



SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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DATE: April 14, 2025

NO. ON LIST: 1

TITLE OF PROCEEDING: Royal Bank of Canada vs. Tung Air Transport Ltd., et al

BEFORE: Justice J. Dietrich

PARTICIPANT INFORMATION

For Plaintiff, Applicant:

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ENDORSEMENT OF JUSTICE J. DIETRICH:

Introduction

- [1] Royal Bank of Canada (the “**Bank**”), seeks an order appointing msi Spergel Inc. (the “**Receiver**”) as receiver and manager over all of the properties, assets, and undertakings of the respondents, Tung Air Transport Ltd. (“**Tung Air**”), 2527366 Ontario Inc. (“**252**”), R. Lessard Trucking Limited (“**Lessard**”, and collectively with Tung Air and 252, the “**Debtors**”) and 1000101395 Ontario Inc. (the “**Secured Guarantor**” and together with the Debtors the “**Respondents**”) pursuant to s. 243 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and s. 101 of the *Courts of Justice Act* (the “**CJA**”).
- [2] Terms used in this endorsement and not otherwise defined herein have the meaning provided for in the factum filed by the Bank on this application.
- [3] The Debtors operate a trucking services business across North America which includes logistics and warehouse services. The Debtors do not dispute that they owe the Bank approximately \$18 million in principal and interest (plus costs and accruing interest) on a secured basis. Nor do the Respondents dispute that security has been granted to the Bank, the indebtedness is in default and the Bank has a contractual right to seek the appointment of a receiver. However, Respondents oppose the Bank's request to appoint the Receiver and seek a delay until the end of May 2025 because the Respondents submit that the Bank is over secured, and the Respondents are in the process of obtaining new financing to repay the Bank.

Background

The Indebtedness

- [4] Each of Tung Air, 252 and Lessard have entered into Credit Agreements with the Bank under which the approximate amounts of \$1,595,068.35, \$13,643,746.94 and \$2,793,188.23 are owed respectively as of January 9, 2025.
- [5] 252 is obligated to repay the Bank the total amount of owing (approximately \$18,032,000) because it has cross guaranteed the obligations of the other Respondents.

- [6] Tung Air and Lessard are obligated to repay a slightly lesser total amount of approximately \$17,985,256.58. Those entities have also cross-guaranteed the obligations of the Respondents, but the guarantee of the 252 obligations contains certain limitations which reduces the total amount slightly for those entities.
- [7] The Secured Guarantor's guarantee is limited to a lesser amount.

The Security

- [8] The Respondents have each entered into general security agreements in favour of the Bank. As well, the Bank holds mortgages over the Real Properties.
- [9] Specifically, 252 owns a piece of real property located 1244 Kamato Road, Mississauga, Ontario (the "**Kamato Road Property**"). The Bank has been granted a mortgage over the Kamato Road Property in the principal amount of \$18,040,000 to secure repayment of the amounts owed by 252.
- [10] Lessard and the Secured Guarantor also own a piece of real property located 12260 Manning Road, Windsor, Ontario (the "**Manning Road Property**"). The Bank has been granted mortgages over the Manning Road Property in the total principal amount of \$11,160,000 to secure repayment of the amounts owed Lessard and the Secured Guarantor.
- [11] The general security agreements and the mortgages provide for the Bank's appointment of a receiver.

The Business

- [12] Tung Air is a family-owned business that was established in 2002 by Sardara S. Tung. Mr. Tung has been able to grow the business which has included an operating a fleet of as many as 70 trucks and 200 trailers providing trucking and transport services for all sorts of goods across Canada and the United States. At its height in 2022, Tung Air grew to annual revenues of approximately \$17 million, with less trucks and tractors because the market was more favourable at that time. The evidence is that given cash flow difficulties, the business is now reduced, however, there is no evidence before me regarding the current level of operations or employees.
- [13] Lessard has trucking operations and sells various aggregates materials such as roof-stone, mulch, topsoil, and a variety of other stones. Lessard's most regular clients are the City of Windsor, LeFarge, Walker, and large contractors, but private customers are also permitted to purchase materials.
- [14] 252 holds the Kamato Road Property. Tung Air is the only tenant on the Kamato Road Property. The Kamato Property is a 2.66 acre (115,809 sqft.) single-tenant industrial site.

