Court file no: CV-22-00678808-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CANADIAN EQUIPMENT FINANCE AND LEASING INC.

Applicant

-and-

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

Respondents

FACTUM OF DELRIN INVESTMENTS INC., SAMUEL STERN, HARVEY KESSLER, RICHARD GOLDBERG, AND BRUCE LUBELSKY

August 31, 2022

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OVERVIEW

1. Bruce Lubelsky (the "***First Mortgagee***") holds a first mortgage on the real property located at 59 Roy Boulevard, Brampton, Ontario (the "***Property***"). Delrin Investments Inc., Samuel Stern, Harvey Kessler, and Richard Goldberg (collectively the "***Second Mortgagees***") hold a second mortgage on the Property. The owner of the Property, 2618909 Ontario ("***909***"), borrowed money from them and granted these mortgages in return (the "***Mortgages***")

2. The applicant Canadian Equipment Finance and Leasing Inc. ("***CEFL***") lent money to The Hypoint Company Limited ("***Hypoint***") (the "***Equipment Loan***") and in return,

perfected a security interest in certain HVAC equipment (the "***Equipment***") which has since been affixed to the Property.

3. Hypoint defaulted on the Equipment Loan.

4. 909 defaulted on the Mortgages.

5. CEFL seeks the appointment of a receiver for, *inter alia*, the Property and 909. The First Mortgagee and the Second Mortgagees (collectively, the "***Mortgagees***") oppose the appointment of a receiver for either the Property or 909.

6. Simply put:

   (a) CEFL has no contractual right to a receiver over the Property or the assets of 909;

   (b) There is no legal basis for a receiver to be appointed over 909 or the Property; and;

   (c) The appointment of such a receiver would interfere and conflict with rights which the ***Mortgagees do have*** with respect to the Property; namely to enforce their Mortgages by selling the Property under power of sale pursuant to Part III of the *Mortgages Act*.

7. In short, the appointment of a receiver is neither just nor convenient.

8. In the end, CEFL simply does not like the bargain that it made in the Equipment Loan; because, on reflection, it does not like the consequences that flow from its rights under that bargain. It is trite that the Court does not relieve parties of their bargains just

because they come to regret them later. Particularly where, as here, the agreement is a pre-printed contract of adhesion.

9. The Mortgagees take no position on the balance of the relief sought by the Mortgagees. In particular, the Mortgagees do not oppose:

(a) The appointment of a receiver over the ***Equipment***, something explicitly provided for in the loan agreement between Hypoint and CEFL;

(b) That the receiver of the Equipment take such steps as are appropriate to secure and protect the Equipment; or

(c) CEFL enforcing its security in and to the Equipment (so long as it does so expeditiously) by entering into the Property and removing the Equipment, in accordance with s. 35 of the *PPSA*.

FACTS

10. On or about February 28, 2018, 909 bought the Property.

PIN Register for the Property; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(A)

11. On or about June 8, 2020, 909 granted a total of $5,300,000 in the Mortgages to the Mortgagees.

PIN Register for the Property; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(A)

12. On or about June 1, 2020, Hypoint borrowed $779,070.00 from CEFL for the purpose of purchasing the Equipment; i.e. the Equipment Loan. Specifically, the Equipment consists of 16 large pieces of ventilation equipment:

(a) Eight new "Trane/Desert Aire Dehumidification Units AHUS"; and

(b) Eight new "Trane/Desert Aire Dehumidification Units Cooled Remote RC8S022C5H22524 Condensers"

13. To evidence the Equipment Loan, the parties executed a loan and security agreement (the "***Equipment Loan Agreement***") pursuant to which Hypoint granted a security interest in the Equipment to CELF.

Equipment Loan Agreement; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(E)

14. CEFL's interest became perfected at that time because, a few days earlier, CEFL had registered its security interest in the PPSA registry; which it then reregistered on June 22, 2020.

PPSA Register; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(F2)

15. In the Equipment Loan Agreement, CEFL contracted for certain rights, including the appointment of a receiver for the ***Equipment***, who would have the right to:

> to take possession of the Collateral, to preserve the Collateral or its value, and to sell, lease, license or otherwise dispose of or concur in selling, leasing, licensing or otherwise disposing of the Collateral.
>
> To facilitate the foregoing powers, any such Receiver may enter upon, use and occupy all premises owned or occupied by the Debtor wherein the Collateral may be situate and maintain the Collateral upon such premises.

Equipment Loan Agreement, s. 12(a); Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(E)

16. At or about the same time, CEFL asked the Second Mortgagees to confirm CEFL's interest and rights in the Equipment in an instrument titled "Mortgagee Waiver and Consent", which provides that the Second Mortgagees:

1. consent to CEFL's present and future security interests in the Equipment;

2. disclaim any present or future interest in the Equipment, regardless of whether the Equipment is now or in the future becomes affixed to the Property;

3. waive all rights to take security enforcement Proceedings against the Equipment or to levy or distrain, at any time, upon the Equipment

4. consent to the exercise by the CEFL, at any time and from time to time, of its security interest and its rights in and to the Equipment and grants CEFL access to the Property for the purposes of exercising such rights, including, taking possession of, disposing of, or removing the Equipment, provided that CEFL shall be liable to the Second Mortgagee for the reasonable costs of repairing any damage to the Property resulting from the exercise of CEFL's rights in and to the Equipment; and

5. agree CEFL may, without affecting the validity of the Mortgagee Waiver and Consent extend, vary or amend the terms of payment of any indebtedness of the Hypoint to it or the performance of any of the terms and conditions of any agreement between the Hypoint and CEFL, without the consent of the Second Mortgagee and without giving notice thereof to the Second Mortgagees.

