SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

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TITLE OF PROCEEDING:

AFC MORTGAGE ADMINISTRATIVE INC. v. SUNRISE ACQUISITIONS (STAYNER) INC. et al
AFC MORTGAGE ADMINISTRATIVE INC. v. SUNRISE ACQUISITIONS (ELMVALE) INC. et al

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNRISE ACQUISITONS (STAYNER) INC., 2846862 ONTARIO INC. AND SUNRISE ACQUISITIONS (ELMVALE) INC.

BEFORE: JUSTICE BLACK

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ENDORSEMENT OF JUSTICE BLACK:

Overview

[1] Before me in this matter were competing sets of applications: the lenders' applications seeking to appoint receivers pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"); and the debtors' application seeking protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[2] The procedural history of these matters, and other related proceedings, is somewhat complex. In order to decide between the proposed approaches, it is necessary to consider and weigh a host of competing considerations against a set of criteria established by the growing case law on this choice between statutory paths.

Conclusion

[3] Having done so, for the reasons set out in detail below, I have decided to grant the receiverships sought by the Lenders, rather than making the CCAA Order sought by the Debtors.

The Debtors - The Sunrise Group

[4] Sunrise Acquisitions (Stayner) Inc., 2846862 Ontario Inc. ("284") (together "Sunrise Stayner"), and Sunrise Acquisitions (Elmvale) Inc. ("Sunrise Elmvale" and, together with Sunrise Stayner, the "Sunrise Entities") are part of a broader group of companies (the "Sunrise Group"). The Sunrise Group also includes Sunrise Acquisitions (Hwy 7) Inc. ("Sunrise Hwy 7").

[5] The Sunrise Group includes a number of real estate development companies, in each case "single purpose" corporations incorporated under the *Business Corporations Act* (Ontario) R.S.O. 1990, c. B.16 for the purposes of a particular project.

[6] The principals of the Sunrise Group and the Sunrise Entities include Sajjad Hussain and Muzammil Kodwavi. Mr. Hussain and Mr. Kodwavi have provided certain guarantees relative to loans at issue (The Sunrise Group, the Sunrise Entities, Mr. Hussain, and Mr. Kodwavi will sometimes be referred to collectively as the "Debtors").

[7] Mr. Hussain and Mr. Kodwavi also own certain personal properties involved in this matter, together with their respective spouses, Mahvesh Hussain and Safana Kodwavi.

The Lenders – AFC and Brexit

[8] AFC Mortgage Administration Inc. ("AFC") and Brexit Holdings Inc. ("Brexit") are privately held lenders that provided mortgage financing to the Sunrise Entities and Sunrise Hwy 7 (AFC and Brexit will sometimes be referred to as the "Lenders").

The Stayner Loan

[9] In the case of Sunrise Stayner, pursuant to a Commitment Letter dated April 12, 2022 (amended May 10, 2022), AFC and Brexit (together with another lender that subsequently transferred its interest to Brexit) provided mortgage financing to the Debtors in the principal amount of $11,000,000.00 (the "Staynor Loan"). The Stayner Loan was guaranteed by Mr. Hussain and Mr. Kodwavi, (the "Stayner Guarantees").

[10] The Stayner Loan was for a 12-month term, maturing June 1, 2023, and was secured by a first mortgage charge (the "Stayner Mortgage") on a 66-acre parcel of vacant land in Stayner (the "Stayner Property"), as well as the Stayner Guarantees, and various other security. Under their security, AFC and Brexit had the right to appoint a receiver in the event of default.

[11] In April of 2023 Sunrise Stayner advised AFC and Brexit that it was unable to repay the Stayner Loan on the maturity date, and the loan accordingly went into default.

[12] The parties to the Stayner Loan entered into a Forbearance Agreement dated July 6, 2023 as a result of which 284 (a company wholly owned and controlled by the Guarantors) provided an additional guarantee of Sunrise Stayner's obligations. The Forbearance Agreement also provides AFC and Brexit a further right to appoint a receiver in the event of a default.

[13] 284 also granted to the Lenders, as additional security, a second charge on a property at 299 Mowat Street North in Stayner (the "Mowat Property"). There is a first charge on the Mowat Property in favour of Louis Harvey Bellwood. Mr. Bellwood, who sold his farm on the Mowat Property to the Debtors, financed by a Vendor Take-Back mortgage (the "VTB"), has a claim outstanding against the Debtors, currently the subject of Power of Sale proceedings. Mr. Bellwood was represented by counsel before me. He supports a receivership and opposes a CCAA Order.