The affidavit of Eknoor Singh Tung, affirmed March 26, 2025 attaches an appraisal dated June 2024 by Colliers International Realty Advisors Inc. (“**Colliers**”) valuing the Kamato Road Property on an 'as is' basis.

- [15] The Secured Guarantor is a holding company which, together with Lessard, owns the Manning Road Property. The Manning Road Property is a 39.40 acre industrial site which includes a truck repair building, storage building and residential dwelling. The Tung Affidavit also attaches an appraisal dated June 2024 by Colliers valuing the Manning Road Property on an 'as is' basis.

Recent Events

- [16] The Respondents began experiencing periodic cash-flow shortages in 2024 because of what the Respondents describe as an industry-wide slow down, certain operational and financial system flaws and certain real estate purchases.
- [17] The 252 Credit Agreement matured in May of 2024. The Respondents elected not to enter into a renewal agreement and the monthly payments at that point switched from fixed amounts to variable payments. 252 retained a consultant, who they say was recommended by the Bank, to attempt to refinance the 252 facility. However, the consultant was unable to obtain refinancing.
- [18] The Bank delivered a default letter to the Debtors on December 19, 2025 as a result of certain alleged defaults. The alleged defaults included certain financial covenant breaches, failure to pay certain daily unauthorized excess amounts, failure to advise of defaults, failure to advise of a material adverse change, failure to file and pay all material taxes, failure to keep all assets insured and failure to deliver certain reporting. Certain of these defaults are disputed, however, the Respondents acknowledge that there have been defaults under the credit facilities and security.
- [19] On January 17, 2025, the Bank issued formal demand letters to the Respondents and delivered notices of intention to enforce security pursuant to s. 244(1) of the BIA.
- [20] In December of 2024, the Bank requested that the Debtors consent to the appointment of Spergel as monitor. However, the Debtors were in the process of retaining counsel and did not execute the Spergel engagement letter until January 31, 2025. The Debtors say the engagement letter was only executed on the understanding that the Bank would not proceed with the receivership application. As the Bank determined to move forward with the receivership application, the Debtors then took the position that the appointment was not valid.
- [21] The Debtors have answered a number of information requests of Spergel despite the dispute regarding the appointment of Spergel as 'monitor'.

- [22] Since the issuance of the demand letters, the Debtors have not had funds in their accounts to operate in the normal course. The Bank's evidence is that property tax arrears of approximately \$124,781.94 are outstanding in respect of the Kamato Road Property and approximately \$446,401.56 is outstanding in respect of HST and employee source deduction arrears due and owing to the Canada Revenue Agency by the Debtors.
- [23] Spergel, who has filed a 'pre filing' report also advised based on reporting given to it by the Debtors, that Tung Air's accounts receivable has decreased to approximately \$112,698 as at February 28, 2025 and that approximately 20% may not be collectable. As well, approximately 79% of Tung Air's accounts payable is aged over 90 days. Including, HST, source deductions, subcontractor payments, repairs, maintenance and storage fees and property taxes over \$1.5 million is owed by the Debtors.
- [24] As of March 31, 2025, the bank account statements provided by the Respondents show less than \$100,000 combined in the relevant accounts (not taking into account negative balances in other accounts).
- [25] The Debtors have also had approximately 35 of their trailers seized by Carrier Systems Inc. because of a payment dispute about storage fees in February of 2025. This impacted the Debtor's business as clients stopped paying accounts and deductions were applied to balances owing to the Debtors to account for costs incurred by clients to recover goods in the trailers.
- [26] The Respondents do not dispute that there is a significant cash flow issue. They have not put forward any evidence as to how the business could operate on a cash flow basis if the Receivership was not granted or adjourned to some fashion until the end of May 2025.

Issue

- [27] The only issue to be determined today is whether it is just or convenient to appoint a receiver over the assets, properties and undertakings of the Respondents.

Analysis

- [28] The test for the appointment of a receiver under s. 243 of the *BIA* or s. 101 of the *CJA* is whether it is just or convenient.
- [29] In determining whether it is just or convenient to appoint a receiver the court must have regard to all of the circumstances of the case particularly the nature of the property and the rights and interests of all parties in relation to the property: see *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 at para. 10 (Gen. Div. [Comm. List] and see *Bank of Montreal v. Sherco Properties Inc.* 2013 ONSC 7023 at para 41 and 42.