Waiver; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(J)

THE AFFIXING

17. On this application, there is a conflict in the evidence regarding the manner in which the Equipment has been incorporated – "affixed" – to the Property. For obvious reasons, that will impact what efforts are required to remove the Equipment from the Property.

18. CEFL's evidence comes from its President and Managing Partner, Brent Keenan. He says:

> 12. In my view, it is impractical to consider removing the collateral that is subject to the Applicant's security from the building. The collateral has been extensively attached to the interior and exterior of the building. There are many exterior heating and cooling units that have been attached to the side and top of the building and with cabling and mechanical connections into the building. There are also extensive interior components of the Applicant's collateral, such as piping and electrical and computer wiring for what are literally dozens of panels.
>
> **Affidavit of Brent Keenan; para. 12; Supplementary Application Record, dated May 16, 2022; Tab 1**

19. With respect, Mr. Keenan is the president of a lending company. There is no suggestion that he has any technical expertise when it comes to removing equipment from a building.

20. He is also factually incorrect. The collateral consists of 16 large mechanical devices, all of which are ***outside*** the building. No part of CEFL's collateral is inside the building and CEFL has no security interest in "piping and electrical and computer wiring for what are literally dozens of panels".

21. In contrast to the evidence of someone who has expertise in equipment ***financing***, the Mortgagees led the evidence of someone who has expertise in equipment ***installation***. They led the evidence of the person who actually installed the Equipment at the Property, Roman Rockliffe. His evidence is that the equipment could be easily detached, because all that would be involved would be disconnecting electrical cables and ventilation ducts.

22. His estimate is that:

(a) it would take all of a day to disconnect the Equipment;

(b) A second day would be required to load the now-freestanding Equipment onto a flatbed truck for removal; and

(c) the impact to the Property would be minimal.

Affidavit of Roman Rockliffe affirmed on June 22, 2022; para. 9-13

23. Photographs of the Equipment confirm that the Equipment stands free of the building and can be easily reached.

Affidavit of Roman Rockliffe affirmed on June 22, 2022; Tab A

24. In an effort to muddy the water, CEFL has purported to put before the Court evidence to contradict Mr. Rockliffe. Brent Keenan swore another affidavit in which he shares information which, he says, Matt Stockley told him in a phone call; about (i) who installed the Equipment, and (ii) what would be required to remove it[1].

Second Supplementary Affidavit of Brent Keenan, sworn May 26, 2022, para. 6 & 8

25. Manifestly, that evidence is improper hearsay. On an application, a party cannot lead evidence, on information and belief, where the evidence concerns contentious facts[2]. In this application, the extent of the affixing, and the consequent requirements for removal, are ***the most*** contentious facts before the Court.

26. The proper remedy is for the Court to ignore that improperly-tendered evidence.[3]

27. As a consequence, the only proper evidence before the Court as to the requirements for removal is that tendered by the Mortgagees.

THE DEFAULTS

28. Apparently, Hypoint's business has become a victim of:

(a) An oversaturated market for cannabis producers; and

(b) COVID-19.

29. Hypoint has permitted the Equipment Loan to fall into default.

30. 909 has permitted the Mortgages to fall into default.

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[1] CEFL relies heavily on this hearsay in its factum, para. 55.
[2] Rule 39.01(5) of the *Rules of Civil Procedure*
[3] *Harbouredge Commercial Finance Corp. v. Jet Express Transportation Group Ltd.*, 2020 ONSC 3794, para. 16-25

31. CEFL provided notice of the default to Hypoint, and made a demand for repayment. CEFL made a similar demand on several other people, all of whom had guaranteed the Equipment Loan.

Demand letter; Application Record dated March 23, 2022; Affidavit of Brent Keenan; Tab 2(L1)

32. When the Equipment Loan remained unsatisfied, CEFL proceeded to issue the present application.

33. In this application, CEFL seeks, *inter alia*:

> a receivership order pursuant to sections 243 of the Bankruptcy and Insolvency Act (Canada) (the "BIA") and 101 of the Courts of Justice Act (Ontario) (the "CJA") ... 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") [emphasis added]

Notice of Application; para. 1(a); Application Record dated March 23, 2022; Tab 1

34. On June 29, 2002, this matter came before the Court for an interim hearing. At that hearing, the Court authorized the appointment of a receiver for the ***Equipment*** (i.e. not the Property); precisely the relief which CEFL contracted for and which Hypoint agreed that it should have.

Endorsement of Gilmore J.; Fourth Supplementary Affidavit of Brent Keenan, sworn on August 30, 2022, Tab C

35. Notwithstanding that order, CEFL has not proceeded to have a receiver appointed for the Equipment.

36. Further to 909's default on the Second Mortgage, the Second Mortgagees delivered a notice of sale, pursuant to the *Mortgages Act*, entitling them to proceed with a sale of the Property under power-of-sale.

37. The Second Mortgagees then attempted to sell the Property to a company called Metro Century Capital Inc. Unfortunately, that sale lapsed when the purchaser refused to waive conditions within the conditional period.

38. The Mortgagees are now proceeding with a more conventional sale, by obtaining appraisals of the fair market value of the Property, and retaining a commercial real estate brokerage to list, market, and sell the Property.

Affidavit of Richard Goldberg, affirmed on August 30, 2022; para. 6-8

ISSUES AND ARGUMENT

39. In its amended factum, the applicant has indicated that it is only seeking the appointment of receivers, and is not seeking any judgments.

40. As indicated above, the Mortgagees confine themselves in their submissions to the issue of the appointment of a receiver for the Property.

41. CEFL grounds its request for a receiver in two basic propositions:

(a) A receiver is necessary to safeguard the Equipment; and

(b) A receiver is appropriate so that there can be a Court-monitored sale of the Property.

