Court File No. CV-22-00678808-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

CANADIAN EQUIPMENT FINANCE AND LEASING INC.

Applicant

- and -

THE HYPOINT COMPANY LIMITED, 2618905 ONTARIO LIMITED, 2618909 ONTARIO LIMITED, BEVERLEY ROCKLIFFE, and CHANTAL BOCK

Respondents

APPLICANT'S AMENDED FACTUM

(Receivership order, judgment against guarantors)
(returnable September 2, 2022 (as regards receivership order only))

August 29, 2022

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I. NATURE OF THIS APPLICATION

1. The September 2, 2022 hearing in this matter will be the return of the portion of this application described in para. 2.a. below only. That described in para. 2.b. will proceed separately and will not be before the court on September 2.

2. This is an application for:

   a. a receivership order, of which a draft in accordance with the Commercial List model receivership order is provided at tab 3 (page 189) of the application record, pursuant to sections 243 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") and 101 of the *Courts of Justice Act* (Ontario) (the "**CJA**") appointing Albert Gelman Inc. ("**AGI**") as receiver and manager (in such capacities, the "**Receiver**"), without security, of all of the assets, undertakings and properties of the Respondents The Hypoint Company Limited ("**Hypoint**") and 2618909 Ontario Limited ("**'909 Ltd.**") acquired for, or used in relation to a business carried on by any or both of them (collectively, the "**Property**"), including without limitation the "**Collateral**" as defined in a loan and security agreement #141-06-2020-01 made as of the 1st day of June, 2020, between Hypoint and the Applicant (together with all attendant signed documentation, the "**Loan and Security Agreement**").

   b. a judgment, of which a draft is provided at tab 5 (page 224) of the application record, against all the other Respondents (being 2618905 Ontario Limited ("**'905 Ltd.**"), Beverley Rockliffe and Chantal Bock, collectively the "**Guarantors**"), jointly and severally, for:

      i. $676,252.29 in outstanding principal and interest owed as of March 11, 2022 on account of the Loan and Security Agreement through respective guarantee and postponement of claim agreements dated June 1st, 2020

(together with all attendant signed documentation, the "**Guarantees**"; the Guarantees and the Loan and Security Agreement are collectively referred to as the "**Debt Instruments**")).

ii. pre-judgment and post-judgment interest at the rate of 19.56% per annum in accordance with the Debt Instruments.

c. an order against all the Respondents, jointly and severally, for the Applicant's costs incurred in respect of this application, on a full indemnity basis in accordance with the Debt Instruments.

II. OVERVIEW

3. The Applicant has first-ranking security on the Collateral (defined below), which is HVAC (heating, ventilation and air conditioning) equipment that is installed on the Premises (defined below). The Premises and the Collateral together constitute an *en-bloc*, turnkey cannabis production facility that can be sold as such. The Collateral is necessary for the Premises to be used for that purpose. The Applicant does not have first-ranking security over the Premises (except to the extent of the Collateral installed thereon).

4. The Applicant seeks the appointment of a receiver over both the Collateral and the Premises. The intent is to sell the whole through a single sale process approved and overseen by this court and the receiver.

5. There appears to be no contestation to the appointment over the Collateral. The only known objection is with respect to the appointment of the receiver over the Premises. The objectors are Delrin *et als*. (defined below), who are first mortgagees over the Premises (the "**Opposing Mortgagees**").

6. No one contests the Premises must be sold. The Opposing Mortgagees apparently want the Applicant to remove the Collateral and then that the Collateral and the Premises be dealt with in separate sale processes. The Opposing Mortgagees will further argue that the appointment of a receiver over the Premises raises legal issues.

7. The Applicant says that splintering the sale process is not appropriate, that the appointment of a receiver over both the Collateral and the Premises is just or convenient as is the legal test under the *Courts of Justice Act*, and that the Opposing Mortgagees raise no legal issue preventing the relief sought if the court finds it just or convenient.

