



SUPERIOR COURT OF JUSTICE

**COUNSEL/ENDORSEMENT SLIP**

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DATE: DECEMBER 19, 2023

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TITLE OF PROCEEDING: 1180554 ONTARIO LIMITED v. CBJ DEVELOPMENTS INC. et al

BEFORE: JUSTICE STEELE

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant:**

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Samantha Hans	CBJ BRIDLE PARK II INC.	437-880-6105 – <a href="mailto:shans@airdberlis.com">shans@airdberlis.com</a> ;
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<b>Name of Person Appearing</b>	<b>Name of Party</b>	<b>Contact Info</b>
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**ENDORSEMENT OF JUSTICE STEELE:**

- [1] The applicant, 1180554 Ontario Limited (“118”), seeks the appointment of a receiver over the three parcels of vacant land owned by the respondents, CBJ Developments Inc., CBJ-Clearview Garden Estate Inc. and CBJ-Bridle Park II Inc.
- [2] The respondents ask the Court to adjourn the receivership application for six months to give the respondents the opportunity to complete the sale process they that started in October 2023. In the alternative, the respondents request a shorter adjournment.
- [3] I have decided to adjourn the matter for approximately one month for the reasons set out below.

**Background**

- [4] It is not disputed that further to a loan agreement in September 2021, between CBJ and 1852773 Alberta Ltd. a first mortgage facility was provided by 118. The total of the mortgages registered on the Properties is \$16,000,000 at an interest rate of 13% per annum.
- [5] The parties also entered into a Side Letter pursuant to which the parties agreed to enter into a Participation Agreement with certain participation payments. The respondents dispute the quantum of Participation Payments the lenders claim arise further to the Participation Agreement.
- [6] 118 has a first ranking mortgage as security for its loan over three properties, which are cross-collateralized, consisting of:
- a) 97.2 acres of land owned by CBJ Inc. having the municipal address 7535 Highway 26, Nottawasaga, Ontario (“CBJ Property”);

- b) 91.2 acres of land owned by CBJ Clearview having the municipal address of 6273 27/28 Sideroad, Staynor, Ontario (“CBJ Clearview Property”); and
- c) 78.6 acres of land owned by CBJ II Inc. having the municipal address of 7535 Highway 26, Nottawasaga, Ontario (“CBJ II Property”)

(The three properties are collectively referred to as the “Properties”).

- [7] The Properties are vacant land. They have not yet been zoned for residential development.
- [8] The borrowers defaulted under the loan in August 2023. The mortgages by their terms matured as of October 15, 2023.
- [9] Under the application, served on October 20, 2023, the applicant claims that the total amount due and owing pursuant to the loan agreement (including the participation payments), as of September 1, 2023, is just under \$28,000,000.

### **Analysis**

*Is it just or convenient to appoint a Receiver?*

- [10] The applicant asks the Court to appoint a receiver.
- [11] The respondents say that it is premature to appoint a receiver and ask that the matter be adjourned.
- [12] Under section 243(1) of the *Bankruptcy and Insolvency Act* on application by a secured creditor, the Court may appoint a receiver where it is “just or convenient” to do so. Similarly, under section 101 of the *Courts of Justice Act* the Court may appoint a receiver where such an appointment is “just or convenient.”
- [13] In deciding whether it is “just and convenient” to appoint a receiver, the Court must consider all of the circumstances of the case, and, in particular, the nature of the property and the rights and interests of all parties in relation to the property: *Bank of Nova Scotia v. Freure Village of Clair Creek*, [1996] OJ No. 5088, at para. 10.
- [14] The parties agree that in determining whether it is just and convenient to appoint a receiver there is not a checklist, but many considerations that are assessed holistically. They disagree as to the outcome of the holistic assessment in this case.
- [15] As noted by Osborne J. in *Romspen Investment Corporation v. Tung Kee Investments Canada Ltd.*, 2023 ONSC 5911, at para. 32, the following are factors that the Courts have historically considered in this analysis:
  - a. Whether irreparable harm might be caused if no order is made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

- b. The risk to the security holding taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
- c. The nature of the property;
- d. The apprehended or actual waste of the debtor's assets;
- e. The preservation and protection of the property pending judicial resolution;
- f. The balance of convenience to the parties;
- g. The fact that the creditor has a right to appointment under the loan documentation;
- h. The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- i. The principle that the appointment of a receiver should be granted cautiously;
- j. The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- k. The effect of the order upon the parties;
- l. The length of time that a receiver may be in place;
- m. The cost to the parties;
- n. The likelihood of maximizing return to the parties; and
- o. The goal of facilitating the duties of the receiver.

