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File: 20444-1086008

July 26, 2023

HAND DELIVERED

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Dear Presiding Justice:

Re: Business Development Bank of Canada v. Stone Brothers Plumbing & Heating Limited - Application to Appoint Receiver and Approval Sale of Real Property – August 16, 2023 at 9:30 a.m.

We represent the Applicant, Business Development Bank of Canada (“BDC”).

This is BDC’s brief in support of its application to appoint MNP Ltd. (“MNP”) as receiver of all of the assets, properties and undertakings of Stone Brothers Plumbing & Heating Limited (the “Company”) and approve the sale of the Company’s real property at 609 Keltic Drive, Coxheath, Nova Scotia, PID 4374300 (the “Real Property”) to 4374300 Nova Scotia Limited (“437”).

Filed in support of this application are the affidavits of Michelle Bursey, Senior Account Manager with BDC, J. Eric Findlay, Senior Vice President of MNP, and Marc Dunning, counsel to BDC.

I. Facts

The Company was incorporated in Nova Scotia and carried on a plumbing and heating service business.

In 2017, BDC advanced loans to 3298501 Nova Scotia Limited (“329”) totalling \$412,500 for the purpose of purchasing the shares of the Company (the “Loans”). The Company

guaranteed the loans supported by a first priority mortgage over the Real Property in the amount of \$230,000 registered in the Cape Breton Land Registry on April 27, 2017 as Document No. 110660173 (the "Mortgage") and security over the Company's personal property. Additional guarantees were provided by Lorne Aucoin Renovations Limited, 3069746 Nova Scotia Limited, Quality Metal Works, EZ Flow Plumbing & Heating Limited, Jeffrey McDonald and Marc Lamarche.

329 defaulted in its payment obligations to BDC under the Loans.

On September 23, 2022, BDC demanded payment from 329, the Company and the other guarantors and issued notices of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") to 329 and the Company.

BDC received no payments. The Company has ceased operations.

As at July 21, 2023, the amount owing to BDC from the Company was \$214,144.45.

The Real Property is encumbered by the following:

1. First charge mortgage granted to BDC in the amount of \$230,000;
2. Second charge mortgage granted to Ambrose Stone, Joseph Stone, Jean Frost-Stone, Jeannie Stone, Joseph Stone Family Trust (2005) and Ambrose Stone Family Trust (2005), with a face value of \$87,500; and
3. Judgment in favour of Canada Revenue Agency ("CRA") in the amount of \$227,131.57.

BDC also hold first priority security over all of the Company's personal property and a 2015 Ford F150 truck, registered in the Nova Scotia Personal Property Registry (the "PPR") on April 27, 2017 as Registration No. 27527621.

The Bank of Nova Scotia holds second priority security over the Company's personal property and a 2017 GMC Sierra 1500 truck, registered in the PPR on May 15, 2017 as Registration No. 27620129.

CRA registered its judgment in the PPR against all of the Company's personal property and four serial numbered vehicles on May 6, 2022 as Registration No. 36696102.

On April 18, 2023, BDC privately appointed MNP as receiver over the Company's assets which it holds as security.

The Company's principal asset is the Real Property, which contains a single storey, 1,584 ft² building formerly used as a sales office for the Company.

A February 1, 2023 appraisal of the Real Property estimated its fair market value at \$155,000.

In May 2023, MNP spoke to Joe MacDonald, a realtor familiar with the Real Property, who said it would likely sell in the \$150,000 to \$160,000 range.

On June 6, 2023, MNP privately negotiated an agreement to sell the Real Property to 437300 Nova Scotia Limited ("437") for \$150,000, subject to Court approval.

BDC consents to selling the Real Property for \$150,000 and wishes to have MNP appointed by the Court as receiver and obtain the Court's approval for MNP to sell the Real Property to 437.

II. Law

a) Appointment of Receiver

Section 243(1) of the BIA gives the Court the authority to appoint a receiver where it is "just and convenient" to do so. It states:

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Similar authority exists under s. 43(9) of the *Judicature Act*.

L.W. Houlden, Geoffrey B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Carswell: Westlaw, 2018) ("Houlden and Morawetz"), at L§3, provide the following comments on the circumstances under which a receiver will be appointed:

The purpose of a general receivership is to enhance and facilitate the preservation and realization of the debtor's assets for benefit of all creditors including secured creditors: ...

...

Factors to consider in the determination of whether it is appropriate to appoint a receiver include: (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed; (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the 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 the right to appoint a receiver under the documentation provided for in the loan; (h) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others; (i) the principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly; (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; (k) the effect of the order on the parties; (l) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver. The court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument-appoint a receiver. ...

[Applicant's Book of Authorities, Tab 1]

b) Approval of Sale

The applicable test for a receiver's sale of property was considered by this Court in *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105, at paras. 7-8, where Justice Moir held that section 247 of the BIA should be considered as the governing test for such a matter [Applicant's Book of Authorities, Tab 2].