[14] Sunrise Stayner has defaulted under the Forbearance Agreement and remains in default on the Stayner Loan (and under Mr. Bellwood's VTB).

The Elmvale Loan

[15] In the case of Sunrise Elmvale, AFC has two mortgages registered against a 10-acre collection of lands beneficially owned by Sunrise Elmvale in Elmvale, Ontario (the "Elmvale Property"). The Elmvale Property is approved for a 65 freehold townhome development.

[16] A first mortgage on the Elmvale Property (the "First Elmvale Mortgage") was transferred to AFC on June 30, 2022. It is in the principal amount of $1,960,000.00 and contains a right for the mortgagee to appoint a receiver in the event of default.

[17] On October 27, 2022, Sunrise Elmvale granted a second mortgage to AFC (the "Second Elmvale Mortgage") in the principal amount of $2,010,000.00. The Second Elmvale Mortgage also contains a right for AFC to appoint a receiver in the event of default.

[18] The Second Elmvale Mortgage is collateralized over four additional (residential) properties (the "Collateral Properties") owned, in each case, by Mr. Hussain, Mr. Kodwavi, Ms. Hussain and/or Ms. Kodwavi. These properties are at 9 Cicada Court in Toronto (the "Cicada Property"), 72 Grand Vellore Crescent in Vaughan (the "Grand Vellore Property"), 88 Abbruzze Court in Woodbridge (the "Abbruzze Property") and 91 Longshore Way in Whitby (the "Longshore Property").

[19] While there was initially some confusion about this in the evidence, it appears now to be common ground that, among the Collateral Properties, only the Longshore Property is occupied by any of the Debtors (specifically Mr. and Ms. Hussain and their three children).

[20] The Cicada Property is unoccupied and in the midst of a major renovation, the Grand Vellore Property is rented to a tenant or tenants, and the Abbruzze Property was the subject of a catastrophic fire. It appears that the proceeds of insurance coverage are currently in dispute and the subject of litigation.

[21] The Debtors owe various amounts to other creditors, secured by various additional charges on the Collateral Properties.

[22] There is also a third mortgage on the Elmvale Property (the "Third Elmvale Mortgage"). The Third Elmvale Mortgage was registered by KSV Restructuring Inc. ("KSV") on May 10, 2023. The Third Elmvale Mortgage secures (in part) a debt owed by Sunrise Hwy 7 to KSV arising from the settlement of proceedings involving property near Highway 7 owned by Sunrise Hwy 7 (the "Hwy 7 Property"). The principal amount of the Third Elmvale Mortgage is $10,500,000.00.

[23] Sunrise Elmvale is in default under the First, Second and Third Elmvale Mortgages, and the Lenders have taken various steps to enforce their loans, including serving notices under s. 243 of the BIA.

Events Arising in the Highway 7 Receivership Proceedings

[24] The significance of events within the proceedings relative to the Hwy 7 Property is the subject of debate before me.

[25] In those proceedings, Wilton-Seigel J. appointed KSV as the receiver on June 9, 2021.

[26] During the course of its investigations, KSV discovered and reported that certain funds had been improperly diverted from Sunrise Hwy 7 to one or more of the principals of Sunrise Hwy 7. In an affidavit filed in response to KSV's motion to recover these funds, which affidavit Kimmel J. referred to in an endorsement from a case conference on November 2, 2022, Mr. Kodwavi admitted that he and other Debtors had received the funds at issue, and that the funds ought to be repaid to Sunrise Hwy 7. Justice Kimmel ordered these amounts to be repaid.

[27] The same issue came on before Osborne J. on December 20, 2022. At that time, His Honour noted that KSV's position was that the Debtors had misappropriated over $14 million from Sunrise Hwy 7, that the Debtors had themselves admitted that they owed over $5 million to Sunrise Hwy 7 that had not been repaid despite Kimmel J.'s Order, and that in fact the Debtors now accepted that they owed at least a net amount of about $12.6 million to Sunrise Hwy 7. Justice Osborne wrote that the Debtors admitted to paying a portion of the funds at issue to a Mr. Shabbar, that all parties agreed that "there is no evidence in the Record justifying these payments" and "no evidence of any justification or basis for the payments made to him whatsoever."