8. As will be seen, **(i)** removing the Collateral from the Premises could cause damage to the Premises and the Collateral and would incur wasteful expense which would then reduce the recovery to the Applicant and add to the guarantors' liability, **(ii)** the Premises likely has more value with the Collateral installed (which together with the applicable licence constitutes a cannabis production facility) and the Collateral likely has more value when installed than if removed and sold as used equipment, **(iii)** the Receiver will be able to run a proper marketing and sale process and locate an acceptable transaction for the Premises in accordance with the highest standards expected of an officer of this court, **(iv)** the Receiver will be able to independently resolve, as an officer of the court, possible competing priorities or complexities arising from the fact that the Collateral is personal property that has been affixed to the Premises, the fact that the respective creditor rights are at the intersection of personal and real property security law, and the possibility that the Applicant's security ranks first on the Collateral while other security interests may rank first on the Premises, and **(v)** throughout, the Receiver will report to the court and all stakeholders to ensure transparency and orderliness.

9. As will further be seen, the actions by the Opposing Mortgagees underscore the need for a neutral court officer to manage the overall assets. They originally cooperated with the Applicant regarding a potential sale transaction, as noted in an endorsement from the court, but have now advised that this potential sale has failed and that the Opposing Mortgagees will not cooperate with the Applicant going forward, and are further taking aggressive positions on the abandonment of the Applicant's collateral. A court-appointed receivership (and the attendant usual stay of proceedings) is specifically appropriate to resolve such "race to remedy" by uncooperative self-interested creditors unilaterally "pulling the blanket" from all others. A court-appointed officer will be able to independently review the situation and make recommendations about the best way to dispose of the assets in the interest of all stakeholders, and a receivership proceeding will allow the treatment of all potential disputes, if any, in one forum.

10. The Opposing Mortgagees' only substantive objection to a receivership is based on possible costs, but the known facts of the value of the overall assets do not support that objection. Moreover, any concern about the costs incurred can and should be dealt with at a later point in allocating the fees and expense of a receiver when **(i)** the total proceeds are known (and therefore whether there is any concern about who bears what expenses) and **(ii)** the relative effort and value of a receivership on the different classes of assets (each with different ranking creditors) are more ascertainable.

11. The court may therefore grant the relief sought.

III. FACTS

A. The parties[1]

12. The Respondent companies' business is, or was, marijuana production (the "**Business**") predominantly out of premises located at 59 Roy Boulevard in Brantford, Ontario (the "**Premises**").[2] Hypoint is the main operating company.

13. The Premises are owned by '909 Ltd. and subject to a lease between '909 Ltd. and Hypoint.

14. Hypoint's chief executive offices are at 25 Morrow Avenue, Toronto.

15. The principals of the Business include Thomas Bock, William Halkiw and Roman Rockliffe. Mr. Bock and Mr. Halkiw are among the directors and officers of '905 Ltd., and Mr. Halkiw is the sole director and officer of '909 Ltd. Hypoint is related to '905 Ltd. and '909 Ltd. through shareholding.[3]

16. The Respondents Chantal Bock and Beverley Rockliffe are the spouse of Mr. Bock and mother of Mr. Rockcliffe, respectively.[4]

B. The security, Collateral and Property, and immediate risk thereto

i. Generally[5]

17. The Applicant financed Hypoint's purchase of the Collateral, primarily comprised of HVAC (heating, ventilation and air conditioning) equipment, under the Loan and Security Agreement.[6]

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[1] Affidavit of Brent Keenan sworn March 21, 2022, tab 2 (page 14) of the application record (the "**Keenan Affidavit**"), paras. 3-6.
[2] A copy of the parcel register for the Premises is tab 2A (page 25) of the application record.
[3] Corporation profile reports for the corporate Respondents are tabs 2B, 2C and 2D (pages 31, 40 and 49) of the application record.
[4] First Supplementary Affidavit of Brent Keenan sworn May 16 , 2022 para 3,, tab 1 (page 2) of the supplementary application record (the "**1st Kennan Supplementary Affidavit**").
[5] Keenan Affidavit, paras. 7-11.
[6] A copy of the Loan and Security Agreement is tab 2E (page 58) of the application record.

18. Under the Loan and Security Agreement:

    a. all Hypoint's obligations to the Applicant are secured by a security interest in the Collateral and proceeds thereof (the "**Security**") (see s. 2 of attached terms and conditions ("**T&Cs**")).

    b. the Security constitutes a purchase-money security interest (PMSI) within the meaning of the Ontario *Personal Property Security Act* (the "**PPSA**") (T&Cs, s. 2(c)).

    c. the Security has attached (T&Cs, s. 12(o)).

