CITATION: *Canada Ici Capital Corporation v. Ecre Smart Living Hinton Inc et al*, 2024 ONSC 5529
COURT FILE NO.: CV-24-96479
DATE: 2024/10/04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N: CANADA ICI CAPITAL CORPORATION Plaintiff **– and –** ECRE SMART LIVING HINTON INC., SMART LIVING MANAGEMENT INC., ECRE HINTON LIMITED PARTNERSHIP and SLH HINTON LP Defendants	Eric Golden, Chad Kopach, and Stephen Gaudreau, for the plaintiff Andrew J. F. Lenz, for the defendants **HEARD: October 2, 2024 (at Ottawa)**

ENDORSEMENT

FLAHERTY J.

[1] This is an 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 for a receivership order. The applicant asks the court to appoint BDO Canada the receiver over Ecre Smart Living Hinton Inc. (the "Debtor") and three beneficial owners of the certain properties located in Ottawa ("Hinton Properties").

FACTS

[2] The Hinton Properties include two apartment complexes as well as commercial rental units. The Debtor holds title to the Hinton Properties in trust as bare trustee and nominee for the beneficial owners.

[3] The applicant is a commercial real estate financing company. In 2023, the applicant lent the Debtor the principal amount of $39 million dollars. The term of the loan was for 12 months, with a maturity date of June 1, 2024.

[4] The applicant's security for the loan includes a first mortgage over the Hinton Properties in the amount of $42,900,000 and a general security agreement. Both these agreements provide that a receiver may be appointed, should the respondent default on the loan.

[5] There is no dispute that the loan is in default. It matured on June 1, 2024 and was not repaid. Approximately $2 million in interest is now owing. Since August 2024, and following an order of this Court, the respondents have remitted rents from the Hinton Properties to the applicant, without deduction. These remittances fall about $100,000 short of the monthly interest owed. The amount of interest outstanding continues to accrue.

[6] The municipal property taxes on the Hinton Properties have not been paid since 2023 and $500,000 is owed. Cashflow statements that the respondents provided to the applicant indicated that June rents were used to pay property taxes. However, this is contradicted by the property tax statement from the City of Ottawa, which indicated a payment of less than $20.

[7] The Debtor has entered into a Letter of Intent ("LOI") with a third party and prospective purchaser. The LOI is conditional on many factors, including CMHC financing and a due diligence period. There is no evidence that any of the required conditions have been fulfilled. The first of many deadlines in the LOI was not met, but the respondents report that discussions are ongoing.

Should a Receiver be Appointed?

[8] The sole issue before me is whether it is just or convenient to appoint a receiver.

[9] The legal principles are not in dispute. Where the rights of the secured creditor include the contractual right to seek the appointment of a receiver, a receivership is not considered an extraordinary, equitable remedy. Rather, it involves enforcing a term of an agreement already made by both parties.

[10] As the Court explained in *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881 (CanLII), a number of factors are relevant to determining whether it is just or convenient to appoint a receiver. These factors are considered wholistically and do not act as a checklist. They include:

a. whether irreparable harm might be caused if no order is made. However, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

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 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 a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon 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.

[11] Applying these factors to the circumstances of this case, I find that it is just and convenient to appoint a receiver.

[12] There is a contractual agreement providing for the appointment of a receiver upon default. While the Hinton Properties generate rental revenues, these are insufficient to service the debt, let alone begin to repay the amounts already overdue.

[13] As noted, municipal taxes are outstanding. Given the respondents' initial lack of transparency about their cashflow statement and municipal tax payments, the applicant has reasonably lost confidence in the respondents' management.

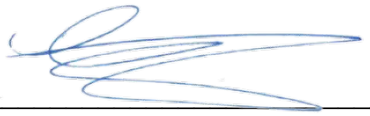
[14] The respondents submit that are actively working to sell the Hinton Properties and the Debtor has entered into an LOI. According to the respondents, appointing a receiver is not appropriate at this time, because the applicant will clearly be repaid following the sale. Importantly, however, there is no certainty that the proposed sale will be completed. The LOI is non-binding and conditional on a number of factors. There is no evidence to suggest that these conditions have been met. In sum, there is significant uncertainty about whether the discussions with the prospective purchaser will result in a purchase, let alone when that might occur.

[15] The respondents submit that the appointment of the receiver may disrupt the operation of leasing, property management, and rent collection by introducing another operator to the Properties. There is no evidence before me to this effect. The respondents are also concerned that the appointment of a receiver will disrupt the prospect of a sale. However, the evidence does not suggest that the sale contemplated in the LOI is imminent. I note, as Justice Obsorne did in *Macquarie Equipment Finance Limited v. Validus Power Corp. et al*., 2023 ONSC 4772 (CanLII), that nothing in this decision prevents the receiver from continuing discussions with the proposed purchaser to determine whether this arrangement is in the best interests of stakeholders.

DISPOSITION

[16] For these reasons, the application is granted. BDO Canada is appointed receiver over all of the assets, undertaking and properties of Ecre Smart Living Hinton Inc. and over the right, title and interest in the Hinton Properties of the beneficial owners.

[17] As discussed at the hearing of this matter, counsel for the parties will attempt to agree on the form and content of the order and will use the Commercial List model form of order as the starting point for these discussions. I remained seized of any issues related to the order that cannot be resolved. Finally, if the parties are not able to resolve the issue of costs, they may make written submissions within 30 days. The submissions must be no longer than three pages, exclusive of the bill of costs.



Madam Justice Michelle Flaherty

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