CITATION: 1599285 Ontario Ltd. et al. v 1000195736 Ontario Ltd. et al.
Re Plan of Arrangement and Compromise of 1000195736 Ontario Ltd. et al.
2024 ONSC 3847
COURT FILE NOS.: CV-24-00716381-00CL and **CV-**24-00722697-00CL
DATE: 20240705

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

BETWEEN:

1599285 ONTARIO LIMITED, RICK BERWICK, 2702749 ONTARIO INC., PETER ADAMO, CROCETTA ADAMO, ANJAY LIMITED, A-ONE AUTO INVESTMENTS INC., CINZIA SORRENTI, ELCRM HOLDINGS INC., SERGIO MOLELLA, DONALD IERFINO, PIERINA PIZZARDI, PIZZARDI INVESTMENTS, AMOND MANAGEMENT INC., SALISI INVESTMENTS LTD., LORENZO ANTONINI, CARMEN ANTONINI, TINA BETTI, ANTHONY BONDI, GIUSEPPA BONDI, C.P.M.C MARQUEZ HOLDINGS INC., FREDY ROSSI, 2438747 ONTARIO LIMITED, 2205633 ONTARIO LIMITED, 1620375 ONTARIO LIMITED, 1288601 ONTARIO LIMITED, AMSTEL MANUFACTURING (1993) INC., BRUCE MCKINLAY, M ANTONINI HOLDINGS INC., GABRIELE PIZZARDI, IMPERIO SA HOLDINGS INC., RONALD CHEMIJ, MARY CHEMIJ, TERRY CHEMIJ, LUBA CHEMIJ, and TAXMART INC.

Applicants

AND:

1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., and MORGIS CORPORATION

Respondents

-AND-

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF 1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., AND MORGIS CORPORATION

BEFORE: Cavanagh J.

COUNSEL: *Sarah Mosadeq and Ian Cantor* for Applicants in the receivership application (CV-24-00716381-00CL)

Jason Wadden and Shimon Sherrington, for the Respondents in the receivership application (CV-24-00716381-00CL) and Applicants in the *CCAA* application (CV-24-00722697-00CL)

Chris Burr for PricewaterhouseCoopers Inc. in its capacity as proposed Monitor in the CCAA application

HEARD: June 25, 2024

ENDORSEMENT

Introduction

[1] There are two applications before me that were heard together.

[2] In the first application, the applicants (the "Lenders") seek an order appointing TDB Restructuring Limited ("TDB") as the receiver ("Receiver"), without security, of the real property described in the proposed receivership order (the "Real Property") and all the assets and undertakings of 1000195736 Ontario Ltd. ("736 Ontario"), 1000193772 Ontario Ltd. ("772 Ontario") and Morgis Corporation (collectively, the "Debtors").

[3] In the second application, the Debtors make application pursuant to the *Companies' Creditors Arrangement Act*, as amended (the "*CCAA*"). At this hearing, they seek an initial order that, among other things:

a. declares that the Debtors are debtor companies to which the *CCAA* applies;

b. approves the proposed monitor as Monitor of the debtors;

c. stays, for an initial period of not more than 10 days until the comeback hearing date, all proceedings and remedies taken or that might be taken in respect of the Debtors, the proposed Monitor and other persons;

d. grants a first ranking Administration Charge against the Real Property as security for the payment of professional fees and disbursements incurred and to be incurred by the proposed Monitor, its counsel and counsel to the Debtors ranking in priority to all other security interests, trusts, liens, charges and encumbrances in favour of any person; and

e. directs a comeback hearing on a date to be scheduled by the Court that is no more than 10 days after the date of the Initial Order.

[4] For the following reasons, I allow the receivership application and I dismiss the *CCAA* application.

Background facts

[5] The Lenders are Ontario corporations and individual Ontario residents. The Debtors are Ontario corporations. The Debtors are controlled by Chris Morgis.

[6] Three loans were made by certain of the Lenders to certain of the Debtors in the amounts of $15,500,000, $33,000,000 and $4,500,000. These amounts total $53,000,000. These loans were secured by, among other security, charges over certain real property (the "Real Property").

