Court of Appeal File No.
Court File Nos.: CV-24-00716381-00CL
/ CV-24-00722697-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

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
(Respondents in Appeal)

– and –

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

Respondents
(Appellants)

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

AND

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

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

NOTICE OF MOTION
(STAY PENDING APPEAL)

THE APPELLANTS, 1000195736 Ontario Ltd., 1000193772 Ontario Ltd. and Morgis Corporation (the "**Appellants**") will make a motion to the Court of Appeal on a date to be set.

PROPOSED METHOD OF HEARING: The motion is to be heard:

☐ In writing under subrule 37.12.1 (1) because it is on consent of all parties;

☐ In writing as an opposed motion under subrule 37.12.1 (4);

☒ In person;

☐ By telephone conference;

☐ By video conference.

at the following location:

Zoom link to be provided at a later date.

THE MOTION IS FOR:

1. A stay of the Order made on July 5, 2024 (the "**Receivership Order**") by the Honourable Justice Cavanagh (the "**Application Judge**") of the Superior Court of Justice until the determination of Appellants' application for leave to appeal of the Receivership Order under *Bankruptcy and Insolvency Act* and the Application Judge's denial of creditor protection under the *Companies' Creditors and Arrangement Act* ("**CCAA**").

2. Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Background

3. The Appellants are developing an important community-building, multi-use development in mid-town Toronto on Eglinton Avenue near the intersection with Castle Knock Road (the "**Eglinton Project**" or the "**Project**"). The Project is in the pre-construction, development phase. The Appellant entities are in debt to the Respondents in the Appeal, which collectively form the Trilend group of lenders. The operating costs of the existing buildings are covered by current rent revenues.

4. The Application Judge heard two competing applications: (i) the Application below (the "**Receivership Application**") for the appointment of a receiver over the Appellants; and (ii) an Application by the Appellants for creditor protection under the CCAA (the "**CCAA Application**") to allow it a short period of time conclude a refinancing transaction with Caerphilly Capital Ltd. before September 30, 2024 that had already been negotiated, and if the refinancing transaction did not close by that date, then to immediately launch a Sales and Investment Solicitation Process ("**SISP**") run by the court-appointed Monitor to concurrently look for a buyer (as would occur in a receivership) and simultaneously look for other refinancing alternatives. The sales process under the SISP would occur along the same timeframes as the sales process under the receivership proceedings proposed by the Trilend group of lenders.

5. The Application Judge granted the Receivership Application. The Appellants filed a Notice of Appeal of the Receivership Order on June 15, 2024. The Appellants were advised the next day by the Respondents in the Appeal that they believed that leave to appeal was required. Without prejudice to the Appellants' position that leave to appeal was not required, on June 16, 2024, the Appellants filed a Notice of Motion

for leave to appeal of the Receivership Order. The Appellants also intend to file a Notice of Motion for leave to appeal of the Application Judge denying the CCAA Application within the 21-day appeal period under the CCAA.

6. Pursuant to the Receivership Order, TDB Restructuring Limited has been appointed receiver (the "**Receiver**") and has issued notices to the tenants of the Appellants of the properties comprising the Project that all rent should be directed to the Receiver rather than the Appellants.

7. The Appellants seek a stay of the Receivership Order pending a determination of the Court of the Appellants' appeals of the Receivership Order and the Application Judge's denial of the CCAA Application given that if a stay is not order pending the appeal, the Appellants will suffer irreparable harm in the interim and their rights may be permanently altered and the appeal rendered moot if the Receiver enters into a sale of the subject properties.

B. The Application Judge's Decision

8. As set forth in the Notice of Motion for Leave to Appeal of the Receivership Order and the Notice of Motion for Leave to Appeal for denial of the CCAA Application, the Appellants submit that the Application Judge erred in granting the Receivership Order in that he committed the following errors:

(a) Erred in principle and in law by applying the wrong legal test by deciding on a final basis whether or not he believed financing would close as opposed to considering whether there was a reasonable prospect that

the CCAA would provide the Appellants with the opportunity to restructure.

