

Court File Number: CV-21-00655706-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

1199403 ONTARIO INC., 1274442 ONTARIO INC., and GULU THADANI

Applicants

AND

SAPTASHVA SOLAR S.A.

Respondent

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
Stephen M. Turk for Applicants		
Allan Morrison and Vibhu Sharma for Respondent		

- Order Direction for Registrar (**No formal order need be taken out**)
 Above action transferred to the Commercial List at Toronto (**No formal order need be taken out**)

Adjourned to: _____

Time Table approved (as follows): _____

Date of Hearing: September 23, 2021

ENDORSEMENT

Introduction

[1] The Applicants 1199403 Ontario Inc. (“119”), 1274442 Ontario Inc. (“127”), and Gulu Thadani (together, the “Lenders”) bring this application for an order appointing Ira Smith & Receiver Inc. as the receiver and manager of the assets and undertakings of the Respondent Saptashva Solar S.A. (“Saptashva”) pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*.

Factual Background

[2] 119 and 127 are Ontario corporations. Mr. Thadani is the President, a director and the principal shareholder of each corporation.

[3] Saptashva is a Spanish corporation that is extra provincially registered in the Province of Ontario with offices in Madrid, Spain and Concorde, Ontario.

[4] Saptashva owns and operates nine solar projects comprised of physical structures along with corresponding revenue generating Feed-in-Tariff Contracts (the “FIT Contracts”). The FIT Contracts were granted by the Ontario Power Authority, now known as the Independent Electricity System Operator (“IESO”).

[5] Mr. Thadani’s evidence is that the Lenders made two loans which are the subject matter of this application:

- a. A loan pursuant to a loan agreement dated September 23, 2014 in the aggregate principal amount of \$450,000 (the “First Loan”); and
- b. A loan pursuant to a loan agreement dated June 15, 2015 in the principal amount of \$67,037.04 (the “Supplementary Loan”).

[6] The purpose of these loans was for the construction, reconstruction, and repair of solar projects that were damaged by a windstorm in respect of which Saptashva required an advance on an insurance claim in order to ensure that the solar projects were made operational.

[7] The FIT Contracts were created by the Government of Ontario as part of its Feed-in-Tariff program to encourage and promote greater use of renewable energy sources for electricity generating projects in Ontario. The goal of the program was to connect renewable energy sources to Ontario’s power grid. In exchange, Ontario would buy power at generous rates.

[8] The loan agreement in respect of the First Loan dated September 23, 2014 (the First Loan Agreement”) provides that the Lender (defined as 127, 109 and Mr. Thadani) has agreed to advance the sum of \$450,000 by way of loan to Saptashva through three advances of \$200,000, \$200,000 and \$50,000 to be made according to article 2.1 of the Loan Agreement. Under the First Loan Agreement, the principal amount of the First Loan together with accrued interest shall be due on the second anniversary of the First Loan Agreement, being September 23, 2016.

- [9] The First Loan Agreement provides for interest at the Prime Rate of interest of the Royal Bank of Canada plus 9% calculated on a daily compounded basis from the date of the advancement of funds on the Loan. The Loan Agreement provides that upon the occurrence of an Event of Default, as defined, the interest rate shall be increased to the rate of the Prime Rate of interest of the Royal Bank of Canada plus 15%, calculated on a daily compounded basis from the date of the occurrence of the Event of Default.
- [10] The principal of Saptashva, Harshal Gunde, has given affidavit evidence in response to this application that the Lenders advanced only \$400,000, and not \$450,000, to complete repairs for one of the solar projects. The amount advanced under the First Loan Agreement is contentious.
- [11] The Lenders submit that there is at least a principal amount of \$400,000 owing under the First Loan Agreement which, they submit, with interest calculated under the First Loan Agreement to December 31, 2020, results in indebtedness of \$1,106,282.70, excluding additional interest or other amounts such as legal expenses. The calculations of this indebtedness, including the rates of interest applicable during relevant periods of time, are shown in a statement provided in response to undertakings given on Mr. Thadani's cross-examination.
- [12] The loan agreement in respect of the Supplementary Loan dated June 15, 2015 (the "Supplementary Loan Agreement") provides that 119 has agreed that the money that was collected by Saptashva from the OPA and/or its successor in furtherance of the Solar Projects being approximately \$67,037.04, although subject to verification by 119 (the Supplementary Loan"), which has not been remitted to the Payment Recipients (as defined), and which payment the parties have agreed is properly due to the Payment Recipients. The Payment Recipients are defined to be 119 or 127. The Supplementary Loan Agreement provides that the principal amount of the Supplementary Loan together with accrued interest and costs as set forth in sections 2.3 and 2.4, respectively, shall be due in full on the 30th day of September 2016 which is the repayment date for the Original Loan (as defined).
- [13] The Supplementary Loan Agreement provides that the Supplementary Loan shall bear interest at the rate of the Prime Rate of interest of the Royal Bank of Canada plus 9% calculated on a daily compounded basis from the date of the advancement of funds on the Supplementary Loan. Upon the occurrence of an Event of Default, as such term is defined, the interest rate shall be increased to the rate of the Prime Rate of interest of the Royal Bank of Canada plus 15%, calculated on a daily compounded basis from the date of the occurrence of the Event of Default.
- [14] Mr. Thadani's evidence is that the First Loan was secured by a General Security Agreement dated September 23, 2014 and the Supplementary Loan was secured by a General Security Agreement dated June 15, 2015. Copies of these two agreements are appended as exhibits to Mr. Thadani's affidavit. These General Security Agreements appear to have been duly executed as shown in the copies marked as exhibits to Mr. Thadani's affidavit.
- [15] Mr. Gunde's evidence is that no amount was advanced under the Supplementary Loan Agreement. This is contentious, and I do not need to make any findings in this respect.
- [16] Mr. Thadani provided evidence that 119 registered notice of its security interest granted pursuant to the First General Security Agreement pursuant to the Personal Property Security Act on March 14, 2014 for a period of five years against the collateral descriptions "Inventory", "Equipment",