[16] The applicant submits that, similar to *Romspen*, it is just and convenient to appoint a receiver in the instant case. The applicant points to the security documents, which include the right of applicant to seek the appointment of a receiver. As noted by the applicant, where the security documents provide this right, the burden on the applicant is lessened. The Court in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27, stated:

[W]hile the appointment of a receiver is generally regarded as an extraordinary remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

[17] While the burden is lessened where the security documents include the right to appoint a receiver, that right is only one factor for the Court to consider in determining whether it is just or convenient to make

the appointment. As noted in *Romspen*, at para. 31, “the presence or lack of such a contractual entitlement is not determinative of the issue.”

- [18] *Romspen* although similar in that the property at issue was vacant land and the loan was in default, is different because the appointment of the receiver was not contested. What was in issue was whether either proposed sale transaction ought to be approved. In addition, the property in *Romspen* “had been marketed extensively” and had been listed for sale for over 160 days and the Court was of the view that a receiver was needed to “bring order and transparency to the chaos that has been the hallmark of dealings with the Property for a considerable period of time.” There were competing motions for sale of the property and “strongly held views and acrimony between and among many of the key stakeholders.” *Romspen*, at para. 36. Further, in *Romspen* the loan had been in default for over a year.
- [19] While the applicant wants to appoint a receiver, there is no evidence of other lenders supporting or opposing this motion, nor is there is evidence of “chaos.” The dispute in this case is between the respondents, which have recently started a sale process for the Properties, and the applicant, who wants to enforce on its security immediately.
- [20] As noted, the mortgage is in default. Although generally the mortgagee is entitled to the appointment of a receiver as a matter of course when the mortgage is in default, the Court may exercise its discretion to not make the appointment where the Court is satisfied that there are “compelling commercial or other reason[s] why such an order not to be made:” *United Savings Credit Union v. F&R Brokers Inc. et al*, 2003 BCSC 640.
- [21] I am satisfied that there are compelling commercial or other reasons why a receivership order should not be granted today and that the matter should be adjourned for approximately one month. The respondents commenced a process this fall to try to sell the Properties so that the 118 mortgage and other debts can be repaid.
- [22] With a view to listing the Properties, the respondents worked with and obtained recent appraisals, valuations and listing proposals for the Properties from Avison Young Canada, Lennard Commercial Realty Brokerage and Royal LePage Commercial Realty. The respondents chose to list the Properties with Royal LePage Signature Realty.
- [23] The Properties have been listed for sale for over two months and the marketing materials have been sent to about 6000 recipients. A number of interested parties have signed non-disclosure agreements and been granted access to a data room with confidential information. The real estate brokers are in discussions with certain interested potential buyers and a prospective purchaser has been identified. The respondents submit that to end this sale process just for the receiver to commence another process would be confusing to purchasers and would delay the selling of the Properties.
- [24] In addition, the Properties are vacant land. A receiver is not needed to manage the Properties, deal with employees, or collect rents, etc. A receiver would only be selling the Properties. There is no evidence of any prejudice to the applicant of continuing the sale process that is already underway. The applicant points to the continued accumulation of interest; however, interest will continue to accumulate whether the existing sale process continues, or a receiver starts a new one.

[25] There are a number of persons who have signed non-disclosure agreements and are engaged in the current process. Based on the dates that the emails were sent from Royal LePage to potential buyers, the 60-day period for confidential access to the entirety of the listing information on the Properties should expire in mid-January 2024.

[26] Having considered the submissions of the parties, I have decided to grant a short adjournment to January 26, 2024 at 10 am (one hour) before me. The respondents shall report to the Court on whether there is a buyer pursuant to the existing sale process and the status of any prospective sale transaction for the Properties pursuant to that process. The Court will assess the applicant's request for a receiver in light of all of the circumstances existing on the return date.

A handwritten signature in blue ink, appearing to be "J. L. [unclear]", located in the lower right quadrant of the page.