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COURT COURT OF KING'S BENCH
OF ALBERTA

JUDICIAL CALGARY
CENTRE

PLAINTIFF CANADIAN WESTERN BANK

DEFENDANT ROCKY MOUNTAIN ALBERTA PARTNERS LTD.

DOCUMENT **BRIEF OF CANADIAN WESTERN BANK**

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTY FILING THIS
DOCUMENT

McLennan Ross LLP
#600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Lawyer: Charles P. Russell, K.C.
Telephone: (780) 482-9115
Fax: (780) 733-9757
Email: chuck.russell@mross.com
File No.: 20230780

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PART 1 INTRODUCTION

1. This brief is submitted on behalf of CWB in support of its application for an appointment of FTI Consulting Canada Inc. as Receiver and Manager over the property of Rocky Mountain Partners Ltd. (“**the Borrower**”).
2. CWB submits that it is just or convenient in these circumstances to grant CWB’s application to appoint a Receiver and Manager over the property of the Borrower.
3. All capitalized terms not defined herein shall have the same meaning ascribed to them in the Affidavit of Cory Stark.

PART 2 SUMMARY OF FACTS

4. The Borrower is a corporation incorporated pursuant to the laws of Alberta. The Borrower’s primary function is as the owner, developer, and landlord of an office building.
5. The Borrower owns a building in downtown Calgary referred to as the Rocky Mountain Plaza (the “**Plaza**”). The Plaza is a 15 storey office building of 238,271 square feet located on the corner of MacLeod Trail and 7 Avenue SE. The Plaza hosts commercial space on the first floor, with the remaining floors being comprised of office space. As at June 29, 2023, the building showed a vacancy rate of 77%. The Borrower intended to convert the majority of the Plaza into residential space (the “**Conversion**”), but had trouble executing this plan due to financial difficulties.
6. The particulars of the Conversion and the Plaza are contained in an appraisal dated June 29, 2023. The Borrower does not appear to have taken into account the full extent of the costs of the Conversion, given the statements made in the appraisal. The appraisal states the Conversion will take 402 days to complete, once work has commenced. The Conversion has not yet commenced.

Affidavit of Cory Stark, sworn June 28,
2024 [the “**Stark Affidavit**”], at paras 4-6
and Exhibits “A” & “B”.

7. CWB issued to the Borrower a Commitment Letter dated October 5, 2018 as amended by letters including those dated April 5, 2019, November 12, 2020, and June 15, 2022 (collectively, the “**Commitment Letter**”), by which CWB agreed to provide financing to the Borrower (the “**Loans**”), in exchange for regularly scheduled repayments and financial reporting.

Stark Affidavit, at para 7 and Exhibit “C”.

8. Payment of the Loans was secured by:

- (a) a GSA dated October 22, 2018 from the Borrower wherein the Borrower charged in favour of CWB all of its present and after acquired property;

Stark Affidavit at para 9(a) and Exhibit "E".

- (b) a Mortgage charging the Lands dated October 22, 2018 for securing payment of the sum of \$25,000,000.00, together with interest at a rate of 10.00% above CWB's prime rate;

Stark Affidavit, at para 9(b) and Exhibit "F".

- (c) a General Assignment of Rents and Leases executed October 22, 2018 and registered against the Lands;

Stark Affidavit, at para 9(c) and Exhibit "G".

- (d) an Environmental Agreement and Indemnity dated October 22, 2018; and

Stark Affidavit, at para 9(d) and Exhibit "H".

- (e) a Hypothecation of Bank Balances dated November 25, 2019;

Stark Affidavit, at para 9(e) and Exhibit "I".

(collectively, the "Security").

9. The Security was duly registered by CWB in the Province of Alberta as required by law.

Stark Affidavit, at para 10 and Exhibit "J".

10. On October 22, 2018 and April 5, 2019, the Borrower executed Demand Notes affirming its obligations with respect to the Debt.

Stark Affidavit, at para 11 and Exhibit "K".

Forbearance Agreements and Acts of Default

11. By mid-2023, the Borrower was in default of its scheduled repayment obligations, and had demonstrated poor operating results over an extended period of time.

12. On July 13, 2023, CWB issued a demand for payment and Notice of Intention to Enforce Security regarding the Loans in accordance with the Commitment Letter and the Security, and to date has not received payment.

Stark Affidavit, at para 13 and Exhibit “L”.