“Accounts”, and “Other”. A report from the Ministry of Government Services for the Personal Property Registration System shows this registration. I accept this evidence.

- [17] It appears on the evidence that Saptashva defaulted on its obligations pursuant to the First Loan Agreement to pay the outstanding principal amount of the loan together with interest as set forth in section 2.3 of the First Loan Agreement by September 23, 2016, as provided for by section 2.3 of the First Loan Agreement.
- [18] On May 2, 2017, the Lenders, through their lawyers, made demand for payment and provided Notices of Intention to Enforce Security pursuant to the *Bankruptcy and Insolvency Act*.
- [19] On June 17, 2017, the Lenders took possession of the Solar Projects and FIT Contracts. However, the Lenders have been unable to direct the revenue from the FIT Contracts. Counsel for the IESO appeared on this motion. The IESO takes no position on the application for a receiver.
- [20] Mr. Thadani estimates that the Solar Projects generate approximately \$100,000 per year, declining each year, and have a remaining life span of 15 years. He states that his understanding is that the Solar Projects and FIT Contracts had an initial life span of 20 years.
- [21] The Lenders provided evidence that another secured creditor of Saptashva, 2040517 Ontario Inc. (“204”), made a PPSA registration on October 4, 2014. On his cross-examination, Mr. Gunde was asked how much of the monthly payment under the FIT Contracts was received by Saptashva and whether any portion was paid to 204. Mr. Gunde refused to answer. On this application, I do not need to make any finding on whether Saptashva is indebted to 204. 204 was given notice of the hearing of this application but no one appeared on its behalf.
- [22] Saptashva failed to repay the amount claimed, although it maintains that at various times since January 2016 it has offered to pay the principal amount of \$400,000 that it says was advanced, but the Lenders have not agreed to accept the amount offered.
- [23] In his affidavit, Mr. Gunde states that in January 2016, Saptashva offered to repay amounts owing to the Lenders in respect of the loan that was due for repayment on September 23, 2016. He states that Mr. Thadani was unwilling to receive an early loan payment and, instead, asked for “additional unsubstantiated amounts” to be paid. Mr. Gunde states that Saptashva made several other offers to repay the \$400,000 until very recently, but that the Lenders would not accept his offers and, instead, demanded repayment of “unsubstantiated, exaggerated and baseless amounts (in addition to the repair monies advanced) throat 2016 and 2017”.
- [24] At the hearing of this application, the position taken by Saptashva was that the principal amount that is unpaid is \$400,000, and that the only real issue on this application is the overall amount owing by Saptashva to the Lenders for interest and costs. Saptashva submits that adjudication of the overall amount of indebtedness should happen in the civil proceedings that are pending on the civil list.

Analysis

- [25] At the opening of the hearing, counsel for Saptashva advised that he was holding \$400,000 and asked for the Court’s direction to pay this amount into Court until the amount owing to the Lenders for principal, interest and other charges, if any, was adjudicated in civil proceedings pending on the civil list.

Counsel asked for a stay of the application, or an adjournment of the application, pending adjudication of the civil proceedings which would include determination of the amount of the overall indebtedness owing by Saptashva to the Lenders. Saptashva is not offering to pay this amount unconditionally to the Lenders.

[26] I declined to stay or adjourn this application. The civil proceedings are two actions commenced in 2017 and 2019 which involve claims for amounts owing under the First Loan Agreement and the Supplementary Loan Agreement. The defendants were noted in default in the 2019 action and a default judgment was obtained against Mr. Gunde on his personal guarantee. Counsel for Saptashva advises that a motion was brought to set aside the noting in default of the defendants, and the default judgment against Mr. Gunde, but the motion has not been scheduled or heard.

[27] Given the acceptance by Saptashva that a principal amount of at least \$400,000 was advanced and is owing, which, with interest, is the amount of indebtedness upon which the Lenders rely for their application to appoint a receiver, in my view, nothing would be gained by delaying the hearing of this application. Saptashva has had since 2019 to have its motion to set aside the noting in default scheduled and heard. I also note that Saptashva requested an adjournment of the hearing of this application at a case conference before Conway J. on August 17, 2021 who declined to grant an adjournment.