[28] Justice Osborne granted an amended and restated Order on April 14, 2023, requiring the Debtors to pay the amount of $14,510,545.24 to KSV forthwith. Then, on May 8, 2023, Osborne J. made an Order approving a settlement agreement, pursuant to which KSV agreed to accept $10,500,000.00 in full and final settlement of the amounts owing under the Debtors' obligations.

[29] Despite the settlement confirmed in Osborne J.'s May 8, 2023 Order, the Debtors have failed to pay the amounts owing. The settlement contemplated the Debtors paying off the settlement debt in instalments of $2,000,000.00. Having made one $25,000.00 payment in December of 2022 (before the settlement), the Debtors made one partial payment under the settlement agreement, in the amount of $1,000,000.00 on June 13, 2023, but since then have made no further voluntary payments. KSV has garnished some relatively modest amounts from certain bank accounts of the Debtors, but the vast majority of the debt (which, given the Debtors' failure to comply with the settlement, has reverted to the full debt of over $14 million) remains outstanding.

[30] The evidence also confirms that the Debtors have not been particularly co-operative in KSV's efforts to identify and attach assets. Mr. Hussain and Mr. Kodwavi failed to attend at a number of appointments for examinations in aid of execution, and when they finally did attend, did so without bringing any documentation (despite being directed to do so in the Notice of Examination). They have also failed to provide answers to undertakings that they gave in that setting. It was during the examinations in aid of execution that KSV determined, despite Mr. Hussain's affidavit evidence that the Collateral Properties are "currently occupied by Mr. Kodwavi and my families" that that was, with the exception of one property (the Longshore Property), not the case.

[31] KSV had of course registered writs of seizure and sale against the Debtors in various jurisdictions in Ontario. KSV agreed to temporarily lift some or all of those writs to permit the Debtors to make payment of the settlement confirmed in May of 2023, but once it became apparent that the Debtors would not be paying any amounts beyond the initial partial payment, KSV re-registered the various writs.

[32] For the most part, the Debtors do not contest this description of events.

Acknowledgement of Misappropriation

[33] In the materials, relative to the funds that admittedly were diverted from Sunrise Hwy 7 into the hands of individuals, which funds largely remain outstanding and unaccounted for, the Debtors at one point described Osborne J.'s finding about the diversion of funds as being a finding that the funds were "misallocated", a characterization with which the Lenders took umbrage.

[34] However, in his submissions, counsel for the Debtors fairly acknowledged that the apt description is "misappropriation" rather than "misallocation." He also fairly acknowledged that the asserted debts are owing and have largely not been repaid (and not repaid at all in the case of the Stayner Property and the Elmvale Property).

[35] While not engaging particularly with the complaints about his clients' non-co-operation with the execution process, he also did not deny that lack of co-operation.

[36] Rather, he purported to argue that all of that backdrop is "water under the bridge" and is not really germane to the currently pressing imperative, which is to determine the way forward that will maximize value for all concerned.

Justice Kimmel's February 21, 2024 Endorsement

[37] In terms of significant recent procedural history, the parties in the matter in relation to the Stayner Property were before Kimmel J. on February 21, 2024. Her Honour's endorsement on that date is instructive.

[38] At that time, AFC and Brexit were seeking to have a receiver appointed over the Stayner Property and the Collateral Properties.

[39] Justice Kimmel noted that AFC's receivership application relative to the Elmvale Property was also pending, at that point scheduled to proceed on February 28, 2024. Her Honour observed that "there are a number of bankruptcies and receiverships involving other affiliated Sunrise entities" and made specific mention of the Sunrise Hwy 7 proceedings, leading to the "December 20, 2022 judgment of Osborne J. that was granted against various Sunrise entities and Kodwavi and Hussain, with a finding of misappropriation."

[40] Justice Kimmel remarked, as I have, that "it is not disputed by the respondent Borrowers that the loan that is the subject of this application [the Stayner Loan] matured on June 1, 2023 and that they are in default." She continued "They are also in default of the Forbearance Agreement dated July 6, 2023."

[41] Her Honour found that "The Lenders have been patient and have granted the Borrowers many indulgences," that the "Lenders' security grants them a contractual right to appoint a receiver, and that in addition "Under the Forbearance Agreement, the Borrowers consented to the appointment of a receiver if there were further defaults."

