CITATION: Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, 2022 ONSC 6186
COURT FILE NO.: CV-22-678808-00CL
DATE: 20221028

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: Canadian Equipment Finance and Leasing Inc., Applicant

AND:

The Hypoint Company Limited, 2618905 Ontario Limited, 1618909 Ontario Limited, Beverley Rockliffe and Chantal Bock, Respondents

BEFORE: Osborne J.

COUNSEL: *R. Brendan Bissell and Joel Turgeon*, for the Applicant

Jonathan Rosenstein, for the Mortgagees
Domenico Magisano, for the Proposed Receiver, Albert Gelman Inc.

HEARD: September 2, 2022

ENDORSEMENT

The Issue

[1] What happens when rights under the *Mortgages Act* and the *Personal Property Security Act* intersect? As is often the case, a business is carried on through two related entities. One owns the real estate and one operates the business. One creditor finances the purchase of equipment and has a security interest. Another creditor finances the purchase of the real property and has conventional mortgage security. The security of each is over a different asset, and the result is generally straightforward. However, when the purchased equipment is affixed to the property, and there is a dispute about whether and how it can be removed and whether such removal will cause a diminution in the value of both the equipment and the real property, the question is more complex: who has rights of enforcement, and over what assets?

[2] The Applicant, Canadian Equipment Finance and Leasing Inc. ["CEF"] brings this Application for a receivership order, judgment and interest. On this motion within the Application, it seeks only the appointment of a receiver as more particularly described below.

[3] CEF seeks the appointment of Albert Gelman Inc. as receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* ["CJA"], over all of the assets and property of the Respondents, The Hypoint Company Limited ["Hypoint"] and 2618909 Ontario Limited ["909"] that was used in relation to a business carried on by either or both of them.

[4] The Mortgagees [as defined below] do not oppose the appointment of a receiver over the assets of Hypoint pledged as collateral for CEF's equipment loan, but oppose the appointment of a receiver over the assets of 909, the related entity that owns the real estate against title to which they hold mortgage security.

[5] The mortgagees do however concede that this Court has the discretion to appoint a receiver over the assets of both entities pursuant to section 101 of the CJA and submit in the alternative that if a receiver is appointed, that receiver be the firm nominated by them, MSI Spergel Inc. Each proposed receiver has filed a consent to act in that court-appointed capacity.

[6] Having reviewed all of the evidence filed by the parties and having heard the submissions of their counsel, I have concluded that it is just and convenient to appoint a receiver over all of the assets of both related debtors, being Hypoint and 909 pursuant to section 101 of the CJA. I appoint the firm nominated by the mortgagees, MSI Spergel Inc., as that Court-appointed receiver.

The Business, The Loans and The Security

[7] The assets and property of Hypoint include HVAC equipment installed at the premises from which the business of the Respondents was conducted at 25 Morrow Ave., Toronto [the "Premises"]. The Premises was essentially a custom-built cannabis production facility.

[8] CEF and the Respondent, Hypoint, entered into a loan and security agreement [the "Agreement"] made as of June 1, 2020. There is no dispute that CEF has first ranking security over that HVAC equipment [the "Collateral"] and, in the circumstances, is entitled to the appointment of a receiver over same.

[9] There is, however, a corollary dispute between the parties over whether the equipment pledged as Collateral includes, in addition to the physical HVAC units affixed to the exterior of the building on the Premises, electronic control units located within the building.

[10] The main dispute arises because CEF is seeking the appointment over the Premises as well as the Collateral, with the intent to sell the Premises with the HVAC equipment still installed, through a single sales process approved and overseen by a receiver under the direction of this Court.

[11] While all parties are in agreement that the Premises ought to be sold, the mortgagees who hold registered mortgage security against title to the Premises argue that the real estate itself is owned by the Respondent 909. Those mortgagees, including the first mortgagee Bruce Lubelsky and the second mortgagees Delrin Investments Inc. and three other individuals, [collectively, the "Mortgagees"] hold registered mortgage interests against title to the Premises.

