

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

CANADIAN EQUIPMENT FINANCE & LEASING INC.

Applicant

- and -

EVELEY INTERNATIONAL CORPORATION

Respondent

APPLICATION UNDER Section 47 of the *Bankruptcy and Insolvency Act*

APPLICANT'S FACTUM

April 22,2020

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LLP**

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TO: THE SERVICE LIST

PART I – INTRODUCTION

1. This is an application for the appointment of an interim receiver pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* over the assets and undertakings of Eveyley International Corporation (the “**Debtor**”).

PART II – OVERVIEW

- 2.

PART III – THE FACTS

The Debtor’s business

3. The Debtor’s business is manufacturing underbody components such as axles and suspensions for transportation vehicles such as trucks and trailers.¹

CEFL’s loans and security

4. CEFL is a lender to the Debtor under two loan and security agreements dated March 4, 2019 and November 1, 2019.² CEFL also has a general security agreement dated March 4, 2019 in respect of its loan.³ The total outstanding is \$1,165,142.70, plus professional costs.⁴

Other creditors of the Debtor

¹ Affidavit of Brent Keenan sworn April 22, 2020 (the “**Keenan Affidavit**”), para. 2; Application Record, page 23, Tab 2.

² Keenan Affidavit, para. 3; Application Record page 24, Tab 2.

³ Keenan Affidavit, para. 4; Application Record page 24, Tab 2.

⁴ Keenan Affidavit, Exhibit “H”; Application Record, page 164, Tab 2(H).

5. The Debtor previously had a line of credit with Bank of Nova Scotia until 2019, when it went through a set of refinancing arrangements.⁵
6. In those arrangements, the Debtor sold the land and building at 665 Arvin Avenue in Stoney Creek in or about January of 2019 to 2565698 Ontario Inc. (“256”), a company related to Innovative Trailer Design Industries Inc. (“ITD”), which was and is a customer of the Debtor. The Debtor then leased the premises back from 256.⁶
7. Those arrangements also included a loan from 256 to the Debtor in January of 2019. 256 has provided a copy of that loan agreement and a general security agreement that accompanied it.⁷
8. CEFL’s first loan in March of 2019 was also part of this refinancing arrangement. As part of that loan, CEFL and 256 signed an intercreditor agreement on March 4, 2019.⁸
9. A further creditor of the Debtor is Canadian Western Bank (“CWB”). CWB provided asset-specific financing on two large pieces of equipment in February of 2019, which CEFL brokered. CWB also provided further purchase financing for three new large pieces of equipment in November of 2019.⁹

⁵ Keenan Affidavit, para. 5; Application Record, page 24, Tab 2.

⁶ Keenan Affidavit, para. 6; Application Record, page 24, Tab 2.

⁷ Keenan Affidavit, para. 7; Application Record, page 24, Tab 2.

⁸ Keenan Affidavit, para. 8; Application Record, page 24, Tab 2.

⁹ Keenan Affidavit, para. 9; Application Record, page 24, Tab 2.

10. The principal of the Debtor, Dawn Eveley, is a registered secured creditor. The details of that are not known.¹⁰

Default and enforcement steps

11. The Debtor was substantially behind on its rent owing to 256 and was locked out of the leased premises on or about April 11, 2020. CEFL was not given notice of this by 256 and only found out indirectly through the Debtor.¹¹ The intercreditor agreement required that CEFL and 256 give notice to each other of any enforcement steps.
12. 256 provided a Notice of Intention to Enforce Security on March 27, 2020. Again CEFL was not provided this at the time and only received a copy on April 20 from 256's solicitor.¹²
13. In response to the lockout of the Debtor and the cessation of the Debtor's business, CEFL sent to the Debtor a demand letter and its own Notice of Intention to Enforce Security, on April 17, 2020. The Debtor consented to early enforcement by CEFL by countersigning that Notice.¹³
14. CEFL and 256 have attempted to discuss ways to cooperate regarding the Debtor. There have, however, been disagreements about a number of issues, including:

¹⁰ Keenan Affidavit, para. 10; Application Record, page 24, Tab 2.

¹¹ Keenan Affidavit, para. 11; Application Record, page 25, Tab 2.

¹² Keenan Affidavit, para. 12; Application Record, page 25, Tab 2.

¹³ Keenan Affidavit, para. 13; Application Record, page 25, Tab 2.