[7] The Real Property consists of four adjacent parcels along Eglinton Avenue West, Toronto, Ontario:

a. 350 Eglinton Avenue West, Toronto (Parcel 1);

b. 356 Eglinton Avenue West, Toronto (Parcel 2);

c. 366 Eglinton Avenue West, Toronto (Parcel 3); and

d. 368, 378 Eglinton Avenue West, Toronto (Parcel 4).

[8] Morgis Corporation is the registered owner of Parcel 1 and Parcel 2. 772 Ontario is the registered owner of Parcel 3. 736 Ontario is the registered owner of Parcel 4.

[9] The Real Property was intended for a redevelopment project consisting of a 10-story mixed-use residential building with a retail component on the ground floor (the "Project"). The Project is in the pre-construction, development phase.

[10] The loan in the amount of $15,500,000 was made by applicants described in the materials as the "Loan 1 Lenders" to Morgis Corporation as borrower. This loan was secured by, among other things, a general security agreement, a general assignment of rents and a first ranking charge on Parcel 1 and Parcel 2.

[11] The loan in the amount of $33,000,000 was made by applicants described in the materials as "Loan 2 Lenders" to the Debtors as borrowers. This loan was secured by, among other things, a general security agreement, a general assignment of rents, a first ranking charge on Parcel 3 and a first ranking charge on Parcel 4. This loan was also registered as a second ranking charge on Parcel 1 and Parcel 2.

[12] The $4.5 million loan was made by applicants described in the materials as "Loan 3 Lenders" to Morgis Corporation and 736 Ontario as borrowers. This loan was secured by, among other things, a general security agreement, a general assignment of rents and third ranking charge on Parcel 1 and Parcel 2 and a second ranking charge on Parcel 3 and Parcel 4.

[13] Mr. Morgis guaranteed all of the obligations of the Debtors under these loans.

[14] The loans were originally due to mature on September 1, 2023. The loans were extended three times at the request of the Debtors with a final maturity date of February 1, 2024.

[15] The Debtors failed to repay the loans when they matured on February 1, 2024.

[16] On February 5, 2024, the Lenders issued demand letters and Notices of Intention to Enforce Security in accordance with section 244 of the *Bankruptcy and Insolvency Act*. The Debtors acknowledge that they are in default of the loans.

[17] Pursuant to the terms of the loans and security documents, upon an event of default that has not been cured, the Lenders are entitled to appoint a receiver in writing and/or make an application for the court-appointment of a receiver of the property, assets and undertakings of the Debtors.

[18] TBD is a licensed insolvency trustee and has consented to be appointed as Receiver, without security, of the Real Property.

[19] The Debtors commenced the *CCAA* application in response to the Lenders receivership application.

[20] The Debtors seek protection under the *CCAA*. In their application materials, the Debtors assert that this protection is needed because the Lenders, who were to be the lenders at least until construction, "pulled out of the Project". The Debtors contend that this has left them to obtain replacement financing at a time when the development financing market is experiencing extraordinary dislocation, making the re-financing process take longer than expected. The Debtors' assertions that the Lenders advised or represented that they intended to act as ongoing partners of the Debtors are denied by the Lenders in their responding evidence. The Lenders rely on the written terms of the various agreements.

[21] The Debtors rely on a commitment letter which, they say, is expected to close on or before August 31, 2024. They say that they have a number of other refinancing alternatives that they are working on to respond to the changes in the development financing market.

Analysis

[22] The issue on these applications is whether relief should be granted pursuant to the *CCAA* instead of an order appointing TDB as Receiver.

[23] The Lenders seek the appointment of a receiver in accordance with subsection 243(1) of the *BIA* and section 101 of the *Courts of Justice Act*. Subsection 243(1) of the *BIA* provides that, on application by a secured creditor, a court may appoint a receiver when it is "just or convenient" to do so. Similarly, section 101(1) of the *CJA* provides for the appointment of a receiver where it is "just or convenient".

[24] In determining whether it is just or convenient to appoint a receiver, the Court must consider all the circumstances including, in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently. Where the secured creditor has a contractual right to appoint a receiver, it is not essential that it establish that it will suffer irreparable harm if a receiver-manager is not appointed. See *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258, at para. 10; *Elleway Acquisitions Ltd. v. Cruise Professional Ltd.*, 2013 ONSC 6866, at para. 27.