[42] The Lenders submitted before Kimmel J. that they had "lost faith in the Borrowers and their ability to manage the situation," and highlighted various reasons why the immediate appointment of a receiver would be appropriate in the circumstances. They argued that they met the "just and convenient" test under s. 243 of the BIA and relevant case law.

[43] There was also discussion of the fact that the Debtors had had at least since June 1, 2023 to obtain refinancing or new investors, were given extra time to do so by way of the Forbearance Agreement, and that they nonetheless provided no evidence of the Debtors making any progress on those fronts, nor that "they have any ability to do so."

[44] In response to the proposed receivership, the Debtors filed materials, including an affidavit from Mr. Hussain, asserting that in the circumstances, an Order bringing the matters, collectively, under the CCAA would be preferable and would better maximize the value for all concerned.

[45] Justice Kimmel described the contents of Mr. Hussain's affidavit before her as "aspirational", and in her endorsement implicitly analogized the circumstances before her to Penny J.'s endorsement in *1180554 Ontario Limited v. CBJ Developments Inc. et al*, in which His Honour had labelled the basis for an adjournment request before him as "nothing more than a wing and a prayer."

[46] However, Kimmel J., while acknowledging that "the Lenders are not wrong to be skeptical about whether the Borrowers will be able to come up with a concrete plan," found that there was "not obvious immediate prejudice to the Lenders in affording the Borrowers this brief further adjournment to allow them to deliver their CCAA Application material and make their arguments so that the question of the appropriate manner of proceeding can be decided with the benefit of their CCAA Application material before the Court."

[47] Justice Kimmel also expressed the view that "While it remains to be seen whether the Borrowers can put together a CCAA package that makes sense and accomplishes what they aspire to, the court sees some advantage to one judge hearing both this receivership application, the receivership application involving Sunrise (Elmvale) and the CCAA application at the same time."

[48] All of Kimmel J.'s comments are supported in the record, and factor into the analysis required by the caselaw, discussed in more detail below.

[49] Against that backdrop, the matters – and all interested parties – came before me on February 29, 2024.

Agreement That the Threshold Requirements for Either Receiverships or CCAA Met

[50] I should note at the outset that the Debtors do not contest the appropriateness of receiverships in the event that I find that route is preferable to the CCAA here. That is, the Debtors acknowledge that they are insolvent and in default in each proceeding, that the evidence in the record satisfies the requirement that a receivership is "just and convenient", and they confirm that AFC and Brexit are entitled, under their security in each

case, to the appointment of a receiver. Even more specifically, the Debtors' counsel advised at the outset that the Debtors consent, should I find a receivership to be the preferable approach, to a receivership Order (and indeed counsel made submissions about a couple of items that the Debtors say should be included in the receivership Order if that is the result).

[51] However, the Debtors argue that in the circumstances, an Order under the CCAA is preferable, in a number of ways, to the receiverships sought by the Lenders.

[52] At the outset of the argument, I advised all counsel that I had formed the view from the materials that the technical threshold requirements for either receiverships or a protective Order under the CCAA were met.

[53] In other words, focusing on the CCAA criteria, I was satisfied that each of the Sunrise Entities is a "debtor company" as defined in the CCAA, meeting the definition of an "insolvent person" under the BIA (which has been adopted for purposes of CCAA proceedings), with a place of business in Ontario, and with a total indebtedness in excess of $5 million.

[54] No party took issue with these preliminary observations, and the argument turned to an application of the growing body of case law - regarding the choice between receivership and CCAA protection – to the facts at hand.

Initial Problem for the Debtors – No Progress on a Plan

[55] A significant shortcoming for the Debtors' position is that, notwithstanding Kimmel J.'s admonition that the Debtors would have to "put together a CCAA package that makes sense and accomplishes what they aspire to", the Debtors came before me with no concrete plan whatsoever.

[56] Counsel for the Debtors said that the "plan" is to establish a Sales and Investment Solicitation process (a "SISP") to be presented at a Comeback hearing in 10 days. He also explained that, inasmuch as the Debtors have expressed a willingness to engage - as the monitor for purposes of the intended CCAA proceedings - the same person whom AFC/Brexit propose as the receiver for one of the matters, and given the uncertainty and attendant awkwardness about that person's role going forward, the Debtors have not yet been able to have a meaningful discussion with their proposed monitor about the relevant details of the plan including the SISP.