19. The Security was properly registered under the PPSA in file number 762167673 on May 27, 2020, as amended on June 22, 2020 to correct minor mismatches in the collateral description (including serial numbers), and as reamended on June 24, 2020 to add '905 Ltd. and '909 Ltd. as debtors.[7]

20. The Collateral was installed on the Premises and used for the Business, as contemplated under the Loan and Security Agreement.

21. The Property is primarily comprised of the Collateral, the Premises, and all things necessary and attendant to the Business.

ii. Immediate risk before and around April 2022[8]

22. An officer of the Receiver and the Applicant attended the Premises in April 2022. There was no activity. The electricity had been cut off because it had not been paid in a long time, as confirmed by the principal of the corporate Respondents.

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[7] Only Hypoint has signed a formal security agreement with the Applicant, although the Guarantees include *inter alia* trust and substitution provisions for which PPSA registrations were done.

[8] 1st Keenan Supplementary Affidavit, paras. 7-9.

23. The Applicant had asked numerous times for proof of insurance and had been provided none.

24. Those are further events of default under the Loan and Security Agreement.

25. The Applicant was very concerned. Without electricity and insurance, the Premises, the Collateral and the rights of stakeholders in the Premises and the Collateral (including the Applicant and all PPSA and land registrants) were in danger of immediate and potentially irreparable damage. The Premises could be vandalized, catch fire, be infested by pests, etc. The Applicant respectfully has no confidence in any Respondent's ability or willingness to address these concerns as would be expected of good faith, reasonable debtors and businesspeople.

26. The Applicant has had to comply with no less than 4 failed sale attempts and months of delay and incertitude, and the Opposing Creditors now propose to stop communicating with the Applicant regarding further sale efforts, as will be seen below.

C. The defaults and the Indebtedness[9]

27. Under the Loan and Security Agreement:

    a. the loan thereunder is for the principal sum of $779,070 repayable in 20 consecutive quarterly payments of $47,814.75 in principal and interest commencing on July 1st, 2020.

    b. the interest rate is an annual fixed rate, pre-computed for the entire term, of 8.75% per annum (absent any defaults).

[9] Keenan Affidavit, paras. 12-15.

c. the total of principal and interest due over the term of the Loan and Security Agreement (excluding interest charged on amounts past due) is $956,295.

28. Hypoint has not made any payments due to the Applicants under the Loan and Security Agreement starting in January 2022. Hypoint is in arrears of $49,095.94 as of February 17, 2022. Under the Loan and Security Agreement:

a. this constitutes an event of default (T&Cs, s. 10(a)).

b. the Applicant is entitled, *inter alia* and whether alternatively or cumulatively, to:

i. declare the owing balance immediately due and payable, which, as of March 11, 2022, was $676,252.29 (the "**Indebtedness**"),

ii. appoint a receiver or receiver and manager, and

iii. repossess and sell the Collateral,

in addition to any other remedy that the Applicant has at law, including without limitation under the PPSA, the BIA or the CJA (T&Cs, s. 11 and 12).

c. Hypoint is liable for all costs, charges and expenses reasonably incurred by the Applicant or any receiver appointed by it in enforcing the Loan and Security Agreement (the "**Enforcement Costs**") (T&Cs, s. 12 (f)).

d. the Indebtedness (post-default) and the Enforcement Costs amounts bear interest at the rate of 1.5% per month (19.56% per annum) (T&Cs, s. 13(e)).

29. The Guarantees all contain the same terms.[10] Under the Guarantees:

a. the Guarantors guarantee all Hypoint's obligations to the Applicant, including the Indebtedness and the Enforcement Costs (s. 1).

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[10] Copies of the Guarantees are tabs 2G, 2H, and 2I (pages 134, 143 and 150) of the application record.

b. the Applicant is granted the right to seek immediate and full repayment of the same from the Guarantors as is done herein, without any condition, restriction or requirement other than Hypoint being in default (see primarily s. 5 and 6).

D. Other registrants[11]

30. All the below registrants have been served with the application record for this application at the addresses disclosed in the PPSA or land registries.

i. PPSA[12]

31. The PPSA registrants against Hypoint other than the Applicant are Mr. Bock and Add Capital Corp.

32. There is no PPSA registrant against '905 Ltd. other than the Applicant.

33. The other PPSA registrants against '909 Ltd. are Delrin Investments Inc., Samuel Stern, Harvey Kessler and Richard Goldberg ("**Delrin *et als*.**").