[25] When dealing with a secured creditor who has the right to appoint a receiver under its security arrangements, the extraordinary nature of the remedy is significantly reduced. See *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, at para. 43.

[26] In *Romspen Investment Corporation v. 6711162 Canada Inc*., 2014 ONSC 2781, Brown J., as he then was, at para. 61, observed that both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests among the various economic stakeholders. Brown J. noted that as a result, the specific factors taken into account by a court are very circumstance-oriented.

[27] In *BCIMC*, there was an application for the appointment of a receiver and an application for protection under the *CCAA*. The application judge granted the application for the appointment of a receiver and dismissed the application for protection under the *CCAA*. The application judge addressed the argument concerning whether a *CCAA* proceeding is available for a single-purpose land development company and held that the case law does not demonstrate a rule or inclination one way or another, rather, the nature of the business and its particular circumstances are factors to take into account in every case when considering whether a *CCAA* proceeding is appropriate.

[28] In *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc.* (CV-23-00710361-00CL; CV-24-00713287-00CL; and CV-24-00715345-00CL) an endorsement released on February 29, 2024, Black J., at para. 70, cited a number of factors that emerge from the jurisprudence where a court considers competing applications for *CCAA* protection and for a receivership order which 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 financing, 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."

[29] The Debtors submit that their *CCAA* application should be granted based on several relevant factors:

a. They say that the evidence shows that there is ample equity in the Real Property to satisfy the indebtedness owed to the Lenders and, therefore, there is no practical prejudice to the Lenders in proceeding with a *CCAA* process.

b. There is no reasonable or objective basis to conclude that the Lenders have lost faith in Mr. Morgis or the Debtors to continue to manage the Projects in a *CCAA* proceeding.

c. The Debtors contend that the Caerphilly letter agreement (addressed below) is evidence of a viable financial commitment that promises to pay out the Lenders' mortgages, leaving ample equity in the Project to allow for the possibility of additional lenders. The Debtors acknowledge that in cases where courts are unconvinced about the viability of the *CCAA* process, receiverships have been granted.

d. The Debtors submit that, in contrast to the proposed viable *CCAA* process, a receivership threatens to destroy significant value created during the life of the Project because additional transactions will not be able to close under a receivership nor will ongoing development work be completed.

e. The Debtors have direct stakeholders including services providers and contractors who will benefit from completion of the Project by the Debtors under *CCAA* protection, and the Project has numerous community stakeholders based on the Debtors' promise to revitalize an underdeveloped part of the City.

f. The Debtors are doing everything possible to pay out the Lenders' mortgages at the earliest opportunity while still funding and advancing the Project through the zoning and approval process.

[30] The availability of a viable financing commitment that, if completed, will pay out the Lenders' mortgages is a key feature of the Debtors' *CCAA* application and one upon which they rely as showing that the *CCAA* process is viable and preferable.

[31] The Debtors rely on evidence of a letter dated June 13, 2024 from Caerphilly Capital Ltd. ("Caerphilly") to Morgis Corporation advising of its preparedness, on the basis of information provided, to offer a first mortgage loan in the principal amount of up to CAD $75 million (subject to receipt of the full "Deposit Fund" (as defined)) and conditional upon the terms and conditions stated in the letter. The letter states that the loan shall be made available on or before November 30, 2024. This letter replaced an earlier letter from Caerphilly dated May 3, 2024.

[32] The June 13, 2024 Caerphilly letter states that as security for the proposed loan and as a pre-condition precedent to funding, the Borrowers (the Debtors) will be required to provide the aggregate amount of $12 million to be held in a Lender designated interest-bearing GIC with $10.6 million to be provided on or before June 14, 2024 and a further $1.4 million on or before July 14, 2024. The letter states that the Borrowers shall pay an initial evaluation fee in the amount of $247,000 of which $215,000 shall be deemed fully earned and payable to Caerphilly upon execution of the letter agreement. The letter states, in a separate paragraph, that a commitment fee in the sum of $1.4 million is to be paid prior to June 14, 2024. The May 3, 2024 letter required a deposit of $12 million and an additional commitment fee of $1.4 million before May 15, 2024

[33] The June 13, 2024 letter states other conditions precedent including completion of Caerphilly's financial and legal due diligence and receipt of and satisfaction with an appraisal of the Lands confirming that the lands have an "as-is" fair market value of not less than a specified amount.