42. The first ground is clearly disingenuous:

(a) CEFL contracted for the right to install a receiver of the Equipment who was authorized to take any steps to protect the Equipment;

(b) The Court confirmed that right in its order of June 29, 2022; however

(c) CEFL has taken no steps to protect itself by actually installing its receiver.

43. The second ground must fail because CEFL is ***not*** a creditor of ***909***. CEFL is only a creditor of Hypoint.

44. It would now appear that 909 also guaranteed the debt of Hypoint[4]. However, CEFL is not seeking a judgment on that guarantee.[5]

45. Nevertheless, even if it were seeking judgment against 909, it does not have one yet. Enforcing against the assets of 909 now is virtually the definition of prejudgment attachment.[6]

46. Because it has no right, in contract or otherwise, to compel the sale of the Property, CEFL has resorted to the general authority of the Court under s. 101 of the *Courts of Justice Act* to appoint a receiver when it is "just or convenient" to do so.

47. The Mortgagees do not dispute this Court's jurisdiction, *simplicter*, to order a receivership. What the Mortgagees dispute is that it would be appropriate to do so here.

48. The authority to order a receivership under s. 101 cannot be used as a magic wand, to be invoked simply because doing so would be *convenient* for a particular party if the Court compelled a judicial sale which it otherwise has no right to seek.

49. All of the cases relied on by CEFL in its factum are cases in which the secured party ***contracted*** for the appointment of a receiver. Where the applicant rests solely on s. 101, the test is far more stringent. As Epstein J. (as she then was) explained in *RBC v. Chongsim*:

> The appointment of a receiver is particularly intrusive. It is therefore relief that should only be granted sparingly. The law is clear that in the exercise of its

[4] According to the affidavit of Brent Keenan sworn three days before the hearing of this application.
[5] Notice of Application; Application Record dated March 23, 2022; Tab 1
[6] *Anderson v. Hunking*, 2010 ONSC 4008

> discretion, the court should consider the effect of such an order on the parties. As well, since it is an equitable remedy, the conduct of the parties is a relevant factor.
>
> ***Royal Bank of Canada v Chongsim Investments Ltd.*, [1997] OJ No 1391 (OCJ Gen. Div.), para. 18**

50. In particular, it cannot be used by a ***general*** creditor to defeat the rights of ***secured*** creditors. As the Court of Appeal explained in *Robert F. Kowal Investments Ltd.*:

> When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.
>
> ***Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.*, (1976), 9 O.R. (2d) 84, p.4**

51. CEFL claims that the appointment of a receiver in the present case will "preserve and realize assets for the benefit of all interested parties". With respect, that presumes too much. While a receiver can be appointed for that purpose:

(a) it will require compelling and urgent reasons for the Court to grant its approval if the secured creditors oppose the making of the order; and

(b) will only be in those cases where absent the appointment of a receiver, the property from which all of the interested parties, including the mortgagees, would otherwise recover, would be dissipated.

***Robert F. Kowal Investments Ltd. supra,* p.5**

52. Here, there is no compelling reason and there is no risk to the Property. And, not to belabour the point, CEFL is not a party with an interest in the Property.

53. In its notice of application[7], CEFL advances four specific reasons why the Property should be sold by a receiver:

(a) the Equipment has been installed on the Property, and removing it would potentially incur expense and/or cause damage to the Property and the Equipment.

(b) the Property likely have more value with the Equipment installed, and the Equipment likely has more value when installed than if removed and sold as used equipment.

(c) a receiver will be able to run a proper marketing and sale process and locate an acceptable transaction for the Property in accordance with the 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 Equipment is personal property that has been affixed to the Property, and the fact that the respective creditor rights are at the intersection of personal and real property security law.

54. With the greatest of respect, none of these provides a proper basis for the appointment of a receiver. CEFL has invented a legal right where none exists.

[7] Notice of Application, para. 25; Application Record dated March 23, 2022; Tab 1

A. THE EQUIPMENT CAN BE EASILY REMOVED

55. As set out above, the only proper evidence before the Court is that the Equipment can be easily removed.[8] But even if it could only be removed with difficulty, it hardly lies in CEFL's mouth to complain about that now. CEFL:

(a) Contracted for the right to remove the Equipment in the event of default;

(b) Induced the Second Mortgagees to execute the "Mortgagee Waiver and Consent" on the explicit basis (as set out in the instrument itself) that in the event of default, CEFL would have the right to remove the Equipment, so long as it repaired the Property; and

(c) In any event had the right, under s. 34 of the *PPSA*, to remove the Equipment, so long as it repaired the Property[9].

56. CEFL is correct about the potential for harm to the Property. Yes, removal may well cause some damage to the Property. And yes, CEFL is responsible to repair that damage. Which is a consequence imposed by the PPSA and which CEFL explicitly agreed to bear.

57. In short, there is a cost - to be borne by CEFL as holder of a security interest in the Equipment - for it to enforce its security. That should come as no surprise, because that cost is implicit in the taking of security in a fixture under the *PPSA* and the remedies which come with that security.

58. The only thing which has changed now is that, in retrospect, CEFL does not like those options.

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[8] Factum, *supra*, para. 18 - 27
[9] Factum, *infra*, para. 74 *et seq*.

59. As a result, instead of enforcing legal rights it no longer prefers, CEFL has made up a legal principle. Namely, that the holder of a security interest under the *PPSA* in a fixture can compel the judicial sale of the underlying property; despite the fact that the property does not belong to the debtor, and in derogation of the rights of mortgagees in the same property.

60. Unsurprisingly, CEFL has cited no legal precedent for such relief. Because there is none.

B. THE VALUE OF THE PROPERTY, WITH OR WITHOUT THE EQUIPMENT, IS IRRELEVANT

61. It does make sense that, without the Equipment, the Property is less valuable.

62. With respect, that is a problem for the Mortgagees. And the owners of the Property. Not for CEFL.

C. A COURT-ORDERED SALES PROCESS IS NOT REQUIRED

63. There is no need for a Court-ordered officer, much less the cost of one, in order to sell the Property.

64. On the evidence before the Court, the only secured creditors of ***909*** are the Mortgagees. They already have a statutory right to sell the Property, in a process mandated by Section III of the *Mortgages Act*; namely, power-of-sale.