[12] Those Mortgagees argue that, while 909 is a related entity to Hypoint, it is not a party to the loan and security agreement with CEF, and that only the HVAC equipment was pledged as Collateral, all with the result that CEF has no legal right to the appointment of a receiver of property owned by any party other than that belonging to the debtor, Hypoint.

[13] The Mortgagees do not oppose the appointment of a receiver over the HVAC equipment only, nor do they oppose CEF or a receiver acting on its behalf entering onto the premises to remove the HVAC equipment [in accordance with section 35 of the PPSA], subject to determination or resolution of the ancillary dispute referred to above about whether the control units inside the Premises are properly considered to be part of the Collateral.

[14] I observe that 909 guaranteed the debt of Hypoint to CEF, although CEF does not seek in its Notice of Application judgment on that guarantee. Accordingly, for the purposes of this motion, that guarantee is of less relevance since judgment based on that guarantee is not the basis relied upon for the appointment of a receiver.

[15] While Hypoint defaulted on the equipment loan in respect of the HVAC to CEF, 909 defaulted on the mortgages. The equipment loan was in the approximate amount of $780,000. The mortgages were in the approximate amount of $5.3 million.

[16] CEF argues that the practical effect of the position of the Mortgagees is that if CEF enforces its rights only as against the Collateral, it will have to remove and sell separately that Collateral which will devalue both the Collateral itself as well as the Premises, to the detriment of all stakeholders, since proceeds and recovery will be maximized for all only if the Premises are sold as a turnkey cannabis production facility, with the HVAC still installed.

[17] CEF argues that a receiver can then resolve disputes over competing priorities and/or entitlement to proceeds of sale, with the later assistance of this Court if necessary, none of which needs to be decided on this motion. CEF notes that the Mortgagees originally cooperated with the Applicant regarding a potential sale transaction, but have now advised that that potential sale was not completed, and the Mortgagees are not prepared to cooperate in an *en masse* sale now.

[18] The Mortgagees take the position that they are entitled, by the terms of their mortgage security and the *Mortgages Act*, to enforce their mortgages by selling the premises under power of sale. That is precisely the fragmented sales process to which CEF objects.

[19] This matter was before the Court on June 29, 2022, on which date Justice Gilmore authorized the appointment of a receiver over the HVAC equipment, although CEF has not proceeded to have a receiver appointed pursuant to that order. The Mortgagees have now delivered notices of sale following on the mortgage defaults. There were discussions and, for a time, some level of cooperation between and among the parties with respect to a potential sale of the Premises, including the affixed Collateral.

[20] When that potential sales transaction collapsed, however, the Mortgagees decided to proceed with a more conventional sale by way of obtaining fair market value appraisals and retaining a commercial real estate brokerage to market the properties. They have begun that process.

[21] While they maintain their primary position that no receiver should be appointed over the property of 909, the Mortgagees do concede that the Court has the discretionary ability to appoint such a receiver pursuant to section 101 of the *Courts of Justice Act*. If the Court determines to exercise that discretion in appoint a receiver, the Mortgagees take the position that the receiver should be the firm nominated by them.

Analysis

[22] The test for appointing a receiver, whether under the BIA or the CJA, is whether it is just and convenient to do so. The overarching objective is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors.

[23] 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).

[24] 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).

[25] In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

(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.

[26] 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. [See *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras. 28-29].

[27] In the present case, CEF's submission that this Court should appoint its proposed receiver over the assets of 909 pursuant to section 243 of the BIA fails, in my view, for the simple fact that, as submitted by the Mortgagees, 909 is not a party to the CEF credit agreement and nor is CEF a creditor of 909, contingent or otherwise.

[28] CEF is not a secured creditor of 909. CEF has no contractual right to the appointment of a receiver over the assets of 909 pursuant to any agreement as it does with respect to Hypoint. As noted above, it similarly lacks any rights as a judgment creditor of 909, since it has not commenced any claim to recover under the guarantee, let alone obtained a judgment.

[29] I am satisfied, however, that it is just and convenient to appoint a receiver under section 101 of the CJA.

[30] 909 and Hypoint are related entities operating the same business out of the same Premises. The Premises, including the Collateral, was custom-built for the operation of a cannabis production facility.