[57] Accordingly, there is really nothing concrete, or really any elements of a plan at all before me, and so the Debtors' proposal remains aspirational.

[58] That is not to say that I would have expected an elaborate or close-to-final plan to be presented before me. I understand and accept that there was only so much that could have been done between February 21 and February 29, 2024, particularly given the limited meaningful access that the Debtors had with their would-be monitor during that interim period.

[59] On the other hand, I also find that it is reasonable to have expected the Debtors to show up on February 29 with even a modicum of flesh on the bones. They knew from the Lenders' position before Kimmel J. that whatever proposal they showed up with would be carefully scrutinized.

[60] It was suggested in argument by the Lenders, and I agree, that one might have expected at least some evidence that the Debtors had approached and not been rebuffed out of hand by potential investors, or even just a list of players within the industry to be approached in the proposed SISP process. The Debtors did

none of that and saying that a SISP will be developed in time for a comeback hearing 10 days down the road effectively amounts to saying that nothing has yet been done.

[61] Consistent with this lack of a plan, the Debtors' materials, and their counsel's submissions, were replete with references to the "possibility" that a SISP might lead to enhanced creditor recovery. In my view, given the history of this matter, the Lenders had the right to expect something more tangible.

Overarching Observations About Relevant Cases in Real Estate Development Context

[62] Apart from this significant threshold problem, the situation in this case also fits better in other respects with the cases in which receiverships have been chosen rather than a CCAA Order.

[63] I should note at the outset of this discussion that it is no longer the case that there is or should be any presumption that, when it comes to real property, a receivership will inevitably be the preferred choice over a CCAA proceeding.

[64] In a very helpful article: "Receivership versus CCAA in Real Property Development; Constructing a Framework for Analysis" (2020 CanLIIDocs 3602), Opolsky et al. confirm that, when it comes to choosing receivership over CCAA in the real estate context, "this is not the legal rule; there is nothing barring a CCAA proceeding for a real estate development company or other real property-centric company. Nor is it absolute: there are examples of a CCAA being granted instead of a receivership."

[65] The article goes on to acknowledge that, notwithstanding that it is not a "legal rule" it is nonetheless the case that "in a significant majority of [real estate] cases, secured creditors' receivership applications will be granted instead of competing debtors' CCAA applications."

[66] In discussing the reasons why, despite the continuously increasing recognition of the CCAA as a flexible and helpful mechanism for preserving assets and restructuring insolvent entities, and even, increasingly, for facilitating liquidations, receiverships are more often granted in the real estate development context than CCAA orders, the authors identify factors in recent cases that incline courts in that direction.

Reliance on Koehnen J.'s Decision in The Clover on Yonge

[67] In particular, by way of a recent illustrative example, the authors focus on Koehnen J.'s decision in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, 78 CBR (6th) 299.

[68] The Lenders also rely on *The Clover on Yonge*, and aptly describe it as a case that not only synthesizes and discusses various important considerations in choosing between receivership and CCAA in the real estate development setting, but which shares many evidentiary similarities with the case at hand.

Relevant Considerations Emerging from Previous Cases

[69] Before discussing the application of *The Clover on Yonge* to the facts before me, the Lenders identify, fairly in my view, a number of relevant factors arising from such cases as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 DLR (4th) 577, *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781, *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911, and *Octagon Properties Group Ltd.*, 2009 ABQB 500, 486 A.R. 296.

[70] These factors include:

(a) While CCAA can apply to companies whose sole business is a single land development, such companies do have difficulty proposing an arrangement or compromise acceptable to secured creditors;
(b) The priorities of security are often straightforward and there is little incentive for secured creditors having greater priority to agree to an arrangement that involves money being paid to more "junior creditors." (And on this parameter, the Lenders note that in this case even the "junior creditors" oppose the relief sought by the Debtors);
(c) If a developer is insolvent and not able to complete a development "without further funding, the secured creditors may feel that they will be in a better position by exercising the remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or a DIP financing; and
(d) Where a mortgagor has provided an express "covenant" agreeing to the appointment of a receiver, the Court "should not ordinarily interfere with the contract between the parties."