Houlden and Morawetz, *supra*, at L§20, refer to the following duties of the Court in reviewing a proposed sale of assets by a receiver:

Section 247(b) provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

The duties of the court in reviewing a proposed sale of assets by a receiver that is opposed by other interested parties are as follows:

- (i) it should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;
- (ii) it should consider the interests of all parties;
- (iii) it should consider the efficacy and integrity of the process by which offers have been obtained; and

(iv) it should consider whether there has been unfairness in the working out of the process: [citations omitted]

...

The Ontario Superior Court of Justice, on a motion by a court-appointed receiver to approve a sale of assets, held that it will show considerable deference to the receiver and will be disinclined to second-guess the various decisions of the receiver in connection with the sales process and the adequacy of the receiver's efforts; the tests set out in *Soundair*, supra had been met. ...

...

In *Re Hoque* (1996), 38 C.B.R. (3d) 133, (sub nom. *Hoque (Bankrupt)*, Re) 148 N.S.R. (2d) 142, 429 A.P.R. 142, 1996 CarswellNS 51, the Nova Scotia Court of Appeal stated the test in these words: was the receiver in selling the assets acting with integrity in a reasonable and competent manner? If the answer is in the affirmative, then the court will not interfere. It is only in exceptional circumstances that the court will intervene and proceed contrary to the recommendation of the receiver: ...

...

In appropriate circumstances, the court may permit the receiver to sell by private sale: *Genelcan Realty Ltd. v. Wiseman* (1986), 59 C.B.R. (N.S.) 284 (Ont. H.C.).

[Applicant's Book of Authorities, Tab 3]

III. Application of Law to Facts

a) Appointment of Receiver

It is just and convenient for MNP to be appointed as receiver for the following reasons:

1. The Company is not carrying on business. The Company's assets, in particular the Real Property, may deteriorate, unless sold in a timely fashion.
2. Compared to a privately-appointed receiver, a Court-appointed receiver would:
 - i) provide the receiver with greater powers to locate, protect and preserve the assets of the Company;
 - ii) provide more transparency and reassurance to creditors that the sale of the assets would be handled expeditiously and in a commercially reasonable manner;
 - iii) serve the interests of all of the Company's creditors, not just BDC;

3. A vesting order will be necessary to enable 437 to acquire the Real Property “free and clear” of encumbrances and a Court appointed receiver is required to facilitate that process; and
4. To extent there may be priority issues and claims of creditors *inter se* to be dealt with upon the distribution of sale proceeds from the assets a Court-supervised process would create a more orderly, just and convenient mechanism to resolve any such disputes which may arise.

For these reasons, and as further supported by the affidavits filed in support of this Application, it is respectfully submitted it is both just and convenient for this Honourable Court to appoint MNP as Receiver of the Company's assets in the form of the draft Order filed in support of this Application.

The draft order follows the Model Receivership Order except that we have removed provisions dealing with a “receiver-manager” (s. 3(c) of the Model Order) and funding the receivership (s. 27-29 of the Model Order) as they are not necessary for this appointment.

b) Sale of Real Property

A Court-appointed receiver is required to act in a commercially reasonable manner prior to obtaining Court approval to sell property.

MNP negotiated a private sale of the Real Property rather than go through a more public process such as carrying out a sales solicitation process or listing the Real Property with a realtor. This is appropriate in the circumstances for the following reasons:

1. The proposed sale price of \$150,000 is very close to the appraised fair market value of \$155,000 and within the range of the estimated sale price provided by a realtor familiar with the Real Property of \$150,000 to \$160,000.
2. a private sale avoids real estate commission, typically 5% or in this case \$7,500 + HST on \$150,000, and other costs, including additional receiver fees if the receiver were to proceed with a sales solicitation process; therefore, the private sale maximizes the amount payable to creditors from the proceeds of sale;
3. the offer from 437 is a cash offer and contains no special conditions such as being contingent on financing or requiring that MNP carry out additional work or repairs;
4. The Company's largest secured creditor, BDC, supports the private sale, even though it will not be fully paid from the proceeds; and
5. Although neither the second mortgagee nor CRA will recover anything from a sale at \$150,000, they would not recover anything unless the Real Property sold for in

excess of \$230,000, which seems highly unlikely given the appraised fair market value of \$155,000.

Based on the above, MNP has acted in a commercially reasonable manner and made sufficient effort to obtain the best price for the Real Property. For these reasons, it is respectfully requested that this Honourable Court approve the sale of the Real Property to 437 for \$150,000 per the terms of the June 6, 2023 Agreement of Purchase and Sale.

The draft sales approval and vesting order follows the standard form this Court has approved since its decision in *Royal Bank of Canada v. Eastern Infrastructure Inc. and Allcrete Restoration Limited*, 2019 NSSC 297, where the authority of this Court to grant such orders was confirmed [Applicant's Book of Authorities, Tab 4]. We have removed the usual reference to s. 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, as it is not necessary to disclose or transfer any human resources or payroll information.

All of which is respectfully submitted.

Yours very truly,

BURCHELL WICKWIRE BRYSON ^{LP}



Marc L. Dunning
Partner

MLD/cmd
Enclosures
cc.