 98 AR 250 (Alta. K.B.)
10. *Ravelston Corporation Limited (Re)*, [2007] OJ No 414 (QL)
11. *Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.)

SCHEDULE "B" – LEGISLATION CITED

***Bankruptcy and Insolvency Act*, R.S.C., 1985, C. B-3, as amended**

Section 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

Section 243(1.1)

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

> (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> (b) the court considers it appropriate to appoint a receiver before then.

Section 243(6)

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Section 244

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

> (a) the inventory,
>
> (b) the accounts receivable, or
>
> (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

> (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
>
> (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

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

Section 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.

(2) An order under subsection (1) may include such terms as are considered just.

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