34. It cannot be determined with certainty, based on a review of the PPSA registry, whether the PPSA registrations other than the Applicant's purport to charge the Collateral, but if so, this would constitute a further event of default under the Loan and Security Agreement (see T&Cs, s. 10(d)), and the Applicant's security interest would rank first on the Collateral both by virtue of being priorly registered and by virtue of being a PMSI.

ii. Land registry

35. The Premises are encumbered by:

a. a $4,000,000 charge registered on June 18, 2020 in favour of Delrin *et als*.

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[11] Keenan Affidavit, paras. 16-21.
[12] PPSA search reports are tab 2F (page 75) of the application record.

b. a $1,300,000 charge registered on June 18, 2020 in favour of Bruce Lebelsky, with a postponement of the Delrin *et als*. charge in favour of Mr. Lubelsky registered on the same day.

c. a $779,070 notice of security interest registered on June 23, 2020 in favour of the Applicant

d. a $166,000 notice of security interest registered on January 27, 2022 in favour of Mr. Bock and Covi Inc.[13]

36. Pursuant to mortgage waiver and consent agreements entered into as of June 1, 2020 with the Applicant (the "**Mortgage Waivers and Consents**"),[14] each of Delrin *et als*.:

a. acknowledge that the Collateral is financed and will be installed on the Premises.

b. consent to the Applicant's security interest in the Collateral.

c. disclaim any present or future interest in the Collateral, regardless of whether it is affixed to the Premises.

d. waive all right to take security enforcement proceedings against the Collateral or to levy or distrain, at any time, upon the Collateral.

e. agreed to allow the Applicant or any agent on its behalf, upon reasonable notice, to enforce its security interest on the Collateral, including the removal thereof from the Premises, provided that the Applicant is liable for the reasonable costs of repairing any resulting damage to the Premises.

37. For the record and while not necessary for purposes of this application, the Applicant submits that it has the right to rely on the Mortgage Waivers and Consents notwithstanding

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[13] A copy of the parcel register for the Premises is tab 2A (page 25) of the application record.
[14] Copies of the Mortgage Waivers and Consents are tab 2J (page 160) of the application record.

the purported June 18 postponement, and denies that any security interest in the Collateral takes priority to the Security.

E. No response to demand and s. 244 notices[15]

38. On February 9, 2022, the Applicant sent the Respondents a demand letter by registered mail. The demand letter sets out the defaults as well as the Indebtedness and Enforcement Costs amounts to date and demands repayment by February 17, 2022. A notice under BIA s. 244 was enclosed with the demand letter.

39. None of the Respondents responded to the demand letter or cured the defaults.

F. Repeated delays to allow Respondents and Opposing Mortgagees to effect alleged potential sale transactions since first scheduling hearing in April, which all failed

40. Before the Applicant made demand on the Respondents, the Applicant had been in touch with the principals of the Business concerning the arrears. The principals asked that the Applicant defer taking any steps notwithstanding the defaults. However, they were not prepared to offer any consideration for such deferral, such as additional guarantees.

41. To the Applicant's knowledge, the Respondents have been attempting to sell the Premises at least since January 2022, including by listings on MLS. The Respondents had stated that the intent of the sale was to generate value sufficient to repay the Applicant. However, the Respondents either not been able or willing to effect a sale.

42. On April 13, 2022, the Applicant, the Receiver and the principal of the corporate Respondents, Mr. Halkiw, attended before the court for a scheduling hearing. Mr. Halkiw asked for and obtained a 5-week adjournment to pursue a sale of the Premises or Business.

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[15] Keenan Affidavit, paras. 22-24; 1st Keenan Supplementary Affidavit, paras. 8 and 10. A copy of the demand letter is tab 2L (page 174) of the application record.

The proposed Receiver was ordered to be given access to the Premises to take photos and videos.[16]

43. During that period, Mr. Halkiw again asked the Applicant to defer the application in order to pursue a sale. When asked for details regarding the transaction pursued, interested parties, status of sale efforts, etc., Mr. Halkiw simply did not respond. The Applicant therefore has no reason to believe that the Respondents had made meaningful, if any, progress towards a viable transaction. The Applicant had also been told about several such pending transactions since January, none of which have materialized.

