CITATION: Duca FSCUL v. Ashcroft Homes -101 Richmond et. al., 2024 ONSC 2830
COURT FILE NO.: CV-24-95337
DATE: 2024 05 16

SUPERIOR COURT OF JUSTICE – ONTARIO

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

RE: DUCA FINANCIAL SERVICES CREDIT UNION LTD., Applicant

AND:

ASHCROFT HOMES - 101 RICHMOND ROAD INC., ASHCROFT HOMES - 108 RICHMOND ROAD INC., and ASHCROFT HOMES - 111 RICHMOND ROAD INC., Respondents

BEFORE: C. MacLeod RSJ

COUNSEL: Stephen Goudreau & Timothy Dunn, for the Applicant

Scott McLean & Sarah DelVillano, for the Resondents

HEARD: May 16, 2024

ENDORSEMENT

[1] The Respondents are indebted to the Applicant in the approximate amount of $6,537,579.45. The Applicant holds security by way of mortgages and general security agreements over the Respondents' personal and real property. This is undisputed.

[2] The loan matured in November of 2023 and was not paid. The parties then entered into a "forbearance agreement" which has also expired without the Respondents paying the debt.

[3] By the terms of the forbearance agreement, the Respondents agreed that BDO Canada Limited would act as a "consultant" (effectively a monitor) during the term of the agreement. The Respondents also agreed that if the debt was not paid when the forbearance agreement expired, the Applicant would have the right to appoint a Receiver.

[4] The Applicant now moves to enforce the consent and asks the court for an order that BDO be appointed as a Receiver with the powers set out in the draft order modelled on the standard Commercial List receivership order.

[5] The Respondents do not dispute the amounts owing nor the right of the Applicants to put in a Receiver, but they request the court to postpone the receivership. The Respondents now have a financing commitment for $7 million. That commitment is conditional upon a number of terms which the Respondents hope to fulfill within a matter of weeks.

[6] Notwithstanding the terms of the forbearance agreement and the right of the Applicant to seek this order, a receivership order pursuant to the *Courts of Justice Act* or the *Bankruptcy and Insolvency Act* is a discretionary order. The statutory language is that the court "may" appoint a receiver "if it is just or convenient to do so".

[7] I agree entirely with the analysis of Osborne J. in *Macquarie Equipment Finance Limited v. Validus Power Corp. et al.*, 2023 ONSC 4772. The Alberta decision of *Servus Credit Union Ltd. v. Proform Management Inc.,* 202 ABQB 316 also contains a useful analysis of the law. Having regard to the agreement, the Respondents cannot argue about the merits of a receivership, and they cannot contest the right of the Applicants to seek the order.

[8] There is a public interest in enforcing security agreements. If creditors cannot rely on the efficient enforcement of their security, that has implications for the ability to obtain credit and the terms on which it might be offered. There is also a public interest in avoiding catastrophic loan defaults, running up unnecessary costs or triggering insolvency or rearrangement proceedings. In this case, the respondents are units of the Ashcroft group of companies, there are significant assets to secure these loans and there are personal guarantees.

[9] The only justification for withholding the order is a question of commercial utility and convenience. There is little point in disrupting the business relationships of the Respondents if they are actually able to obtain the proposed financing to pay out the loan. There is also the possibility that immediate drastic action by the Receiver might impair the capacity of the Respondent to secure that financing. On the other hand, although the financing commitment has been signed by both parties, it remains conditional. The Applicant argues that it has been more than patient and has allowed the Respondents an already lengthy indulgence. Counsel argues that enough is enough".

[10] I agree it would be unfair to dismiss the application and require a fresh application if the new financing does not appear. In my view the appropriate disposition is to grant the order now but to stay any steps by the receiver to take possession of the security or to sell the assets for 30 days. In the interim the receiver may monitor the business of the Respondents and the steps they are taking to secure the financing.

[11] I have signed the proposed order with these amendments.

[12] The Applicant does not ask for costs of the Application at this time. Under the terms of its loan agreements, it is entitled to costs of enforcement and it prefers to deal with the costs at the stage of calculating the loan payout. The Respondents are content with that approach.

[13] Order to go as signed.

Digitally signed by C. MacLeod RSJ
Date: 2024.05.16 16:19:55 -04'00'

Mr. Justice C. MacLeod

May 16, 2024