65. And on the evidence before the Court, those same mortgagees are already engaged in "a proper marketing and sale process and locate an acceptable transaction for the" sale of the Property; under that same power-of-sale.

66. There is no suggestion, much less evidence, that the sale of the Property, under power-of-sale, will be anything other than fair and proper.

67. In that respect, CEFL has mischaracterized the Mortgagees' position:

(a) They have not refused to keep CEFL informed as to the power-of-sale process[10]; and

(b) Have now confirmed that they are indeed content to keep CEFL informed.

Affidavit of Richard Goldberg, affirmed on August 30, 2022, para. 11

D. RESOLVING COMPETING PRIORITIES IS FOR THE COURT TO DO

68. CEFL is quite right that there are "competing priorities or complexities arising from the fact that the Equipment is personal property that has been affixed".

69. However, they turn on purely legal determinations. With respect, those cannot be delegated to ***an officer*** of the Court to decide; they are for ***the Court*** to decide.

70. Nevertheless, as explained below, they are also a "red herring": the resolution of those priority issues has no bearing on when and how the Property can or should be sold.

71. On the contrary, they will become issues to be resolved only ***after*** the Property is sold and even then, only if the net proceeds of the sale are insufficient to satisfy all the secured debt.

72. Accordingly, they have no bearing on whether a receiver is appropriate.

[10] Contrary to CEFL's factum at p. 47

The Rights of a PPSA Security Holder in a Fixture

73. Under the *PPSA*, a perfected security interest in personal property – the collateral – gives the secured party a right to enforce against that collateral. Those rights become more nuanced if the collateral is affixed to real property.

74. Once collateral becomes a fixture, the interests of the secured party in the fixture are ***subordinate*** to those with an interest in the real property; unless certain statutory requirements are met. The Court in *Grant Thornton* provided a comprehensive overview:

> Section 34 of the *PPSA* addresses fixtures. Section 34(1) of the *PPSA* provides a statutory scheme for determining priority between the claim of a person who has a security interest in goods attached to real property that became a fixture and the claim of a person who has an interest in the real property. Section 34(1) provides that a security interest in "goods" that attached after the goods became a fixture has priority as to the fixture over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the fixture. The term "goods" is defined in the *PPSA* to mean "tangible personal property other than [specified types of personal property], and includes fixtures …".
>
> Section 34(3) of the *PPSA* provides that if a secured party has an interest in a fixture that has priority over the claim of a person having an interest in the real property, the secured party may, on default, remove the fixture from the real property if, unless otherwise agreed, the secured party reimburses any encumbrances or owner of the real property who is not the debtor for the cost of repairing any physical injury but excluding diminution in the value of the real property caused by the absence of the fixture or by the necessity for replacement.
>
> ***Grant Thornton Limited, as Court-appointed Receiver v 1902408 Ontario Ltd*, 2021 ONSC 1237, para. 24-25**

75. However, despite retaining a security interest in the fixture, the secured creditor acquires does not acquire an interest in the underlying ***real*** property:

> The *PPSA* recognizes that goods attached to real property may retain their discrete character as personal property. The *PPSA* allows a secured party to take a security interest in tangible personal property, "goods" which became fixtures, something that was not allowed at common law. The security interest that the

> *PPSA* permits a secured party to take in goods which are fixtures is an interest in personal property. It is not an interest in real property.
>
> ***Grant Thornton**, supra,* **para. 27**

The Rights of a PPSA Security Holder When Enforcing

76. In the event of default, a secured party under the *PPSA* has a right to take possession of the collateral,[11] sell the collateral, and then use the proceeds in satisfaction of the secured debt.[12]

77. That remains true in the case of collateral which has become a fixture.

78. However, as a matter of common sense, selling collateral which has become a fixture requires, as a first step, that the collateral be "unaffixed". As indicated above, s. 34(3) gives the secured party the right to remove the fixture in the event of a default; but only if the secured party repairs the damage caused to the real property in the process of removal.

79. There is one exception. S. 34(7) of the *PPSA* allows a mortgagee to prevent the secured party from removing the fixture by paying off the secured debt:

> A person having an interest in real property that is subordinate to a security interest in a fixture may, before the fixture has been removed from the real property by the secured party in accordance with subsection (3), retain the fixture upon payment to the secured party of the amount owing in respect of the security interest having priority over the person's interest.

The Rights of a PPSA Security Holder in a Power of Sale

80. The present case is not unusual. A group of debtor companies which runs into trouble will often run into trouble with many creditors, and allow multiple obligations to fall into default. When that happens:

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[11] *Personal Property Security Act*, s. 62
[12] *Personal Property Security Act*, s. 63

(a) The mortgagees will seek to enforce against the real property; and

(b) The secured parties (under the *PPSA*) will enforce against the collateral.

81. As indicated above, where the collateral is a fixture, the *PPSA* provides for two explicit scenarios for disposition of that fixture:

(a) Under s. 34(3), the secured party can remove the fixture for the purpose of enforcement; or

(b) Under s. 34(7), the mortgagee can compel the secured party to leave the fixture in place.

82. The *PPSA* is ***silent*** on the third option:

(a) The secured party takes no steps to remove the fixture; but

(b) The mortgagee does not exercise its right to compel the secured lender to leave the fixture in place.

83. If that happens, then the property – ***however*** it is sold – will be sold together with the fixture.

84. That is precisely what, it would appear, is going to happen here:

(a) CEFL clearly refuses to exercise its rights under s. 34(3) of the *PPSA*; and

(b) The Mortgagees, equally clearly, decline to exercise their rights under s. 34(7) of the *PPSA*.