44. A further return date was set to May 20, 2022. On that date, the Respondents again sought more time to complete yet another alleged potential sale, and the Opposing Mortgagees stated their position to the court that they would oppose a receivership over the Premises. They also committed to providing information to the Applicant regarding any power-of-sale or like initiative, which was noted in the court's endorsement. A further return date was set for June 29, 2022.[17]

45. On June 29, 2022, history repeated itself. There was no sale. The latest potential transaction had failed to materialize and would not in the short term. The court schedule a 2-hour hearing on September 2, 2022 for argument on the substance of this application.[18]

46. In the interim, the Opposing Mortgagees advised the Applicant and the court that they had located a potential transaction to be done by way of power of sale. The Opposing

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[16] A copy of the April 13, 2022 endorsement and the photos taken by the receiver are respectively exhibits "B" and "D" to the 1st Kennan Supplementary Affidavit and respectively found at page 12 and 17 of the Applicant's first supplementary application record dated May 16, 2022.

[17] The May 20 endorsement is exhibit "B" (pages 8-9) to the fourth supplementary affidavit of Brent Keenan sworn August 28, 2022 (the "**4th Keenan Supplementary Affidavit**").

[18] The June 29 endorsement is exhibit "C" (pages 12-13) to the 4th Keenan Supplementary Affidavit.

Mortgagees and the Applicant made an agreement regarding the flow of funds in light of the likely net proceeds of sale. In consideration therefor, the Applicant agreed not to oppose the sale by power of sale.[19]

47. Indeed this transaction failed as well. On August 23, 2022, the Opposing Mortgagees announced that **(i)** the possible power-of-sale deal had failed, **(ii)** that the Opposing Mortgagees were now taking the position that the Applicant had to remove the Collateral by August 31, 2022 failing which the Opposing Mortgagees would consider that the Applicant had abandoned its rights, and **(iii)** that the Opposing Mortgagees were not going to communicate or cooperate with the Applicant on further sale efforts. The Applicant has not been told why the transaction failed or whatever problems there was.[20]

48. Prior courtesy, cooperation and common sense appears to have now given way to beggar-thy-neighbour tactics.

IV. ISSUES AND LAW

49. The issues are whether the court should **(A)** make the receivership order sought, and **(B)** grant the judgment sought.

A. Receivership order[21]

i. Appointment is just or convenient

50. The test for the appointment of a receiver under CJA s. 101 and BIA s. 243 is that it be "just or convenient to do so". The test is often described as the "just **and** convenient test"; nothing turns on this specifically, but the Acts say "just **or** convenient".

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[19] 4th Keenan Supplementary Affidavit, paras. 6-7, confidential exhibits "D" and "E", and Exhibit "F".
[20] 4th Keenan Supplementary Affidavit, paras. 8, 9.
[21] Keenan Affidavit, paras. 25-29.

51. In deciding whether or not to appoint a receiver, the courts will "have regard to all circumstances". Typically considered in the caselaw are the nature of the property involved, the rights and interests of affected parties, the right of the applicant to appoint a receiver under an agreement, whether court appointment would enable the receiver to carry out its duty more efficiently, potential costs, the relationship between the debtor and the creditors, the maximization of the return on the subject property, and the preservation of the subject property. The applicant is not required to prove irreparable harm. It is also regularly said, though in different words, that when a contract provides for the right to appoint a private receiver, the applicant's burden of proof is in effect substantially reduced. Some cases say that court appointment in such cases "is not extraordinary"; some others say the agreement is "a strong factor in support of the imposition of a receiver"; some still say that in such circumstances "the court should not interfere with the contract between the parties."[22]

52. In this case, it is just or convenient, considering the principles above, to appoint the Receiver, including in consideration of the following:

   a. Hypoint and '909 Ltd. are related parties operating the same Business, and the receivership order is only sought against the Property, which is all things acquired for, or used in relation to the Business, including the Collateral and the Premises, on which the Collateral is installed.