- a) the extent to which the Debtor's business should be kept as a going concern, which I am told by Ms. Eveley in the immediate term involves orders for repeat customers that were overdue as of April 17, 2020 and would be ready to be shipped in a few days' work;
 - b) the terms under which the Debtor might be able to access the premises owned by 256, including requests for releases from any claims under the lease and also an occupation rent amount payable;
 - c) the extent to which 256 should have access to the Debtors business, affairs and in particular customer information;
 - d) whether CEFL's general security agreement has priority over that of 256; and
 - e) whether 256's general security agreement also secures amounts that are or may yet be owing under the lease between 256 and the Debtor.¹⁴
15. One particular aspect of concern of those issues for CEF is access by 256 to the Debtor's customer information. This is because 256 is a related company to ITD, which is in turn a customer of the Debtor and operates in the same industry of providing transportation equipment. I understand that ITD provides fully

¹⁴ Keenan Affidavit, para. 14; Application Record, page 25, Tab 2.

assembled trailers, for which the Debtor has provided parts. ITD is therefore a logical possible purchaser of the Debtor's assets if a sale were to take place.¹⁵

16. CEFL's concern is heightened by what it has been told by Dawn Eveley are contacts that she has received from customers of the Debtor by Benito Di Franco, who is the principal of both 256 and ITD, to say to those customers that he is putting the Debtor out of business and that the customers should not deal with the Debtor.¹⁶
17. If that is true, CEFL is very concerned about the prejudicial effect that such communication by Mr. Di Franco could have on the estate of the Debtor.¹⁷
18. The role of 256 and ITD in the Debtor's affairs is also problematic in connection with payables by ITD owing to the Debtor. Based on a statement provided by the Debtor, ITD is now overdue on payments of \$84,046.08 to the Debtor. While 256 has said that there are issues with the amounts owing, ITD previously provided cheques for \$60,408.82 of the amounts owing. 256 also said that the amounts owing by ITD to the Debtor would be dealt with after the arrears of rent are paid.¹⁸

PART IV – ISSUES AND ARGUMENT

19. The main issue is whether an interim receiver should be appointed over the Debtor's assets and undertakings.

¹⁵ Keenan Affidavit, para. 16; Application Record, page 26, Tab 2.

¹⁶ Keenan Affidavit, para. 17; Application Record, page 26, Tab 2.

¹⁷ Keenan Affidavit, para. 18; Application Record, page 26, Tab 2

¹⁸ Keenan Affidavit, para. 19; Application Record, page 26, Tab 2

20. A subsidiary issue is whether Mr. Di Franco and other employees of 256 and ITD should be directed not to discuss the Debtor with its customers or suppliers and should instead direct all such contact to the interim receiver.

Appointment of an interim receiver

21. On the issue of appointment of the interim receiver, the issues noted above with lockout of the Debtor from its premises and pending order demonstrate urgency to stabilize the estate of the Debtor, and to obtain an independent and professional review and recommendation as to the appropriate next courses of action.
22. The issues above also show that a way to manage and if necessary adjudicate the differences between CEFL and 256 is important so that proper management of and if necessary realization on the estate of the Debtor can be done.
23. CEFL only seeks the appointment of an interim receiver to preserve and protect the assets of the Debtor for the time being. This is in part because it may be possible for the Debtor to operate, and also because the intercreditor agreement with 256 gives 256 an option to buy out CEFL's position. While it is not clear whether that option still applies given some of the conduct by 256, if it does then by its terms CEFL would not have to be paid for another 30 days, so during that time period any erosion of the Debtor's assets and business could prejudice CEFL.
24. An interim receiver is accordingly an appropriate remedy in these circumstances. The interim receiver will review and report on the issues in dispute and other aspects of the Debtor's business.

Communication by Mr. Di Franco

25. The communications made by Mr. Di Franco could doom any going concern nature of the Debtor.
26. In circumstances where 256 is asserting that CEFL might be a subordinate creditor, for 256 to also take steps that might pre-empt restructuring or realization options for the Debtor is very concerning.
27. The interests of all stakeholders and creditors are better served by ensuring that communications regarding the Debtor's affairs, and in particular with its customers and suppliers, be routed through the interim receiver.

PART V – ORDER SOUGHT

28. CEFL accordingly seeks an interim receivership order in the form filed, which is substantially based on the Commercial List model receivership order, but with deletion of sale powers and the ability to remove assets from leased premises.

All of which is respectfully submitted.

Dated April 22, 2020



Brendan Bissell, counsel for Canadian
Equipment Finance & Leasing Inc.

Schedule A – Authorities

[None]

Schedule B – Statutes and Regulations

Bankruptcy and Insolvency Act, s. 47

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under [subsection 244\(1\)](#), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

- **(a)** the taking of possession by a receiver, within the meaning of [subsection 243\(2\)](#), of the debtor's property over which the interim receiver was appointed,
- **(b)** the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and
- **(c)** the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- **(a)** take possession of all or part of the debtor's property mentioned in the appointment;
- **(b)** exercise such control over that property, and over the debtor's business, as the court considers advisable;
- **(c)** take conservatory measures; and
- **(d)** summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- **(a)** the debtor's estate; or
- **(b)** the interests of the creditor who sent the notice under [subsection 244\(1\)](#).

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor

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