Letter from Jonathan Rosenstein dated August 23, 2022, Fourth Supplementary Affidavit of Brent Keenan, sworn on August 30, 2022; Tab F

85. CEFL is correct that the proceeds of the sale of the Property – however it is sold – may be subject to competing priority claims:

(a) The Mortgagees will argue that:

(i) what was sold was real property;

(ii) that they are the only ones with a charge over real property; and as a result

(iii) they have priority.

(b) CEFL will argue that:

(i) What was sold, necessarily, included the Equipment;

(ii) A portion of the proceeds, necessarily, reflects (in some fashion) the value of the Equipment; and as a result

(iii) They have priority (by virtue of s. 34 of the PPSA which says that they have priority).

86. These conflicting interests will be academic in the event that the proceeds of the sale of the Property – whenever and however that occurs – are at least enough to satisfy (i) the Mortgagees and (ii) CEFL. If there is enough money to satisfy all of the parties with security, priority is irrelevant.

87. Indeed, the aborted sale to Metro Century Capital Inc., had it closed, would have provided sufficient net proceeds to satisfy all of the secured parties.

88. However, now that it will be necessary to expose the Property to the general market, the ultimate sale price is unknown. In the event that the proceeds of the sale of the Property

are insufficient to pay out all of the parties with security, then the Court will be called upon to resolve the priority dispute.

89. If forced to do so at that time, the Court will then have to make new law. Surprisingly, this specific issue of priorities has never been addressed and resolved by the Court before now.[13]

90. In any event, none of it justifies a receiver to sell the Property.

IN THE ALTERNATIVE THE COURT SHOULD APPOINT THE MORTGAGEES' PREFERRED RECEIVER

91. For all of the reasons set out above, the Mortgagees oppose the appointment of any receiver for 909 or the Property.

92. However, the Mortgagees do acknowledge that the appointment of a receiver is a discretionary remedy, available to the Court here. It may be that the Court is not persuaded by the Mortgagees' arguments.

93. In that case, if the Court determines that a receiver should be appointed, then it should be the receiver of the ***Mortgagees'*** choosing.

94. Appointing a receiver to sell the Property would necessarily deprive the Mortgagees of their statutory right to sell under power-of-sale.

95. At the very least, the Mortgagees should have a minimal say in selecting the individual who supplants their rights.

[13] The Court of Appeal identified the issue, but did not resolve it, in *G.M.S. Securities & Appraisals Ltd. v. Rich-Wood Kitchens Ltd.*, [1995] O.J. No. 44 (CA)

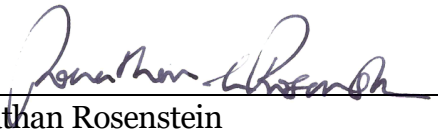
ORDER SOUGHT

96. The application to appoint a receiver for 909 and the Property should be dismissed, with costs payable to the Mortgagees.

97. In the alternative, if the Court determines that it is just or convenient to appoint a receiver, it should be the receiver selected by the Mortgagees.

August 31, 2022

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Jonathan Rosenstein
Lawyer for the Mortgagees

SCHEDULE "A" – *AUTHORITIES*

1. *Harbouredge Commercial Finance Corp. v. Jet Express Transportation Group Ltd.*, 2020 ONSC 3794

2. *Anderson v. Hunking*, 2010 ONSC 4008

3. *Royal Bank of Canada v Chongsim Investments Ltd.*, [1997] OJ No 1391 (OCJ Gen. Div.)

4. *Robert F. Kowal Investments Ltd. et al. v. Deeder Electric Ltd.*, (1976), 9 O.R. (2d) 84

5. *Grant Thornton Limited, as Court-appointed Receiver v 1902408 Ontario Ltd*, 2021 ONSC 1237

6. *G.M.S. Securities & Appraisals Ltd. v. Rich-Wood Kitchens Ltd.*, [1995] O.J. No. 44 (CA)

SCHEDULE "B" – *RELEVANT STATUTES*

COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43

Injunctions and receivers
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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms
(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

MORTGAGES ACT, R.S.O. 1990, C. M.40

PART III: NOTICE OF EXERCISING POWER OF SALE
Notice of power of sale
31 (1) A mortgagee shall not exercise a power of sale unless a notice of exercising the power of sale in the form prescribed by the regulations made under this Act has been given by the mortgagee to the following persons, other than the persons having an interest in the mortgaged property prior to that of the mortgagee and any other persons subject to whose rights the mortgagee proposes to sell the mortgaged property:

1. Where the mortgaged property is registered under the Land Titles Act, to every person appearing by the parcel register and by the index of executions to have an interest in the mortgaged property.

2. Where the Registry Act applies to the mortgaged property, to every person appearing by the abstract index and by the index of writs received for execution by the sheriff for the area in which the mortgaged property is situate to have an interest in the mortgaged property.

3. Where there is a statutory lien against the mortgaged property in favour of the Crown or any other public authority and where the mortgagee exercising the power of sale has written notice of the lien, to the Crown or other public authority claiming the lien.

4. Where the mortgagee has actual notice in writing of any other interest in the mortgaged property and where such notice has been received prior to the giving of notice exercising the power of sale, to the person having such interest.

5. Where the last registered owner of the mortgaged property is a dissolved corporation, to the Minister responsible for the administration of the Forfeited

Corporate Property Act, 2015. R.S.O. 1990, c. M.40, s. 31 (1); 2000, c. 26, Sched. B, s. 14 (3); 2015, c. 38, Sched. 7, s. 52 (2); 2017, c. 20, Sched, 11, s. 22.