[34] The terms of the letter were accepted by the Debtors on June 13, 2024.

[35] In his affidavit affirmed June 23, 2024, Mr. Morgis states that the outside funding date under the Caerphilly letter was accelerated to September 30, 2024 and that the loan transaction is expected to close before September 30, 2024. Mr. Morgis appends as an exhibit to his affidavit an email from Charles Yang of Caerphilly to Steve Fabian of Morgis Corporation. The email states that the timeline for the loan transaction is conditional upon "TD accounts opened for both Chris and Investor by June 28, 2024 - $10.6M Deposit and $1.4M Commitment Fee deposit into Investor's TD GIC account". The email states that the "lender fee" of $215,000 was received on June 17, 2024.

[36] With respect to the fee of $10,600,000 (a portion of the $12 million fee), Mr. Morgis deposes:

> Caerphilly and Morgis Corp. have agreed to push back the deadline for the delivery or provision of this item closer to the funding date (likely until sometime next month) to help manage

> Morgis Corp.'s cash flow position. Morgis Corp. has been and will continue to work to satisfy this condition by arranging for funds to satisfy the deposit. To this end, Caerphilly has put Morgis Corp in touch with numerous entities who would be willing to act as Deposit Holder and Morgis Corp. has started the process of engaging with these entities to open these investment accounts. The deposit is not a current gating item to the progress of the closing of the Caerphilly Commitment, and Morgis Corp. and Caerphilly are fully aligned that the deposit will be paid at the appropriate time prior to closing. It is anticipated that the funding for the deposit will be pledged against my personal assets or other assets within the broad Morgis Group of companies, rather than collateral from the Eglinton Project Entities.

[37] Mr. Morgis deposes that the anticipated funding date for the Caerphilly Commitment continues to draw into sharper focus and is still expected to close by the end of August 2024.

[38] On May 16, 2024, before the revised Caerphilly letter was issued, the Lenders, through their counsel, asked counsel for the Debtors whether the Debtors had paid the required deposit and commitment fee under the Caerphilly letter agreement that were to be paid by May 15, 2024. In response, counsel for the Debtors advised that his clients had paid the commitment fee ($1.4 million) that was due to Caerphilly and have discussed the $12 million amount with Caerphilly and they are in agreement that the amount will not be paid until closer to the funding date. No supporting documents were provided. In fact, the commitment fee of $1.4 million was not paid by the Debtors. The only amount paid by the Debtors to Caerphilly was $215,000 representing the fully earned portion of the initial evaluation fee.

[39] The Debtors have had a considerable period of time, since May 30, 2023, to make arrangements to refinance the Project, and they have been unsuccessful. The Lenders have loans in default totalling $53 million and monthly interest in the amount of approximately $464,791.67 continues to accrue. I do not regard the Caerphilly letter agreement as a firm commitment to provide financing in the amount of $75 million, or in any amount. The proposal for financing is highly conditional. There is no evidence from Caerphilly confirming that the proposal in the Caerphilly letter is still available or confirming that Caerphilly has agreed to vary the conditions in the letter agreement concerning the commitment fee and the deposit. There is no evidence that the required appraisal has been provided. There is no evidence of the source for funding payment of the fees needed to fulfill the conditions in the Caerphilly letter, if an oral extension was given. Completion of the Caerphilly refinancing is, on the evidence before me, highly speculative.

[40] I am not satisfied that the Debtors have shown that they have a viable financial commitment to pay out the Lenders' mortgages.

[41] The Lenders' evidence is that they have lost confidence in Mr. Morgis and the Debtors. They cite the continuing failure of the Debtors to remit any monthly payments of interest for almost nine months. They point to an apparent decline in the equity in the Real Property because two appraisals by the same appraiser show a decline in value from the first appraisal. At the hearing of these applications, the Lenders also relied on evidence of what they characterize as a false statement made to them that the $1.4 million commitment fee in relation to the proposed Caerphilly refinancing was paid.