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[22] See, *inter alia*, *Bank of Nova Scotia v Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC); *1529599 Ontario Limited v Dalcor Inc.*, 2012 ONSC 5707, paras. 40-42; *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007, paras 23-30; *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023, paras. 38-53; and *Potentia Renewables Inc. v Deltro Electric Ltd.*, 2018 ONSC 3437, paras. 45-50.

b. Hypoint is in default under the Loan and Security Agreement for the substantial amount of $676,252.29 (i.e. the Indebtedness) as of March 11, 2022, which is 87% of the $779,070 principal loan amount and 71% of the total amount of $956,295 that would have been payable over the entire term.

c. all Hypoint's obligations to the Applicant are secured by the Security, which is a PMSI in the Collateral and proceeds thereof. By virtue both of being a PMSI and being priorly registered, the Security ranks first on the Collateral.[23] The Security has attached and has been properly registered under the PPSA.[24]

d. there is no activity, nor has there been electricity at the Premises for a long time. The Applicant was not provided proof of insurance. It is respectfully submitted that the court may not have great confidence in the Respondents regarding those facts and the lack of information provided. The appointment of a receiver is appropriate to ensure the preservation of the Premises and Collateral and the rights of stakeholders therein (including the Applicant and all PPSA and land registrants).

e. AGI consents to its appointment as Receiver on the terms of the order sought.[25]

53. Further, it is unfair that the Applicant be asked to essentially wait and be unpaid while the Respondents are in default and are unwilling or unable to sell the Premises in order to pay what is owing.

54. Finally, subject to the Receiver's assessment of the most proper way to proceed, the Applicant believes that a sale of the Premises, including the Collateral, is appropriate to

[23] PPSA, s. 33.
[24] PPSA, s. 11 and 20(3).
[25] A copy of the executed consent is tab 2M (page 184) of the application record.

ensure that the value of the Collateral and the Premises – which is intrinsically linked – is preserved and obtained for the benefit of all stakeholders, considering among other things that:

a. the Collateral has been installed on the Premises, and removing it would incur wasteful expense and cause damage to the Premises and the Collateral <u>(more on this below)</u>.

b. the Premises likely have more value with the Collateral installed, and the Collateral likely has more value when installed than if removed and sold as used equipment.

c. the Receiver will be able to run a proper marketing and sale process and locate an acceptable transaction for the Premises in accordance with the highest standards expected of an officer of this court.

d. the Receiver will be able to independently resolve, as an officer of the court, possible competing priorities or complexities arising from the fact that the Collateral is personal property that has been affixed to the Premises, the fact that the respective creditor rights are at the intersection of personal and real property security law, and the possibility that the Applicant's security ranks first on the Collateral while other security interests may rank first on the Premises.

e. throughout, the Receiver will report to the court and all stakeholders to ensure transparency and orderliness.

55. As to the difficulty and expenses related to any removal of the Collateral from the Premises, an affidavit filed by Mr. Rockliffe suggests that removing the collateral would be "simple" and could be done in "approximately one day". This is disputed for the following reasons:

    a. despite what Mr. Rockliffe contends in that affidavit, he did not install the Collateral on the Premises. That was done by a subcontractor arranged by the manufacturer of the Collateral, Trane.

    b. Matt Stockley, P. Eng. LEED, an engineer at Trane, confirmed to the Applicant that Trane does both commissioning and decommissioning of HVAC systems and that the removal of the Collateral from the Premises would involve the following:

        i. removal of the freon coolant, which requires a special tanker truck and is a delicate operation given that freon is tightly regulated. This alone would likely take two days. The freon would then need to be stored or disposed of in accordance with environmental regulations. This alone would likely take two days.

        ii. the full process of removing the Collateral from the exterior and interior of the Premises would require approximately two weeks assuming regular access to a suitable crane to move the 16 pieces of heavy exterior equipment.

        iii. Trane's labour costs would be in the range of $60,000. Further costs would be incurred with respect to rental of a tanker truck, crane, and flatbed tractor-trailers to transport the equipment.

iv. This is in addition to the costs of storing the Collateral pending a sale, neither of which Trane would arrange.[26]

v. all those costs and losses would then reduce the recovery to the Applicant and add to the Guarantors' liability.

56. Splitting the sale of the Premises and the Collateral as the Opposing Mortgagees suggest would lead to obvious inefficiency, including without limitation in terms of judicial resources. Further, a divided sale process disregards the potential value for stakeholders of offering the full Business for sale, which includes the Premises and the Collateral but potentially other assets of the Respondents as well, such as equipment and the cannabis growing licence.

57. Furthermore, should there be any issue to be resolved among the creditors of the Respondents, a receivership proceeding paired with a stay of proceedings would offer the efficiency of a single forum (the desirability of which was most recently reiterated by the Ontario Court of Appeal in the matter of *Mundo*[27]), with an independent officer of the court being able to review and offer recommendations which will greatly assist in avoiding any deadlocks.