(b) Erred in principle and in law by failing to consider relevant legal factors that much be considered by a judge hearing competing CCAA and receivership applications. While the Application Judge cited the “just and convenient” test regarding the appointment of the receiver, he failed to consider and apply that test in the context of the multi-factorial considerations that have emerged from the jurisprudence with respect to competing CCAA and receivership applications that guide the consideration and exercise of any discretion in the “just and convenient” test.

(c) Erred in principle and in law by making a final finding, or a finding that had the effect of a final finding, regarding the prospects of the legitimacy or likelihood of refinancing closing when the uncontested evidence was that the refinancing was expected to be closed by September 30, 2024, or sooner, such that the request for protection under the CCAA was not open ended, but rather based on a concrete plan that showed that there was a germ of a plan, and the Applicant Judge erred discounting such uncontested evidence.

(d) Erred made making the palpable and over-riding error of fact by making a finding that there was no evidence from the prospective refinancing lender that the refinancing was still available, when in fact there was

recent written confirmation from the prospective refinancing lender confirming that all due diligence had been completed and that the refinancing was proceeding.

(e) Erred in principle and in law in exercising discretion by relying upon an irrelevant factor, being the amount of the deposit that was paid to refinancing lender, when there was uncontradicted evidence that the refinancing lender did not have an issue with the amounts that had been paid to date or the changes in the dates the payments had been made.

(f) Erred in law by misinterpreting and misapplying the legal test of "loss faith in management" as a criterion in granting the Receivership Order. That criterion addresses concerns regarding the debtor’s conduct in the management of the business. There was no evidence or allegation at the beginning of the proceedings about any loss of faith in management. The Applicants in the court below then attempted to backfill their position through plainly bald allegations about loss of faith in management devoid of any evidentiary grounding. After that, the Respondents made a belated allegation based on the irrelevant consideration regarding the amount of a deposit which had been paid to the refinancing lender, when there was uncontroverted evidence that the refinancing lender themselves had no issue with the amounts which had been paid to them.

(g) Failed to appreciate evidence and give any consideration to the relevant reasons regarding why obtaining refinancing took as long as it did and how the refinancing from a non-Canadian funder did not take long once that occurred.

(h) Failed to consider the relevant factor of to the uniqueness of the property at the issue and loss of value caused by the appointment of a receiver under the Receivership Order as opposed to the CCAA process.

(i) Failed to consider the relevant factor of to the fact that the CCAA process would not prejudice the secured creditor, as it contemplated the commencement of the sales process at the same time.

(j) Misapprehended the timing of when steps would begin to be taken to prepare for the sales process, finding that the SISP under the proposed CCAA proceeding would only start to be prepared upon a motion to be heard on or about October 2, 2024, such that the sales process would not actually be commenced until after that time, when in fact the Appellants' proposal under the CCAA was that the Monitor would begin taking steps immediately to prepare for the SISP. If the prospective refinancing does not close by August 30, 2024, such that the SISP could start immediately upon an order approving the SISP in the week following September 30, 2024, which was the same time frame that the

Applicants in the court below stated it would take a receiver to be ready to launch a sales process.

(k) Failed to consider that the proposed terms of the CCAA Order was that the costs of the CCAA would be subordinate to the Applicants' debt; and

(l) Failed to give consider the relevant factor that related companies and entities of the Appellants (collectively, the Morgis Group) are themselves a significant creditor and that their position is undermined by receivership as opposed to CCAA process because of loss of value over the entire assembly, and thereby failed to consider the relevant factor of the impact of the Receivership Order on the greater body of creditors.

(m) Failed to consider the relevant factor of the impact of the receivership as opposed to a CCAA on the greater community of stakeholders, including a women's shelter that is to be provided with a number of homes in the complex.

9. The Appellants also submit that the appeals raise an issue that is of general importance to the practice of bankruptcy and insolvency matters and administration of justice as a whole, and thus has importance beyond this case. The Court of Appeal has not had an opportunity to consider the factors and tests that Courts must keep in mind when considering competing CCAA and Receivership applications. These issues impact a large number of cases. In addition, the appointment of the Receiver

interferes and impacts that the right of a debtor or mortgagor to redeem the property, and therefore when a receivership order is made in respective of real property it impacts the future rights of the debtor mortgagor and raises issues of such importance that leave to appeal should be granted. Guidance from this Honourable Court on these issues is needed. It is therefore desirable that leave to appeal be granted.