[31] Both CEF and the Mortgagees agree that the Premises and the Collateral should be sold. There is a dispute about whether the Collateral is technically a "fixture" to the Premises, and the factual dispute about the cost of removing the Collateral and the extent of any consequent physical damage to, or diminution in the value of, either or both of the Premises and the Collateral itself. Those issues are for another day. Whether, how, and on what terms [i.e., together or separately]

those assets should be sold can and should be determined by this Court following on a report from the receiver with respect to a proposed sales process and if the process gets that far, a sale approval motion.

[32] However, in circumstances where all parties agreed that all of the assets of both Hypoint and 909 should be sold to maximize recovery for all creditors, but cannot agree on the process pursuant to which that should be undertaken with the result that the entire process is stalled, I am satisfied that this represents a classic example of a situation in which it is just and convenient to appoint a receiver.

[33] The receiver is a court-appointed officer. It has the obligation to design and run a process with a view to monetizing the assets of the debtor for the benefit of all creditors. Further delay is in the interest of no one. There is no activity at the Premises, electricity has been cut off for a significant period of time, and winter is coming. Proof of insurance was requested by CEF and has not been provided.

[34] I am concerned about the real and immediate risk of dissipation of assets and diminution in value of those assets, with the result that I am satisfied that it is important and beneficial to all creditors to accelerate the process. The fair and transparent way to do that is to have a court-appointed receiver run the process. Order needs to be brought to the chaos, and the status quo of competing processes cannot continue unsupervised.

[35] To do otherwise would be to permit CEF to enforce against the Collateral only and the Mortgagees to enforce as against the real property. This has the potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value.

[36] Moreover, nothing in the appointment of a receiver now, over the assets of Hypoint and 909 together, affects or diminishes the ability of the receiver appointed to consider whether in fact recovery will be maximized by a sale of the Collateral and the Premises separately as opposed to together. Even if that were to occur, however, it can occur under a Court-supervised process, by a court-appointed receiver with obligations to all stakeholders, in an orderly and efficient manner.

[37] I should be clear that in appointing a receiver, I am not concluding that the rights of CEF defeat or somehow rank in priority to the rights of the Mortgagees. Rather, I am expressly reserving those rights for another day. In my view, that is the time for a determination if necessary of the relative priority of the competing interests here and whether, for example, the interests of CEF as a secured party of the Collateral are subordinated to the rights of the Mortgagees as a result of the Collateral having become a Fixture to real property [i.e., the Premises].

[38] As the Mortgagees concede in their factum [see paragraph 86], these conflicting interests will be academic in the event that the proceeds of sale of the "Premises" - whenever and however that occurs - are sufficient to satisfy both the Mortgagees and CEF.

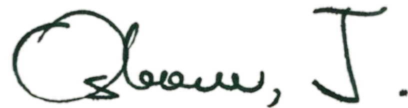
[39] I also observe that there are other unsecured creditors whose rights may be affected by the manner in which a sale is undertaken. I am satisfied that their interests also, are best protected by a fair and transparent process run by a court-appointed receiver rather than any one party individually.

[40] The objective of the appointment of the receiver is to maximize proceeds. If, as all parties agree should occur, the assets of Hypoint and 909 are sold, Court approval of that sale as well, presumably, as the relative rights and priorities over the net proceeds, can be determined. All other issues, including costs of the receivership and who should bear those costs or any proportion thereof, can also be determined.

[41] As to who the court-appointed receiver should be, both firms nominated here are well-known to this Court, and are respected in this area. There is no reason that either would not be appropriate. On balance, however, and given all of the circumstances, including the practical fact that the appointment of a receiver will deprive the Mortgagees of their right to power of sale, as well as the relative debts owed to the Mortgagees and CEF, I appoint MSI Spergel as nominated by the Mortgagees.

[42] Counsel for the Mortgagees is directed to provide to the Court a form of receivership order consistent with these Reasons. If the parties cannot agree on the form of that order, they may schedule a brief attendance before me to settle the terms of that order.

[43] Costs of this motion are reserved to the judge ultimately determining, if necessary, the relative priority to net proceeds of sale of the assets.



Osborne J.

Date: October 28, 2022