Application of Relevant Factors by Koehnen J. in The Clover on Yonge

[71] Against the backdrop of these and other factors arising in the cases comparing receiverships to CCAA protection, Koehnen J. summarized, in *The Clover on Yonge*, the law and issues bearing on the choice. His Honour wrote:

1. Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements;
2. The relief becomes even less extraordinary when dealing with a default under a mortgage;
3. The court should consider factors as set out by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 at para 20:

    (a) the lenders' security is at risk of deteriorating;
    (b) There is a need to stabilize and preserve the debtors' business;
    (c) Loss of confidence in the debtors' management; and
    (d) Positions and interests of other creditors.

4. In choosing between receivership or CCAA process, the court must balance the competing interests of various stakeholders to determine which process is more appropriate; and
5. The factors to be considered are:

    (a) Payment of the receivership applicants;
    (b) Reputational damage;
    (c) Preservation of employment;
    (d) Speed of the process;
    (e) Protection of all stakeholders;
    (f) cost;
    (g) nature of the business.

Argument re Application of Case Law to the Matter

[72] Applying these factors to the case at hand, the Lenders first argue that there is no doubt that their security is at risk of deteriorating, inasmuch as interest continues to accrue, at significant rates, on a daily basis, and defaults continue, with no servicing of the debts and evidence, by way of construction liens being registered on title, that trades are not being paid.

[73] The Lenders argue that there is also no dispute about the need to stabilize the business, and that, given the need to avoid leaving the "foxes in the henhouse" (discussed a bit more below) a receivership will achieve more stability than a CCAA order.

[74] The Lenders place particular emphasis on their loss of confidence in the Debtors' management. The Lenders say that in fact, having regard to past and ongoing irregularities, they have lost complete confidence in management. They point in particular to the Debtors' mismanagement and a specific judicial finding of misappropriation by the Debtors' principals. The Lenders also allege irregularities in recent financial statements produced by the Debtors, suggesting that still more funds are unaccounted for. To allow management to remain in place, they say, would be akin to leaving proverbial "foxes in the henhouse." They also rely on their contractual rights to appoint receivers and note the disappointing absence of any concrete plan by the Debtors (even in the face of the need, confirmed by Kimmel J. about a week before the attendance before me, for some evidence that the Debtors have some semblance of a plausible way forward).

[75] Turning to the seven factors articulated by Koehnen J., the Lenders reiterate that the Debtors have known for many months that the mortgages at issue would mature and have had ample opportunity to refinance during the forbearance period, and even for several months after the forbearance had expired. Despite this opportunity, the Lenders assert, the Debtors have still come to court with nothing more than continued aspirations (and no evidence of potential financing, or even potential financiers).

[76] With respect to potential reputational damage, the Lenders note Koehnen J.'s conclusion in *The Clover on Yonge* that "in the circumstances of this case, that is irrelevant. Any reputational damage to [the debtor] is of its own making. Similarly here, the Lenders argue, given the earlier findings of misappropriation, previous receiverships and bankruptcies, given the Sunrise Group's ongoing lack of transparency and cooperation, and given additional irregularities that the Lenders allege appear in recent financial statements of the Debtors, any reputational damage to the Debtors is "of their own making."

[77] The Lenders also note (and the Debtors concede) that there is no evidence in this case of any employees whose employment will be at risk if a receivership is granted rather than CCAA protection.

[78] They also argue that, in terms of the speed of the competing proposed processes, it would be preferable "to have a receiver acting as an officer of the Court who can act without being hamstrung by closing a transaction that favours equity over creditors" and that "CCAA proceedings are inherently expensive," requiring as they do "regular court attendances, probably with greater frequency than a receivership does."

[79] Finally, the Lenders rely on jurisprudence relating to single-use land development companies showing that "Courts are inclined against using CCAA proceedings for single purpose land development companies." The Lenders astutely acknowledge that "this is not as a result of them being single purpose land use companies, but rather "they turn on the nature of the security and the position of a security holder with respect to a CCAA proceeding." On this point, they again rely on Koehnen J.'s findings (in *The Clover on Yonge*) as follows:

"In a much quoted paragraph from *Cliffs Over Maple Bay*, the British Columbia Court of Appeal stated at paragraph 36

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing requirements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining financing, capital injection by a new partner of DIP financing…..Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors….In the case at hand, where the breakdown in the relationship was caused by persistent and deliberate wrongdoing by the debtor, where there were no significant differences to the outcome to other stakeholders between a receivership or a CCAA proceeding, and where there were no material employment concerns, three was no reason to restrain the exercise of the Receivership Applicants' contractual rights."