[28] The question on this application is whether the Lenders have shown that it is just and convenient for the Court to appoint a receiver of the assets and undertakings of Saptashva pursuant to section 101 of the CJA and section 243 (1) of the BIA.

[29] In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not. When there is a contractual power of appointment, the Court assesses the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property, and the best way of facilitating the work and duties of the receiver. See *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ON SC 7661, citing *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258.

[30] The factors to be considered by the Court when determining whether to appoint a receiver include, among other things:

- 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 assets while litigation takes place;
- c. the nature of the property;
- d. rights of the parties thereto and the balance of convenience of the parties;
- e. the preservation and protection of the property pending judicial resolution;
- f. the fact that the creditor has the right to appoint a receiver under its security;
- g. the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

- h. that the appointment of receiver is extraordinary relief which should be granted cautious and sparingly, however, this proposition does not apply or is less essential to a secured creditor with the right to enforce its security;
- i. whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- j. the effect of the order and the parties;
- k. the conduct of the parties;
- l. the length of time that a receiver may be in place;
- m. cost of the parties;
- n. the likelihood of maximizing return to the parties;
- o. facilitating the duties of the receiver and
- p. a secured creditor's good faith, commercial reasonableness of the proposed appointment and any questions of equity. [insert authority].

[31] On the evidence before me, Saptashva accepts that there is \$400,000 of principal that the Lenders advanced that, with interest, is unpaid. Although Saptashva maintains that it had offered to pay this amount in the past, including some amount for interest, there is no evidence that Saptashva ever tendered payment unconditionally. It has always been open to Saptashva to pay the full amount of principal and interest that it accepts is owing, without conditions, but it has not done so. Based on the interest rates in the First Loan Agreement and the evidence of applicable rates based on the Royal Bank of Canada rates, the amount owing as of December 31, 2020 appears to have been \$1,106,282.70. Further interest would have accrued since this date.

[32] The security for the indebtedness, the FIT Contracts, have a declining value because each month payments are made on fixed term contracts. With the passage of time, the value of the security for the indebtedness owing to the Lenders becomes lower.

[33] The General Security Agreement dated September 23, 2014 provides that if, following default, the Lenders declare that the loans shall become immediately due and payable, the Lenders may take proceedings in any court of competent jurisdiction for the appointment of a receiver. The Lenders have made demand for payment of amounts owing under the First Loan Agreement and they are contractually entitled to apply to court for the appointment of a receiver.

[34] The Lenders, in support of the application, and Saptashva, in opposition to this application, rely on the decision of Myers J. in *L Bank of Canada v. CFNDRS Inc.* In this case, Myers J. observed, at para. 9, that while the appointment of a receiver may be seen to be extraordinary, it is much less extraordinary when the plaintiff has a contractual right to appoint a receiver on its own. Myers J. held, citing *Freure Village*, at para. 12, that "[t]he question of whether a court appointment then is just and convenient when there is a contractual power of appointment will turn on an assessment of, 'the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and

preserving the subject property and the best way of facilitating the work and duties of the receiver-manager”’. In *CFNDRS*, at para 12, Myers J. held:

In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties’ dispute put the business assets at risk or where realization options may be impaired by leaving the business in the debtor’s hands or requiring the secure creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.

[35] I accept the statements made by Myers J. in *CFNDRS*.

[36] On the evidence before me, I am satisfied that it is just and convenient to appoint a receiver for the following reasons:

- a. Saptashva has failed to pay the principal and interest on the advances made under the First Loan Agreement. The outstanding amount was due on September 23, 2016 and demand was made on May 2, 2017. Saptashva accepts that the principal amount advanced of \$400,000, with interest, remains unpaid.
- b. The Lenders are entitled to apply for the appointment of a receiver under their security.
- c. The FIT Contracts are assets whose values are declining each month. Saptashva has been noted in default in the 2019 civil action, and, since that time, the action has not advanced and no motion to set aside the noting in default has been scheduled. It would not be just to delay the appointment of a receiver in the circumstances.
- d. A Court supervised receiver will ensure that the interests of all creditors and other stakeholders are considered with a view to maximizing realization on the solar projects, including the FIT Contracts.
- e. The appointment of a receiver will avoid the risk that, with the passage of time, the value of the Lenders’ security becomes insufficient to satisfy the amount that is properly owing to them. Any distribution will be made only with court approval.

[37] The Applicants have shown that there is a reason to incur the expense and procedural formality of appointing a receiver.

Disposition

[38] For these reasons, I grant the application. I ask counsel for the Applicants to provide me with a clean form of the Order that is sought that is substantially in the form of the Commercial List Model Order.

[39] I encourage the parties to settle costs. If the parties are unable to resolve costs, the Applicants may make written submissions (not longer than three pages, excluding costs outline) within 10 days. Saptashva may make responding submissions (also not longer than three pages excluding costs outline) within 10 days thereafter. If so advised, the Applicants may make brief reply submissions (one page) within 5 days thereafter.

Cavanagh J.

January 24, 2022