58. A court appointment is more efficient than a private appointment because the Receiver and/or the Applicant will possibly require the assistance of the court in respect of a sale process, an approval and vesting order, and advice and directions as to priorities.

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[26] See the 1st Keenan Supplementary Affidavit, at paras. 12-14, and the second supplementary affidavit of Brent Keenan sworn May 26, 2022 ("**2nd Keenan Supplementary Affidavit**") at paras. 7-14.

[27] *Mundo Media Ltd. (Re)*, 2022 ONCA 607.

59. For those reasons, the Applicant believes that the appointment of the Receiver is likely to bring a better result for all stakeholders than any other enforcement mechanism.

60. Therefore, the appointment of the Receiver is just or convenient.

ii. Opposing Mortgagees' position that the court lacks jurisdiction to make orders under CJA s. 101 and BIA s. 243 regarding assets over which the applicant does not have security

61. It is anticipated that the Opposing Mortgagees will so argue. That argument is not supported by the plain words of the statutes or the caselaw.

62. In *Ontario Securities Commission v Consortium Construction Inc.*,[28] the Ontario Court of Appeal recognized the superior courts' *inherent jurisdiction* to charge third-party interests (in that case, trust funds) with the payment of administration costs. The case was that of a *Securities Act* receivership (i.e., not a CJA or BIA receivership) over an investment fund. The funds were in trust for investors and the receiver was appointed without notice to them. The Ontario Superior Court ordered the trust funds be used to satisfy the receivership's costs. Despite it being unclear whether the investors ever had fair notice, the Court of Appeal upheld the order. If the Superior Court has such inherent jurisdiction, it necessarily follows that it keeps that jurisdiction under CJA s. 101 unless the Act removes that jurisdiction, which by its plain words it does not.

63. Similar is the Ontario Court of Appeal case of *Ontario (Registrar of Mortgage Broker) v Matrix Financial Corp*.[29] There, the appointment order had been rescinded, but the

[28] 1992 CanLII 7734 (ON CA).
[29] 1993 CanLII 9420 (ON CA).

administration costs incurred during the currency of the order were ordered to be paid in priority to trust claims.

64. It is therefore clear that the court has jurisdiction, *provided it finds it just or convenient*, to grant a receivership order under CJA s. 101 that effects the Premises, notwithstanding that the Applicant may not have first-ranking or any security therein.

iii. The sought receivership order terms are just or convenient

65. The terms of the receivership order sought are also just or convenient.

66. The receivership order sought is per the Commercial List model order. The only substantive change is that the language in para. 7 relative to a landlord's dispute of the Receiver's entitlement to remove any fixtures was removed because the only likely relevant landlord is '909 Ltd. 909' Ltd. is the owner of the Premises which form part of the Property over which the receivership order is sought, and one of the entities against which the receivership order is sought. Moreover, '909 Ltd. executed a consent and postponement of landlord agreement in favour of the Applicant on June 1, 2020, subordinating all of its rights and interests to those of the Applicant.[30] Finally, '909 Ltd is one of the Guarantors, a related party, and a Respondent. This change of language is therefore appropriate.

67. The threshold for dispositions of Property without court order is set at $50,000, which is to ensure that any likely sale of the Collateral or Premises will require prior court approval.

68. The receivership order sought only provides for priority charges as to the "Receiver's Charge" and the "Receiver's Borrowings Charge", both of which form part of the model order. The "Receiver's Charge" is for the Receiver and its counsel's reasonable fees and

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[30] A copy of this agreement is tab 2K (page 167) of the application record.

disbursements as approved at a passing of accounts, and is not in favour of the Applicant or its counsel (whose costs are secured by the Security under the Loan and Security Agreement). The Receiver's Borrowings Charge, to the extent that it is necessary, is limited at $100,000, which is a reasonably low amount considering the amounts at play (the Indebtedness, likely value of the Premises, value of the Collateral, etc.).

69. For those reasons, the terms of the receivership order sought are just or convenient.

B. Judgment and costs

70. <u>The below will not be before the court at the September 2 hearing (except to the extent that the court is willing to entertain the matter of costs).</u>

71. The judgment sought is for:

   a. as against the Guarantors, the amount of the Indebtedness, with pre-judgment interest at the rate of 19.56% per annum in accordance with the Debt Instruments.

   b. as against all the Respondents, the Enforcement Costs.

   c. on the above, post-judgment interest at the rate of 19.56% per annum in accordance with the Debt Instruments.