13. As of June 21, 2024, the outstanding amounts owing to CWB by the Borrower are:

LOAN 101010442142	<u>\$19,571,203.32</u>
LOAN 101017107373	<u>\$25,347.68</u>
TOTAL	<u>\$19,596,551.00</u>

this amount is exclusive of interest, costs, and legal fees on a solicitor and own client full indemnity basis, which continue to accrue (collectively the “**Debt**”).

Stark Affidavit, at para 8 and Exhibit “D”.

14. On July 24, 2023, CWB, the Borrower, and the Guarantors executed a Forbearance Agreement, under which CWB agreed to abstain from enforcing its security interests against the Borrower with respect to the Loans in exchange for certain conditions, with the forbearance period ending January 5, 2024 (the “**Forbearance Term**”). Following the end of the Forbearance Term, the Forbearance Agreement gave CWB the unrestricted right to realize upon the Security, including the appointment of a Receiver and Manager. During the Forbearance Term, the Borrower failed to meet certain monthly reporting requirements and failed to make timely payments as required.

Stark Affidavit, at para 14 and Exhibit “M”.

15. Following the expiration of the Forbearance Term, CWB chose to postpone enforcement of its Security to allow for the Borrower to attempt to correct its record of non-payment or, alternatively to allow the Borrower to market its assets or obtain refinancing in an effort to pay off the Debt.

Stark Affidavit, at para 15 and Exhibit “N”.

16. On January 25, 2024, CWB, the Borrower, and the Guarantors executed the Forbearance Amending Agreement, under which CWB agreed to renew and extend the Forbearance Term (the “**Extended Forbearance Term**”) to February 29, 2024 to give the Borrower further time to obtain refinancing with a view to discharging the Debt. The Borrower was required to make ongoing payments to CWB during the extended Forbearance Term.

Stark Affidavit, at para 16 and Exhibit “O”.

17. During the Forbearance Terms, the Borrower failed to meet its reporting obligations and also failed to make timely payments to CWB.

Stark Affidavit at para 17.

18. Throughout the term of the each forbearance, CWB made enquiries to the Borrower as to its progress in refinancing or selling assets. CWB continually asked for justification of the Borrower's noncompliance with the terms of the Commitment Letter, the Security, and Forbearance Agreements and requested the Borrower provide CWB with a realistic and suitable plan to discharge the Debt. CWB was continually told that refinancing was a matter of days with concrete terms being formalized, but no refinancing came to pass that discharged the Debt. No viable plan was put forward by the Borrower to cure its defaults under the Commitment Letter, Security and Forbearance Agreements.

Stark Affidavit, at paras 19-23 and Exhibits "P", "Q", "R", and "S".

19. The Borrower has considerable corporate tax arrears payable to the Canada Revenue Agency.

Stark Affidavit, at para 2 and Exhibit "T".

20. The Borrower has not submitted a Statement of Defence, only a Demand for Notice.

PART 3 ISSUES

21. The issue before this Honourable Court is whether it is just or convenient to appoint a Receiver and Manager over the Borrower' assets in these circumstances?

PART 4 APPOINTMENT OF A RECEIVER AND MANAGER

A. LAW

22. This Honourable Court has authority to appoint a Receiver and Manager where it is just or convenient to do so pursuant to section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, section 13(2) of the *Judicature Act*, RSA 2000 c J-2, section 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, and section 99 of the *Business Corporations Act*, RSA 2000, c B-9.

Bankruptcy and Insolvency Act, RSC 1985,
c. B-3, s 243.

[Tab 1]

Judicature Act, RSA 2000, c J-2, s 13(2).

[Tab 2]

Personal Property Security Act, RSA 2000,
c. P-7, s 65(7).

[Tab 3]

Business Corporations Act, RSA 2000, c B-
9, s 99.

[Tab 4]

23. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”), a court may appoint a Receiver and Manager on application by a secured creditor over the assets and property of an insolvent person and upon the expiry of 10 days’ notice.

Bankruptcy and Insolvency Act RSC 1985,
c B-3, s 243(1.1).

[Tab 1]

24. The test to appoint a Receiver and Manager is whether it is just or convenient to do so in light of the circumstances.

*Servus Credit Union Ltd. v Proform
Management Inc.* (“**Proform**”), 2020 ABQB
316 at para 65.