Key Considerations and Findings

[80] I find that many of these same factors have direct application to the situation before me. Distilling and applying some of the key considerations, I note as follows:

(a) the Lenders have clear and uncontested rights, under various of their security instruments, to appoint receivers;
(b) in terms of other stakeholder, there is not a single person or entity who expresses support for the Debtors' proposed CCAA protection. In fact, all stakeholders who have expressed a view strongly favour receiverships;
(c) the Lenders have a legitimate evidentiary basis for their avowed lack of confidence in the Debtors' management. There are uncontested findings of past misappropriation, more recent concerns the Lenders see arising in the Debtors' recent financial statements, and an abiding lack of cooperation and transparency on the part of the Debtors and their principals;
(d) while in general there is ostensible appeal to the notion that appointing a single monitor rather than two receivers should yield costs savings, here the Lenders assert, fairly in my view, that the Stayner Property and the Elmvale Property are very different projects giving rise to the need for independent analysis and decision-making for each of them. As such, the Lenders argue, the notional savings associated with having a single monitor rather than two receivers will prove illusory, inasmuch as two separate and independent exercises will be required, meaning that there will be no economies of scale or other efficiencies readily achieved;

(e) although the Debtors propose to imbue the monitor with "super monitor" powers, it seems evident that nonetheless the Debtors, and their principals, envision retaining a role in the CCAA proceedings they seek. The Lenders' level of distrust is such (and reasonably so in my view) that proposing "super powers" for the monitor does not entirely allay these concerns in the way that appointing receivers will;
(f) the priorities here, and the Lenders' strong preference simply to realize on their security in accordance with those priorities, is reasonable when compared to a SISP process which, although as yet undefined, will inevitably forestall to some extent the Lenders' recovery, and may well lead to payments to more junior creditors – in the fashion described in the caselaw – before the Lenders are fully paid out; and
(g) this concern is particularly apt and pronounced, in circumstances in which, as stated at the outset, the Debtors have come back to court before me with nothing more than aspirations.

Receiverships Granted

[81] For all of these reasons, and others set out in the review of the caselaw set out above, I am granting the receiverships sought by the Lenders relative to the Stayner Property and the Elmvale Property respectively.

Debtors' Requests Concerning Certain Contents of Receivership Orders

[82] Counsel for the Sunrise entities asked, in the event I would order receiverships, that I make allowances for a couple of factors.

[83] First, since the evidence shows that one of the principals (Mr. Hussain) and his family are living at the Longshore Property, the Debtors asked that I carve that property out of the potential set of assets to be used by the Lenders to recover the debts. Alternatively, counsel asked that there be a "staging" of recovery, and that resort to the Longshore Property not be taken unless and until there is a demonstrated shortfall from the realizations of other assets.

[84] The Lenders fairly point out that the Longshore Property is among the Collateral Properties offered by the Debtors as security for the Stayner Loan and should not be excluded from resort by the Lenders if necessary. That said, the Lenders expressed a willingness to resort to the Longshore Property last in sequence, and only in the event of an evident shortfall. I find that this is an entirely reasonable position, and that this can be addressed in the fullness of the Stayner receivership.

[85] The Debtors also asked that I provide them with a period within which they should be entitled to redeem the debts on the Stayner and Elmvale Properties, in priority to other proposed realizations, and they asked that they be given until June 15, 2024, or at least until May 15, 2024.

[86] While it may well prove to be the case that, as a practical matter the Debtors will have an opportunity to redeem until those dates (because the properties may not be sold before then) I decline to build in a specific protected priority for the Debtors beyond whatever ordinary right or ability they may have to redeem. As noted, the Debtors have had ample time and opportunity to source financing and repay the debts, and I see no benefit in giving them yet more time to do so. Again, as a practical matter if they can source financing, it may prove to be the case that the Debtors will have an opportunity to redeem before other sales are made, but to put it bluntly they have not earned the right to additional protection for their potential redemption.

Costs

[87] The Lenders are entitled, as the successful parties here, to their costs of these motions. No costs outlines were uploaded before me, and I have no insight into how the labour was divided among the Lenders in terms of preparing the written and oral submissions. I direct the parties to discuss the costs issue and to propose both the amount of costs and a proposed allocation.

[88] In the event that the parties cannot agree on costs, I can be spoken to.

Black J.