Interpretation
(2) In subsection (1), the expressions "parcel register" and "abstract index" include instruments received for registration before the time specified on the day immediately before the day on which a notice of exercising the power of sale is given. 2000, c. 26, Sched. B, s. 14 (4).

When notice may be given and power exercised
32 Where a mortgage by its terms confers a power of sale upon a certain default, notice of exercising the power of sale shall not be given until the default has continued for at least fifteen days, and the sale shall not be made for at least thirty-five days after the notice has been given. R.S.O. 1990, c. M.40, s. 32.

Manner of giving notice, general rules
33 (1) A notice of exercising a power of sale shall be given by personal service or by registered mail addressed to the person to whom it is to be given at the person's usual or last known place of address, or, where the last known place of address is that shown on the registered instrument under which the person acquired an interest, to such address, or by leaving it at one of such places of address, or, where the mortgage provides for personal service only, by personal service, or, where the mortgage provides a specific address, to such address.

Execution creditors
(2) Where a person to be given a notice of exercising a power of sale is an execution creditor, the notice may be given in the manner provided in subsection (1) by addressing it to the solicitor who issued the execution or, where there is no solicitor, to the execution creditor.

Construction lien creditors
(3) Where a person to be given a notice of exercising a power of sale is a construction lien claimant, the notice may be given in the manner provided in subsection (1) by addressing it to the solicitor who filed the claim for lien, but, where there is no solicitor and no address for service is shown on the claim for lien and the mortgagee has no actual knowledge of the lien claimant's address, no notice need be given to such lien claimant.

Persons under disability
(4) Where a person to be given a notice of exercising a power of sale is under a disability, the notice shall be deemed to have been effectually given if given in accordance with subsection (1).

Deceased persons
(5) Where a person to be given a notice of exercising a power of sale has died, the notice shall be deemed to have been effectually given if given by registered mail in accordance with subsection (1), and, subject to paragraph 4 of subsection 31 (1), shall be

deemed to be effectual notice to all persons who have any interest in the deceased's estate. R.S.O. 1990, c. M.40, s. 33.

When notice by mail effective
34 A notice of exercising a power of sale shall, if given by registered mail, be mailed in Ontario, and such a notice shall be deemed to have been given on the day on which it was mailed. R.S.O. 1990, c. M.40, s. 34.

Statutory declarations conclusive
35 Subject to the Land Titles Act and except where an order is made under section 39, a document that contains all of the following is conclusive evidence of compliance with this Part and, where applicable, with Part II, and is sufficient to give a good title to the purchaser:

1. A statutory declaration by the mortgagee or the mortgagee's solicitor or agent as to default.

2. A statutory declaration proving service, including production of the original or a notarial copy of the post office receipt of registration, if any.

3. A statutory declaration by the mortgagee or the mortgagee's solicitor that the sale complies with this Part and, where applicable, with Part II. 1998, c. 18, Sched. E, s. 183.

Impeachment of title
36 Where a notice has been given in professed compliance with this Part and, where applicable, with Part II, the title of the purchaser is not liable to be impeached on the ground that the provisions of this Part or, where applicable, Part II respecting default and the provisions of this Part respecting notice, have not been complied with, but any person damnified thereby has a remedy against the person exercising the power of sale. R.S.O. 1990, c. M.40, s. 36.

Abridgement of time
37 Nothing in this Part shall be deemed to abridge,

(a) the period of default after which notice exercising a power of sale may be given where the period of default provided by the mortgage is greater than the period of default mentioned in section 32; or

(b) the period of time after notice has been given after which the mortgaged premises may be sold where the period of time provided by the mortgage is greater than the period of time mentioned in section 32. R.S.O. 1990, c. M.40, s. 37.

Notice rules paramount
38 Despite any agreement to the contrary or any provision contained in any mortgage or any provision of this or any other Act, sections 31, 32, 33, 34, 35 and 36 apply to any

power of sale in a mortgage, and sections 31, 33, 34, 35 and 36 apply to the power of sale conferred by section 24. R.S.O. 1990, c. M.40, s. 38.

Exercise of power of sale without notice
39 (1) Where a mortgage by its terms confers a power of sale upon a certain default and such default has continued for fifteen days, or where there has been at least three months default under a mortgage with respect to which a power of sale is conferred by section 24, a mortgagee may apply without notice to a judge of the Superior Court of Justice for leave to exercise power of sale without notice. R.S.O. 1990, c. M.40, s. 39 (1); 2000, c. 26, Sched. B, s. 14 (5); 2020, c. 11, Sched. 5, s. 18 (2).

Idem
(2) Upon an application under subsection (1), the judge shall, having regard to the circumstances, either grant leave to exercise the power of sale without notice or with such notice to such persons, in such manner and within such time as he or she considers proper. R.S.O. 1990, c. M.40, s. 39 (2); 2020, c. 11, Sched. 5, s. 18 (3).

Transitional provision
40 Where a mortgage made before the 1st day of January, 1965, contains a power of sale in accordance with The Short Forms of Mortgages Act, being chapter 374 of the Revised Statutes of Ontario, 1960, a sale made under such power of sale, so long as it complies with this Part, is as effectual as if The Short Forms of Mortgages Amendment Act, 1964, being chapter 110, had not been passed. R.S.O. 1990, c. M.40, s. 40.

Part III does not apply to bond mortgages
41 This Part does not apply to a mortgage given by a corporation to secure bonds or debentures. R.S.O. 1990, c. M.40, s. 41.

PERSONAL PROPERTY SECURITY ACT, R.S.O. 1990, c. P.10

Fixtures
34 (1) A security interest in goods that attached,

(a) before the goods became a fixture, has priority as to the fixture over the claim of any person who has an interest in the real property; or

(b) after the goods became a fixture, has priority as to the fixture over the claim of any person who subsequently acquired an interest in the real property, but not over any person who had a registered interest in the real property at the time the security interest in the goods attached and who has not consented in writing to the security interest or disclaimed an interest in the fixture.