[42] I accept that the Lenders have lost confidence in the Debtors, in part, because of the incorrect statement made to the Lenders about payment of the commitment fee to Caerphilly, a very material fact. If the lenders cannot trust the Debtors to be honest about this fact, they should not be expected to rely on the Debtors to oversee a sale process for the Real Property, even under the supervision of the proposed Monitor.

[43] In support of their submission that a *CCAA* process is preferable to a receivership, the Debtors rely on Mr. Morgis' evidence that if the Caerphilly Commitment does not close by September 30, 2024, the Debtors will bring a motion on October 2, 2024 for an Order approving and implementing a "dual-track SISP" that will implement both a sales process and a process to search for an alternative refinancing arrangement. He deposes that the terms of the SISP will be developed with the assistance of the proposed Monitor (if appointed) and that the Lenders will be consulted with respect to the SISP. Mr. Morgis deposes that if a SISP is necessary, it will be run by the proposed Monitor. Mr. Morgis deposes that if the Caerphilly Commitment collapses prior to September 30, 2024, the Debtors will return to Court within two weeks (or as soon thereafter as possible) to have the SISP approved.

[44] The Debtors' proposal amounts, in substance, to a request for additional time to complete arrangements to refinance the indebtedness owed to the Lenders, either from Caerphilly or, failing that, from another lender. Failing successful refinancing, the Debtors propose a SISP directed by the proposed Monitor which will involve a sale process and a parallel search for alternative financing.

[45] I am not satisfied that a sale process under the *CCAA* will be more efficient or less costly than a receivership.

[46] The Debtors cite *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 as an example of a case where the court concluded that a *CCAA* proceeding was preferable to a receivership. In *Pacific Shores*, the application judge, against the opposition of two secured creditors (whose arguments were not fully heard initially because of time constraints), granted an initial order under the *CCAA* including an interim stay of proceedings and a nominal administration charge. The developments were resort properties around B.C. and the business of the applicant group included sales of vacation ownership products, sales of deeded ownership products, and management of those interests. One of the secured

creditors applied to appoint a receiver over the security it held relating to one of the developments. At the comeback hearing, the application judge addressed the secured creditors' argument that a *CCAA* proceeding is not appropriate in respect of the resorts because they are real estate developments. The application judge cited other B.C. cases that had considered this issue and held that they were distinguishable because, in those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner. The application judge considered the fact that in the case before her, there was an active business being carried on within a complicated corporate group to be a factor that distinguished other cases involving undeveloped land. The application judge rejected the submission of the two secured creditors that their main security be released from the proceedings and that other businesses and properties remain within the *CCAA* proceedings.

[47] In my view, the circumstances in *Pacific Shore* are materially different to those on the applications before me. In *Pacific Shore*, there was an active business being carried on within a complicated corporate group and many stakeholders in addition to the secured creditors. On the applications before me, although there are persons who would benefit from the proposed development of the Real Property and successful completion of the Project, the Debtors are not carrying on an active business, other than development of the Project, and the Debtors have no employees whose jobs are at stake. The main stakeholders are the Lenders.

[48] On the applications before me, the loans have been in default for many months without payment of interest. The Debtors have had a considerable period of time to arrange replacement financing, and they have been unsuccessful. The Lenders have the contractual right to appoint a receiver or seek a court-appointed receiver under their security. There is insufficient evidence to show that a refinancing in the near term is viable or likely. In these circumstances, there is no reason to restrain the Lenders from exercising their contractually negotiated remedy for default in payment of the Loans.

Disposition

[49] For these reasons, I grant the Lenders' application for the appointment of a receiver. I dismiss the Debtors' application.

[50] The Order to be issued is to be in form of Order appended as tab 3 to the Lenders' Application Record, with any minor revisions to clarify details in relation to the hearing. I ask counsel for the Lenders to provide me with an approved a copy of the Order to be signed, with any necessary revisions, through the Commercial List Office.

[51] If necessary, I may be spoken to about costs.

Cavanagh J.

Date: July 5, 2024