[30] While the appointment of a receiver is generally an extraordinary equitable remedy, 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: see *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 [Comm. List] at para. 27 and *iSpan Systems LP*, 2023 ONSC 6212 [Comm. List] [***iSpan Systems***] at para. 31.

[31] As recently summarized by Justice Osborne in *iSpan Systems* at paras 32-34, a number of factors have historically been taken into account in the determination of whether it is appropriate to appoint a receiver. The factors are not a checklist, but rather a collection of considerations to be viewed holistically, they include:

- 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.

[32] In this case, it is just and convenient to appoint a receiver.

[33] There is no dispute that defaults under the Credit Agreements and security have occurred, and the Bank has a contractual right to seek the appointment of the Receiver.

[34] The Respondents' primary argument is that there is sufficient equity in the Real Properties such that there is no risk to the Bank's repayment if the requested relief is delayed by 45

days. They point to a recently filed letter of intent from Aureus Capital Management dated April 11, 2025, which indicates that Aureus may be willing to provide the Respondents with funding in the amount of \$20,600,000. However, the Respondents acknowledge that the letter of intent is not binding and subject to numerous due diligence items.

- [35] The Respondents also rely on the appraisal evidence from Colliers referenced above to show that the Bank is over secured. The appraisals provide a combined 'as is' value of the Real Properties as of June 2024 in excess of the amount of the principal amount of the mortgages registered against the Real Properties and the amount owed to Bank.
- [36] The Bank alleges that the appraisals do not provide an accurate representation of the true value of the Real Properties. However, the evidence of Sylvia Kovesdi contained in an affidavit sworn on April 2, 2025, simply says she has been advised of this by CBRE Limited, but does not provide any reasoning or specificity behind the statement.
- [37] The fact is however, that since the appraisals were obtained in June of 2024, the Respondents have not been able to secure refinancing. In part, the Respondents blame the consultant recommended by the Bank in May of 2024, however, even following the parting of ways with that consultant in December of 2024, the Respondents have not obtained committed new financing.
- [38] The Respondents' position is that the conduct of the Bank has contributed to the current situation and on that basis the receivership should not be granted at this time. As for urgency, the Bank points to the deterioration in their security in terms of decreasing accounts receivable, the seizure of trailers by Carrier, unpaid priority payables (including HST and source deductions) and other unpaid trade creditors, some of which may have priority over the Bank.
- [39] The Respondents acknowledge the severe cash flow issues. Given the evidence before me, it is not clear how the Respondents intend to finance going concern operations should a receiver not be appointed at this time.
- [40] The Bank's submission is that if the Receiver is appointed, the Receiver will assess the business to determine if going concern operations are feasible as part of determining next steps – which would also include a sale process. However, to date the Bank and Spergel have not been provided with enough information from the Respondents to determine if ongoing operations are feasible.
- [41] The Respondents take the position that cessation of operations will result in prejudice to them and damage the business. In part, however, the lack of information provided by the Respondents regarding ongoing cash flow issues is what has led to this situation.

[42] In the circumstances the Bank has understandably lost confidence in the management of the Debtors and the appointment of a receiver will provide transparency and fairness to stakeholders in a fair and orderly process to maximize realizations.

[43] msi Spergel Inc. is qualified to act as receiver and has consented to do so.

Disposition

[44] The terms of the proposed receivership order are appropriate and consistent with the Model Order of the Commercial List.

[45] In posting the material from today on the Receivers' website, the Receiver is to redact from the material references made to the appraised value of the Real Properties. The estimated value of the Real Properties set out in the appraisals may impact upon the sale process which is expected to unfold in these receivership proceedings to the detriment of all stakeholders. This request was supported by all counsel present today. If the parties determine, a formal sealing order request may be made.

[46] As well, there is nothing in the relief granted today which should stop the potential refinancing efforts, including that contained in the letter of intent referred to above.

[47] Accordingly, I grant the receivership order in the form signed by me today.

April 14, 2025

Justice J. Dietrich