Exceptions
(2) A security interest mentioned in subsection (1) is subordinate to the interest of,

(a) a subsequent purchaser for value of an interest in the real property; or

(b) a creditor with a prior encumbrance of record on the real property to the extent that the creditor makes subsequent advances,

if the subsequent purchase or subsequent advance under a prior encumbrance of record is made or contracted for without knowledge of the security interest and before notice of it is registered in accordance with section 54.

Removal of collateral
(3) If a secured party has an interest in a fixture that has priority over the claim of a person having an interest in the real property, the secured party may, on default and subject to the provisions of this Act respecting default, remove the fixture from the real property if, unless otherwise agreed, the secured party reimburses any encumbrancer or owner of the real property who is not the debtor for the cost of repairing any physical injury but excluding diminution in the value of the real property caused by the absence of the fixture or by the necessity for replacement.

Security
(4) A person entitled to reimbursement under subsection (3) may refuse permission to remove the fixture until the secured party has given adequate security for the reimbursement.

Notice
(5) A secured party who has the right to remove a fixture from real property shall serve, on each person who appears by the records of the proper land registry office to have an interest in the real property, a notice in writing of the secured party's intention to remove the fixture containing,

(a) the name and address of the secured party;

(b) a description of the fixture to be removed sufficient to enable it to be identified;

(c) the amount required to satisfy the obligation secured by the security interest of the secured party;

(d) a description of the real property to which the fixture is affixed sufficient to enable the real property to be identified; and

(e) a statement of intention to remove the fixture unless the amount secured is paid on or before a specified day that is not less than ten days after service of the notice.

Idem
(6) The notice mentioned in subsection (5) shall be served in accordance with section 68 or by registered mail addressed to the person to whom notice is to be given at the address furnished under section 168 of the Land Titles Act or section 42 of the Registry

Act, or where no such address has been furnished, addressed to the solicitor whose name appears on the registered instrument by which the person appears to have an interest.

Retention of collateral
(7) A person having an interest in real property that is subordinate to a security interest in a fixture may, before the fixture has been removed from the real property by the secured party in accordance with subsection (3), retain the fixture upon payment to the secured party of the amount owing in respect of the security interest having priority over the person's interest. R.S.O. 1990, c. P.10, s. 34.

Accessions
35 (1) Subject to subsections (2) and (3) of this section and section 37, a security interest in goods that attached,

(a) before the goods became an accession, has priority as to the accession over the claim of any person in respect of the whole; and

(b) after the goods became an accession, has priority as to the accession over the claim of any person who subsequently acquired an interest in the whole, but not over the claim of any person who had an interest in the whole at the date the security interest attached to the accession and who has not consented in writing to the security interest in the accession or disclaimed an interest in the accession as part of the whole. R.S.O. 1990, c. P.10, s. 35 (1).

Exceptions
(2) A security interest referred to in subsection (1),

(a) is subordinate to the interest of,

(i) a subsequent buyer of an interest in the whole, and

(ii) a creditor with a prior perfected security interest in the whole to the extent that the creditor makes subsequent advances,

if the subsequent sale or subsequent advance under the prior perfected security interest is made or contracted for before the security interest is perfected; and

(b) is subordinate to the interest of a creditor of the debtor who assumes control of the whole through execution, attachment, garnishment, charging order, equitable execution or other legal process, if control is assumed before the security interest is perfected. R.S.O. 1990, c. P.10, s. 35 (2).

Idem
(3) Despite clause (2) (b), a purchase-money security interest in an accession that is perfected before or within 15 days after the debtor obtains possession of the accession

has priority over the interest of a creditor referred to in that clause. R.S.O. 1990, c. P.10, s. 35 (3); 2010, c. 16, Sched. 5, s. 4 (2).

Removal of collateral
(4) If a secured party has an interest in an accession that has priority over the claim of any person having an interest in the whole, the secured party may, on default and subject to the provisions of this Act respecting default, remove the accession from the whole if, unless otherwise agreed, the secured party reimburses any encumbrancer or owner of the whole who is not the debtor for the cost of repairing any physical injury excluding diminution in value of the whole caused by the absence of the accession or by the necessity for replacement. R.S.O. 1990, c. P.10, s. 35 (4).

Security
(5) A person entitled to reimbursement under subsection (4) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement. R.S.O. 1990, c. P.10, s. 35 (5).

Notice
(6) The secured party who has the right to remove an accession from the whole shall serve, on each person known to the secured party as having an interest in the other goods and on any person with a security interest in such other goods perfected by registration against the name of the debtor or against the vehicle identification number of such other goods, if such number is required for registration, a notice in writing of the secured party's intention to remove the accession containing,

(a) the name and address of the secured party;

(b) a description of the accession to be removed sufficient to enable it to be identified;

(c) the amount required to satisfy the obligations secured by the security interest of the secured party;

(d) a description of the other goods sufficient to enable them to be identified; and

(e) a statement of intention to remove the accession from the whole unless the amount secured is paid on or before a specified day that is not less than ten days after service of the notice. R.S.O. 1990, c. P.10, s. 35 (6).

Idem
(7) The notice mentioned in subsection (6) shall be served in accordance with section 68 at least ten days before the accession is removed. R.S.O. 1990, c. P.10, s. 35 (7).

Retention of collateral
(8) A person having an interest in the whole that is subordinate to a security interest in the accession may, before the accession has been removed by the secured party in

accordance with subsection (3), retain the accession upon payment to the secured party of the amount owing in respect of the security interest having priority over the person's interest. R.S.O. 1990, c. P.10, s. 35 (8).

