



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00685439-00CL DATE: November 15th 2022

NO. ON LIST: 3

TITLE OF PROCEEDING: **THE TORONTO-DOMINION BANK v 2314251 ONTARIO INC.**
et al

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE OSBORNE:

1. In this Application, TD seeks the appointment of a receiver over the assets of 2314251 Ontario Inc. ["231"] and other relief. Within that Application, TD brought a motion only for the appointment of a receiver, and is content to adjourn the Application in respect of the balance of the relief sought, including judgment against the individual guarantors.
2. On October 27, 2022, after hearing that motion, I released an Endorsement in which I declined to appoint a receiver at that time for the reasons set out in that Endorsement. However, I did so on terms, and the Endorsement provided that nothing I ordered or declined to order would prejudice any rights of TD including any relief it may seek on the return of the motion and/or the application.
3. In the interests of brevity, I have not repeated the contents of that Endorsement here but incorporate it by reference in respect of the background and context for the return of the motion today.
4. TD returns today and renews its request for the appointment of a receiver. In addition to the materials before me when I made my earlier Endorsement, TD has filed a supplementary affidavit of Ms. Amanda Bezner sworn November 14, 2022.
5. 231 has filed a supplementary affidavit of Mr. Mohammad Hafiz also sworn November 14, 2022.
6. Both parties also rely on the material previously filed, as is appropriate.
7. Essentially, when the parties were last before me, Mr. Hafiz as principal of 231, and 231 itself, took the position that he owned various pieces of real property in Bangladesh and was in the process of selling those with the intention that the proceeds of sale would pay out the indebtedness to TD.
8. It is not contested by 231 that it is indebted to TD, that the security documentation contractually entitles TD to the appointment of a receiver in the event of default, nor that an event of default has occurred.
9. Regardless of whether and the extent to which financial statements delivered to TD by 231 constitute a representation by it, or a misrepresentation, the business [operating as a gas station] has failed to continue operating and this fact was not disclosed to TD.
10. 231 maintains its position today, however, that notwithstanding the clear default under the loan agreements, it is not just and convenient to appoint a receiver. It argues that nothing is to be gained by such an appointment since, if the Respondents are given enough time, sufficient proceeds from the property sales in Bangladesh should be generated and TD can be paid out.
11. Among the terms I ordered in my earlier Endorsement was the requirement for 231 and its principal to deliver to TD particulars of the proposed sale, and value, of the Bangladeshi properties.
12. The supplementary affidavit material relied upon by TD today shows that certain information has been provided. Surprisingly, in their responses to questions asked by the bank, the Respondents confirmed that one Bangladeshi property belonging to the Respondent Mr. Hafiz, was already sold but that the relevant records relating to that property and the sale were "in storage in Bangladesh".
13. Yesterday, the day before the return of this motion, the Respondents delivered a letter from the brother of Mr. Hafiz [not a sworn or affirmed affidavit] advising that he was working on reviewing the records in Bangladesh to find documentation relating to the property sold. Images of documents for the property said to be sold were included, although they are all written in Bengali and are not translated into English.
14. The supplementary affidavit of Mr. Hafiz confirmed, as noted above, that he had provided or caused to be provided certain information to TD [with the exception of the renewed Ontario Fuel Safety Licence which due to an administrative error by the TSSA, he stated, he was currently unable to get a copy.
15. The affidavit states that the records relating to the three properties referred to in his prior affidavit are in a storage unit in Bangladesh, and Mr. Hafiz attaches as Exhibit D a copy of the letter from his brother advising that he will attend the storage unit to find the records referred to above.
16. At paragraph 13, Mr. Hafiz states that based on his communications with the buyer of the property now sold, his belief is that he will receive payments in instalments. No amounts nor timetable are scheduled for the payments of those instalments is provided.

17. At paragraph 14, Mr. Hafiz states that he has already received some payments from the buyer which were deposited into his TD account, and indeed Exhibit L to his affidavit shows a balance in that account of approximately \$509,000 [as against the approximate amount of \$2.4 million plus interest owed to TD].
18. Counsel for the Respondents advised today [although the affidavit does not state this] that transfers and deposits into the account dated yesterday in the aggregate amount of \$460,000 represent a portion of the proceeds of sale, as do two earlier deposits on September 6 and 16, 2022 in the amount of \$25,000 and \$13,000 respectively.
19. TD points out that this explanation as to the source of funds is inconsistent with the statements provided to TD by the Respondents under cover of the letter from counsel dated November 10, 2022 [Exhibit C to the supplementary Bezner affidavit] in which, in response to numbered questions 18 and 19 specifically relating to the two deposits referred to above, the Respondents advised that the source of funds was another business owned by Mr. Hafiz in Toronto.
20. TD submits that its concern about the status of the sale of the properties in Bangladesh is heightened and increased by the inconsistent answers as to the source of funds in the bank account.
21. While the conduct of real estate transactions in Bangladesh may very well be different than in this jurisdiction, I find it odd that Mr. Hafiz cannot provide responses to relatively straightforward questions asked about those properties because the records are in storage, when those very properties are the subject of sale transactions literally ongoing now. It is also surprising that in the circumstances, his affidavit does not provide any particulars of the exact sale price of the property or properties sold, or the terms of sale and schedule for payments of the purchase price, if the purchase price is to be paid over time in instalments. Nor is there any evidence about the timing of sale proceeds out of Bangladesh and into Canada given what are apparently certain currency restrictions.
22. In short, there is still no evidence before me as to the specifics of the sale or what proceeds exactly will be available to TD or when.
23. Nor is there any update on the discussions with the fuel supplier of the gas station, other than the advice from counsel for the Respondents that there has been no resolution to that dispute, with the result that there continues to be no operating business nor any timeline as to when the gas station might resume operations in the future.
24. 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 and convenient to do so?
25. In making a determination about whether it is, in the circumstances of a particular case, just and 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. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258).
26. 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. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 7101 at para. 27).
27. There are also examples of situations where a receiver has been appointed for the purposes of gaining access to the books and records of the company (see *DeGroot v. DC Entertainment Corp. et al*, 2013 ONSC 7101 at para. 52). I recognize that in that case, unlike here, the plaintiff had established a strong *prima facie* case of fraud. However, a number of observations of the Court in that case, including that there had been serious breaches of the agreements and the court had little faith in the defendants producing the records, were relevant to the analysis.

28. In the present case, there is no operating business. Accordingly, the appointment of a receiver would not disrupt operations.
29. In the circumstances, I am satisfied that now, if not before, it is just and convenient to appoint a receiver. TD is entitled to the contractual remedy for which it bargained in the circumstances. If, as the Respondents submit they hope will be the case, sufficient funds are generated from Bangladesh to pay out the indebtedness to TD, that would obviously go a long way to resolving matters. But today, TD is entitled to have a receiver appointed.
30. The consent of msi Spergel Inc. to act as receiver has been filed. That firm is appropriate for an engagement such as this. The terms of the proposed receivership as reflected in the draft order are appropriate in the circumstances of this case.
31. Order to go in the form signed by me today. The order is effective immediately and without the necessity of issuing and entering.

O'Shea, J.