[Tab 5]

25. A Receivership is appropriate when required to protect the interests of a secured lender and when it is just or convenient, having considered and balanced the interest of the parties. The applicant need not demonstrate irreparable harm

Law Society of Alberta v Higgerty, 2023
ABKB 499 at paras 24-26

[Tab 6]

26. In *Paragon Capital Corp. v Merchants & Traders Assurance Co.*, 2002 ABQB 430, the Honourable Justice Romaine adopted the following non-exhaustive list of factors cited by Frank Bennett in *Bennett on Receiverships* in determining whether it is appropriate to appoint a receiver:
- (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 and Manager is not appointed, particularly where the appointment of a Receiver and Manager 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 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 and Manager under the documentation provided for the loan;
 - (h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with debtor and others;
 - (i) the principle that the appointment of a Receiver and Manager is extraordinary relief which should be granted cautiously and sparingly;
 - (j) the consideration of whether a court appointment is necessary to enable the Receiver and Manager to carry out its' duties more efficiently;
 - (k) the effect of the order upon the parties;
 - (l) the conduct of the parties;
 - (m) the length of time that a Receiver and Manager 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 and Manager.

Paragon Capital Corp. v Merchants & Traders Assurance Co., 2002 ABQB 430 at para 27 ("**Paragon Capital**"). [Tab 7]

27. The extraordinary nature of appointing a Receiver and Manager is less influential to the court's determination where the secured creditor holds security that provides for the appointment of a Receiver and Manager.

Schendel Management Ltd, 2019 ABQB
545, at para 44. **[Tab 8]**

28. Where there was no plan to repay any of the debtor's indebtedness and no persuasive evidence that the appointment would cause undue hardship to the debtor, a Receiver and Manager should be appointed.

Paragon Capital at para 31. **[Tab 7]**

29. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a Receiver and Manager is not appointed, particularly if the security held by the creditor allows for the appointment of a Receiver and Manager.

Bank of Nova Scotia v Freure Village of Clair Creek, 1996 CanLII 8258 (ON SC), at paras 9-11, 40 CBR (3d) 274. **[Tab 9]**

30. In *Export Development Canada v IFM Film Associates Inc.*, a secured creditor applied for the appointment of a Receiver and Manager over the debtor's assets and undertaking pursuant to a security interest given in a general security agreement over all of the debtor's present and after acquired property. The Court held that the security document authorized the appointment of a Receiver and Manager:

5 The General Security Agreement contains provision for the appointment of a receiver by the security holder. Thus, the parties agree that the discretion of the court to appoint a receiver should only be exercised if it is demonstrated that a receiver appointed by the security holder is not likely to be able to properly fulfill the functions of a receiver: *Royal Bank v. White Cross Properties Ltd.* (1984), 34 Sask. R. 315 (Sask. Q.B.).

Export Development Canada v IFM Film Associates Inc., 2003 SKQB 469
at para 5. **[Tab 10]**

B. ARGUMENT

31. CWB respectfully submits that this Honourable Court should exercise its discretion to appoint FTI Consulting Canada Inc. as Receiver and Manager of the Borrower.
32. CWB states that the Borrower is an "insolvent person" for the purposes of the BIA, being generally unable to meet its obligations to CWB as they become due.

33. Having regard to the factors listed in *Paragon Capital*, CWB notes:
- (a) CWB is the first-ranking secured creditor of the Borrower and holds a first ranking security interest in all of its present and after-acquired property and various serial numbered goods;
 - (b) the GSA authorizes the appointment of a Receiver and Manager under section 9(a);
 - (c) the Forbearance Agreement authorizes the exercise of all remedies under the Security, including the appointment of a Receiver and Manager under section 2.6;
 - (d) the risk to CWB is significant at approximately \$19,596,551.00.
 - (e) the Borrower has shown poor operating results over an extended period of time, and failed to issue timely financial statements and payments;
 - (f) the assets of the Borrower are such that judicial assistance will be required to maximize value, given the complexity of the Lands and the various relationships surrounding the Lands;
 - (g) a court appointment is necessary to enable the Receiver and Manager to carry out its duties efficiently and to obtain court approval for preservation of property and eventual liquidation;
 - (h) the appointment of a Receiver and Manager would ensure court oversight and ensure consistent treatment of all stakeholders;
 - (i) a court-appointed Receiver and Manager will guarantee maximum value and a transparent process under the court's supervision; and
 - (j) CWB is acting in good faith and in a commercially reasonable manner in respect of the appointment of the Receiver and Manager.
34. Given the facts set out above, it is submitted that it is both just and convenient to appoint a Receiver and Manager over the Borrower.
35. In light of the current state of the Borrower, the Borrower's defaults under the Commitment Letter, the Security, and Forbearance Agreements, and expiration of the Extended Forbearance Term, administration of the Borrower through appointment of a Receiver and Manager will be the most effective way of maximizing value for CWB, and it would be just and equitable that a receiver and manager is appointed over the Borrower's assets.
36. There are no other remedies short of the appointment of a Receiver and Manager which are available to CWB which will sufficiently protect its interests. The Borrower has had sufficient time to pay back the Loans but has been unable to do so. The Borrower made many claims over the course of several months that it was on the verge of providing

refinancing to discharge the Debt, but has been unable to deliver on its promises. The balancing of interests of the parties favours CWB and the appointment of a receiver.