Possession upon default
62 (1) Upon default under a security agreement,

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) if the collateral is equipment and the security interest has been perfected by registration, the secured party may, in a reasonable manner, render such equipment unusable without removal thereof from the debtor's premises, and the secured party shall thereupon be deemed to have taken possession of such equipment; and

(c) the secured party may dispose of collateral on the debtor's premises in accordance with section 63. R.S.O. 1990, c. P.10, s. 62.

Exempt collateral
(2) If any of the collateral in which the secured party has a security interest under the security agreement, other than a purchase-money security interest or a possessory security interest, is property that would be exempt under the Execution Act from seizure under a writ issued out of a court, that property is exempt from the rights of the secured party under subsection (1). 2006, c. 34, Sched. E, s. 20.

Disposal of collateral
63 (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,

(a) the reasonable expenses of the secured party, including the cost of insurance and payment of taxes and other charges incurred in retaking, holding, repairing, processing and preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement, any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition,

and the surplus, if any, shall be dealt with in accordance with section 64. R.S.O. 1990, c. P.10, s. 63 (1).

Methods of disposition
(2) Collateral may be disposed of in whole or in part, and any such disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (4), may be made

at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable. R.S.O. 1990, c. P.10, s. 63 (2).

Secured party's right to delay disposition of collateral
(3) Subject to subsection 65 (1), the secured party may delay disposition of all or part of the collateral for such period of time as is commercially reasonable. R.S.O. 1990, c. P.10, s. 63 (3).

Notice required
(4) Subject to subsection (6), the secured party shall give not less than fifteen days notice in writing of the matters described in subsection (5) to,

(a) the debtor who owes payment or performance of the obligation secured;

(b) every person who is known by the secured party, before the date that the notice is served on the debtor, to be an owner of the collateral or an obligor who may owe payment or performance of the obligation secured, including any person who is contingently liable as a guarantor or otherwise of the obligation secured;

(c) every person who has a security interest in the collateral and whose interest,

(i) was perfected by possession, the continuance of which was prevented by the secured party who has taken possession of the collateral, or

(ii) is perfected by registration before the date the notice is served on the debtor;

(d) every person with an interest in the collateral who has delivered a written notice to the secured party of the interest in the collateral before the date that the notice is served on the debtor. R.S.O. 1990, c. P.10, s. 63 (4); 2000, c. 26, Sched. B, s. 16 (9).

Idem
(5) The notice mentioned in subsection (4) shall set out,

(a) a brief description of the collateral;

(b) the amount required to satisfy the obligation secured by the security interest;

(c) the amount of the applicable expenses referred to in clause (1) (a) or, in a case where the amount of such expenses has not been determined, a reasonable estimate thereof;

(d) a statement that upon receipt of payment the payor will be credited with any rebates or allowances to which the debtor is entitled by law or under the agreement;

(e) a statement that upon payment of the amounts due under clauses (b) and (c), any person entitled to receive notice may redeem the collateral;

(f) a statement that unless the amounts due are paid the collateral will be disposed of and the debtor may be liable for any deficiency; and

(g) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made. R.S.O. 1990, c. P.10, s. 63 (5).

Date of giving notice
(6) If the notice to the debtor under clause (4) (a) is mailed, sent by courier or by any other transmission provided for in section 68, then the relevant date for the purpose of clause (4) (b), subclause (4) (c) (ii) and clause (4) (d) shall be the date of mailing, the date that the notice was sent by courier or the date of transmission, as the case may be, and not the date of the service. 2000, c. 26, Sched. B, s. 16 (10).

Notice not required
(7) The notice mentioned in subsection (4) is not required where,

(a) the collateral is perishable;

(b) the secured party believes on reasonable grounds that the collateral will decline speedily in value;

(c) the collateral is of a type customarily sold on a recognized market;

(d) the cost of care and storage of the collateral is disproportionately large relative to its value;

(e) for any reason not otherwise provided for in this subsection, the Superior Court of Justice, on an application made without notice to any other person, is satisfied that a notice is not required;

(f) after default, every person entitled to receive a notice of disposition under subsection (4) consents in writing to the immediate disposition of the collateral; or

(g) a receiver and manager disposes of collateral in the course of the debtor's business. R.S.O. 1990, c. P.10, s. 63 (7); 2000, c. 26, Sched. B, s. 16 (1).

Secured party's right to purchase collateral
(8) The secured party may buy the collateral or any part thereof only at a public sale unless the Superior Court of Justice, on application, orders otherwise. R.S.O. 1990, c. P.10, s. 63 (8); 2000, c. 26, Sched. B, s. 16 (1).

Effect of disposition of collateral

(9) Where collateral is disposed of in accordance with this section, the disposition discharges the security interest of the secured party making the disposition and, if the disposition is made to a buyer who buys in good faith for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral. R.S.O. 1990, c. P.10, s. 63 (9).

Idem
(10) Where collateral is disposed of by a secured party after default otherwise than in accordance with this section, then,

(a) in the case of a public sale, if the buyer has no knowledge of any defect in the sale and if the buyer does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the buyer acts in good faith,

the disposition discharges the security interest of the secured party making the disposition and, where the disposition is made to a buyer for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral. R.S.O. 1990, c. P.10, s. 63 (10).

Certain transfers of collateral
(11) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to the secured party's rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral. R.S.O. 1990, c. P.10, s. 63 (11).

RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194

Evidence by Affidavit
Generally
39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Service and Filing
(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions
(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications
(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

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

CANADIAN EQUIPMENT FINANCE AND LEASING INC.

- and -

THE HYPOINT COMPANY LIMITED et al.

Applicant

Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced at Toronto

FACTUM OF
DELRIN INVESTMENTS INC., SAMUEL STERN, HARVEY KESSLER, RICHARD GOLDBERG, AND BRUCE LUBELSKY

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