C. The Appellants Meet the Test for a Stay Pending Appeal

10. The Appellants' proposed appeals of the Receivership Order and the Application Judge's denial of the CCAA Application satisfies the test for a stay pending appeal for the following reasons:

(a) There is a serious question to be determined regarding the errors noted above made by the Application Judge. These errors raise an issue of public importance that warrant granting leave to appeal, specifically, how competing receivership and CCAA applications should be treated.

(b) If the stay is not granted, the Appellants will suffer irreparable harm, including:

(i) The Receiver could enter into a sale of the properties thereby irreparably harming the Appellants' rights to restructure the properties or redeem the properties and thereby rendering the appeal moot and the Appellants' rights permanently altered without review by this Court.

(ii) Since rental revenues from the properties comprising the Project cover operating costs of the existing buildings, the redirection of these rental revenues to the Receiver will have severe negative impacts on the operations of these buildings and the operations of the Appellants and the tenants, and may permanently alter the priorities of charges on the properties.

(iii) Future steps taken by the Receiver may interfere with the Appellants' ability to perform its obligations under its existing contracts and ensure the viability of existing operations.

(iv) Future steps taken by the Receiver may prejudice the Appellants' suppliers, contractors, and stakeholders in the Eglinton Project, thereby increasing the costs and expenses associated with the completing the project without recourse to compensation from the Respondents.

(v) The Appellants are not likely to be able to recover amounts seized by the Respondents on the appeal without the Court's intervention and a stay of all further enforcement, as the Respondents are disparate individuals and companies, some with limited Canadian assets, making it difficult for the Appellants to recover any amounts that may later need to be returned to the Appellants.

(c) The balance of convenience favours a stay for the following reasons. The Respondents will be compensated for any delay by continuing

accrual of interest, they are over secured (the amounts owing from the Appellants to the Respondents in the appeal are fully secured, as the loan to value ratio is only approximately 55%), there is no evidence that the property is being impaired or wasted in the interim, and there is no issue about the Appellants ability to manage the properties. In contrast, the Appellants stand to lose the entirety of years worth of work and investment, along with all associated anticipated profits from the project; their rights regarding their properties may be permanent and irrevocably altered and taken from them; and their appeal may be rendered moot. Thus, whereas the Respondents will not have any of their legal rights altered if a stay is granted, the Appellants stand to lose all of their rights with respect to the properties if the stay is not granted.

11. As noted above, the Appellants have already served and filed materials in connection with the appeal of the Receivership Order and in the process of preparing materials seeking leave to appeal regarding the denial of the CCAA Application. The Appellants are moving expeditiously to appear before the Court of Appeal to have their appeals regarding the Receivership Application and CCAA Application heard at the earliest opportunity.

12. Rules 3.02, 37, 61.16, 63.01, 63.02 and 63.03 of the *Rules of Civil Procedure*, RRO 990, Reg 194;

13. Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

14. Section 13 of the CCAA, R.S.C. 1985, c. C-36*;* and

15. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The Affidavit of Christopher Morgis, to be affirmed; and

(b) such further and other evidence as counsel may advise and this Honourable Court may permit.

JURISDICTION OF A SINGLE JUDGE OF THE COURT OF APPEAL: Section 13 of the CCAA grants jurisdiction to a single judge to hear the appeal of a Notice of Motion for leave to appeal of a denial of a CCAA application. As the stay pending appeal is sought until the hearing of both the appeal of the granting of the Receivership Application and the denial of the CCAA Application, a single judge of this court should hear this Notice of Motion for stay pending appeal.

The time estimation for this oral argument is approximately 60 minutes.

July 26, 2024

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Court of Appeal File No.
Court File Nos. CV-24-00716381-00CL
/ CV-24-00722697-00CL

1000195736 ONTARIO LTD. ET AL. v. 1599285 ONTARIO LTD. ET AL.

Appellants Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

NOTICE OF MOTION
(STAY PENDING APPEAL)

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