37. FTI Consulting Canada Inc. is a recognized and respected insolvency firm, and is capable of dealing with the rights of all interested parties in a fair manner.

PART 5 SUMMARY JUDGMENT

A. LAW

38. The Alberta Rules of Court seek to promote the fair and just resolution of claims in a timely and cost-effective manner.
39. The law on summary judgment is well established. It will be available where, among other things, there is no merit to a claim or part of it, and where the evidence consists only of records contained in affidavits that are before the Court:

7.2 On Application, the Court may at any time in an action give judgment or an order to which an applicant is entitled when

- (a) admissions of fact are made in a pleading or otherwise, or
- (b) the only evidence consists of records and an affidavit is sufficient to prove the authenticity of the records in which the evidence is contained.

7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:

- (a) there is no defence to a claim or part of it;
- (b) there is no merit to a claim or part of it;
- (c) the only real issue is the amount to be awarded.

(2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.

40. More specifically, summary judgment is appropriate when the process allows the court to make the necessary findings of fact and to apply the law to the facts, and it is a proportionate, more expeditious and less expensive means to achieve a just result.

Canadian Natural Resources Limited v Harvest Operations Corp, 2024 ABCA 3, at paras 17-18 [TAB 12]

41. It is appropriate to award a plaintiff summary judgment when the applicant can meet the four-part test from *Weir-Jones* in regard to the standard of proof, the record, and fairness. The key considerations are:

- (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- (b) Has the moving party met the burden on it to show that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
- (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- (d) The Court must have sufficient confidence in the state of the record such that they are prepared to exercise the judicial discretion to summarily resolve the dispute.

Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd., 2019 ABCA 49 at para 47 [“*Weir-Jones*”] [TAB 13]

42. Summary judgment has been granted in the context of a defended receivership application. Summary judgment may be granted where the merits of the debtor’s denials of validity and enforceability of the security do not survive the “good hard look at the evidence.” This is the case where the debtor has acknowledged elements of the security,

where there is no compelling evidence to support the defence, and where there is nothing to suggest any substantive issues with the security, among other things.

Bank of Nova Scotia v Freure Village of Clair Creek, 1996 CanLII 8258 (ON SC), at paras 2-7, 40 CBR (3d) 274. [Tab 9]

B. ARGUMENT

43. The totality of the evidence supports that summary judgment is fair and just under the circumstances.
44. The Borrower has not adduced any compelling evidence of any issues with the validity or enforceability of the Security. CWB has adduced substantial documentary evidence through the affidavit of Cory Stark of binding Security that supports the validity of the Debt, the Borrower's obligations pursuant to the Debt, the Borrower's breaches therein, and CWB's entitlement to the appointment of a Receiver and Manager over the assets of the Borrower on a balance of probabilities.
45. The facts of the case have been proven on a balance of probabilities. The extent of the Security, the Debt, and the Borrower's default under the Security is well-documented and is not in reasonable dispute. Conversely, the Borrower has only submitted a demand for notice, not a statement of defence.
46. The Borrower has not introduced any evidence to suggest that there is a triable issue.
47. CWB therefore submits that there is sufficient evidence to support this application, and no evidence to the contrary. CWB further submits that the state of the record is such that the Court may have the confidence to exercise its judicial discretion to grant summary judgment.

PART 6 SUMMARY AND RELIEF REQUESTED

48. CWB respectfully submits that it is both just and convenient to grant CWB's Receivership Application and appoint FTI Consulting Canada Inc. as Receiver and Manager of the Borrower.

49. CWB is entitled to such a remedy in the GSA and Forbearance Agreements, and on a balance of convenience and with respect to the totality of circumstances, this fact favours CWB's Receivership Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this ___ day of July, 2024.

MCLENNAN ROSS LLP

Per:



Charles P. Russell, K.C
Solicitor for Canadian Western Bank