72. As seen above, the Indebtedness, the Enforcement Costs and the interest thereon are due by Hypoint and the Guarantors on account of the Loan and Security Agreement under the Guarantees, which all provide that the Guarantors guarantee all Hypoint's obligations to the Applicant, including the Indebtedness, the Enforcement Costs and the interest thereon, and that the Applicant may seek immediate and full repayment of the same from the Guarantors as is done herein, without any condition, restriction or requirement other than Hypoint being in default.

73. By the terms of the Guarantees, each of the Guarantors is liable for the totality of the Indebtedness. There is no apportionment of liability. It is therefore appropriate for the judgment to be against the Guarantors jointly and severally.

74. On the record before the Court, there are clear and uncontested facts as to the documents signed by the Guarantors and their responsibility thereunder. Rules 14.05(3)(d) and (h) of the *Rules of Civil Procedure* give the court the jurisdiction to make the judgment sought.

75. Under CJA s. 131, costs are always in the discretion of the court. The traditional maxim is that "costs follow the event". Costs are sought against all Respondents jointly and severally, on a full indemnity basis in accordance with the Debt Instruments.

76. Sections 128, 129 and 130 of the *Courts of Justice Act*[31] (the "**CJA**") provide that subject to the court's discretion, an order for the payment of money bears pre- and post-judgment interest. Post-judgment interest can apply to an award of costs. This is what is sought.

V. NATURE OF THE RELIEF SOUGHT

77. Only the relief sought in para. a. below will be sought at the September 2, 2022 hearing. That described in para. 2.b. will proceed separately and will not be before the court on September 2.

78. Considering the above, the Applicant is entitled to the relief sought, being:

    a. a receivership order, of which a draft in accordance with the Commercial List model receivership order is provided at tab 3 (page 189) of the application record, appointing AGI as Receiver, pursuant to BIA s. 243 and CJA s. 101, without

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[31] R.S.O. 1990, c. C.43.

security, of all of the Property of the Respondents Hypoint and '909 Ltd. including without limitation the Collateral.

b. a judgment, of which a draft is provided at tab 5 (page 224) of the application record, against all the other Respondents (being '905 Ltd, Beverley Rockliffe and Chantal Bock), jointly and severally, for:

   i. $676,252.29 in outstanding capital and interests owed as of March 11, 2022 on account of the Debt Instruments.

   ii. pre-judgment and post-judgment interest at the rate of 1.5% per month (19.56% per annum) in accordance with the Debt Instruments.

c. an order against all the Respondents, jointly and severally, for the Applicant's costs incurred in respect of this application, on a full indemnity basis in accordance with the Debt Instruments.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of May 2022.

Brendan Bissell

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SCHEDULE A – LIST OF AUTHORITIES

1. *Bank of Nova Scotia v Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC)
2. *1529599 Ontario Limited v Dalcor Inc.*, 2012 ONSC 5707
3. *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007
4. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023
5. *Potentia Renewables Inc. v Deltro Electric Ltd.*, 2018 ONSC 3437
6. *Mundo Media Ltd. (Re)*, 2022 ONCA 607
7. *Ontario Securities Commission v Consortium Construction Inc.*, 1992 CanLII 7734 (ON CA)
8. *Ontario (Registrar of Mortgage Broker) v Matrix Financial Corp.*, 1993 CanLII 9420 (ON CA)

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SCHEDULE B – RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

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.

(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.

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

(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.

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

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.

(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.

(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).

(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.

(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

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.

Rules of Civil Procedure, R.S.O. 1990, c. C.43

14.05 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

> **(d)** the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> **(h)** in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial.

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Court File No. CV-22-00678808-00CL

CANADIAN EQUIPMENT FINANCE AND LEASING INC.

Applicant

\- and -

THE HYPOINT COMPANY LIMITED, 2618905 ONTARIO LIMITED, 2618909 ONTARIO LIMITED, BEVERLEY ROCKLIFFE, and CHANTAL BOCK

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

APPLICANT'S AMENDED FACTUM

(Receivership order, judgment against guarantors)
(returnable September 2, 2022 (as regards receivership order only))

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