



Court File No. CV-08-750400-CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

THE HONOURABLE  
  
JUSTICE WILTON-SIEGEL

) WEDNESDAY, THE 24<sup>TH</sup> DAY  
)  
) OF SEPTEMBER, 2008

**CATERPILLAR FINANCIAL SERVICES LIMITED**

Applicant

- and -

**HARD-ROCK PAVING COMPANY LIMITED, HARD-ROCK CONSTRUCTION INC.,  
DIAMOND STONEBRIDGE CONTRACTING INC., 942355 ONTARIO LIMITED and  
942356 ONTARIO LIMITED**

Respondents

**ORDER**

**THIS APPLICATION**, made by the Applicant, Caterpillar Financial Services Limited ("CFSL") for an Order pursuant to section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA") and section 101 of the *Courts of Justice Act*, R.S.O 1990 c. C.43, as amended (the "CJA") appointing BDO Dunwoody Limited ("BDO") as interim receiver and receiver and manager (in such capacities, the "Receiver") without security, of all of the assets, undertakings and properties of the Respondents, Hard-Rock Paving Company Limited., Hard-Rock Construction Inc., Diamond Stonebridge Contracting Inc., 942355 Ontario Limited and 942356 Ontario Limited (collectively the "Debtors") was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the Notice of Application dated April 28, 2008, the affidavits of William Scarlett sworn April 28, 2008, May 9, 2008 and September 12, 2008, the motion material filed in Court File No. 08-CL-7503, including the Fifth Report and the Supplement to the Fifth Report of BDO in its capacity as Monitor of the Debtors, and on hearing the submissions of counsel for CFSL, counsel for GE Capital Canada ("GE"), counsel for BDO, counsel for the Debtors, counsel for Shell Energy North America (Canada) Inc., counsel for International Union of Operating Engineers, Local 793 and Labourers International Union of North America, Local 837, counsel for The Guarantee Company of North America, counsel for Fowler Construction Company Limited and counsel for McLennan Financing Limited, and such other parties in attendance at the hearing of the Application,

**SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

**APPOINTMENT**

2. **THIS COURT ORDERS** that pursuant to section 47(1) of the BIA and section 101 of the CJA, BDO is hereby appointed Receiver, without security, of all of the Debtors' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"), provided that the vehicles leased by the Debtors from GE listed in Schedule "A" attached hereto, shall not form part of the Property, subject to the consent of CFSL or further order of the Court.

### RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, protect and maintain control of the Property, or any part or parts thereof;
- (c) to engage counsel to assist with the exercise of the powers and duties conferred by this Order, including engaging Chaitons LLP in respect of collection of accounts receivable owing to the Debtors (the "Accounts Receivable");
- (d) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (e) with the consent of CFSL and GE, to settle, extend or compromise any indebtedness owing to the Debtors;
- (f) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

- (g) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;
- (h) with the consent of CFSL and GE, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
  - (i) without the approval of this Court in respect of any transaction not exceeding \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$200,000; and
  - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,and in each such case notice under subsection 63(4) of the *Ontario Personal Property Security Act*, or section 31 of the *Ontario Mortgages Act*, as the case may be, shall not be required, and in each case the *Ontario Bulk Sales Act* shall not apply.
- (i) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

- (j) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (k) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (l) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors; and
- (m) to take any steps reasonably incidental to the exercise of these powers,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and

providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

**NO PROCEEDINGS AGAINST THE RECEIVER**

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

**NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY**

8. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

9. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the preservation and perfection of a claim for lien.

**NO INTERFERENCE WITH THE RECEIVER**

10. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

**CONTINUATION OF SERVICES**

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

**RECEIVER TO HOLD FUNDS**

12. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date

of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "Post Receivership Accounts") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

## **EMPLOYEES**

13. **THIS COURT CONFIRMS** that the employment of each employee of the Debtors not previously terminated by the Debtors has been terminated pursuant to bankruptcy orders of the Ontario Superior Court of Justice in Bankruptcy and Insolvency made September 23, 2008 (the "Bankruptcy Orders"). The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction. Furthermore, pursuant to sub-section 14.06(1.2) of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA"), the Receiver shall not be liable for any amount that is or could be due to any employee or independent contractor or consultant of the Debtors including, without limitation, any amount calculated by reference to any period of employment, service or seniority that precedes the Receiver's appointment.

14. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada Personal Information Protection and Electronic Documents Act, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to

whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

#### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

15. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the Canadian Environmental Protection Act, the Ontario Environmental Protection Act, the Ontario Water Resources Act, or the Ontario Occupational Health and Safety Act and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

#### **LIMITATION ON THE RECEIVER'S LIABILITY**

16. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

#### **RECEIVER'S CHARGE**

17. **THIS COURT ORDERS** that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, including liens or trusts under the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the "CLA"), in favour of any Person (the "Receiver's Charge"). The Receiver's Charge relating to costs that are incurred directly by the Receiver for the purpose of collecting the Accounts Receivable (including any portion of the Accounts Receivable impressed with a trust under the CLA or otherwise) shall be allocated first to the Accounts Receivable, and subject to further order of the Court, then to the balance of the Property.

18. **THIS COURT ORDERS** that the filing, registration or perfection of the Receiver's Charge shall not be required, and that the Receiver's Charge shall be valid and

enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected prior to or subsequent to the Receiver's Charge coming into existence, notwithstanding any failure by the Receiver to file, register, record or perfect the Receiver's Charge.

#### **RECEIVER'S ACCOUNTS**

19. **THIS COURT ORDERS** the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### **EXPENSES INCURRED AT REQUEST OF GCNA**

21. **THIS COURT ORDERS** that any fees or expenses (subject to GCNA being provided with prior advice of any third party charges and a reasonable estimate of the proposed expense) of the Receiver incurred in providing services or information to GCNA as a result of a written request by GCNA shall be at the expense of GCNA.

#### **FUNDS HELD IN TRUST**

22. THIS COURT ORDERS that the funds held by the Monitor, namely the Thorold Trust Fund Balance in the amount of \$75,219.17 and the Fort Erie Trust Fund Balance in the amount of \$227,376.28 (as defined in the Wishart Affidavit) shall be held by the Receiver as bare trustee pending further order of the Court as to the payment of the said funds.

**FUNDING FOR TRUSTEE**

23. THIS COURT ORDERS that the Receiver is authorized to make funds available to the Trustee in Bankruptcy to pay all proper expenses related to the bankruptcy, to a maximum amount of \$10,000, or such further amounts as may be agreed to by GE and CFSL.

**DIP CHARGE**

24. This Court Orders that notwithstanding anything else ordered herein or in Court File number 08-CL-7503, the allocation of the DIP Charge established under the Amended and Restated Initial Order in court file number 08-CL-7503 shall be reserved to be determined in these proceedings herein by further order of this Court. The priority of the DIP charge over the Property of the Debtors as set out in the Amended and Restated Initial Order shall remain as provided in that order.

**EFFECTIVE TIME**

25. THIS COURT ORDERS that this Order is effective immediately after the Bankruptcy Orders made by this Court in respect of the Debtors without any intervening period between such Orders.

**GENERAL**

26. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

27. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors, or any of them.

28. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

29. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

30. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order. The Receiver shall be entitled to waive in writing, the notice provision contained in this paragraph as it relates to service upon the Receiver.

31. **THIS COURT ORDERS** that CFSL, any parties who have filed a Notice of Appearance in this proceeding or in Court File No. 08-CL-7503, and the Receiver may serve any Court materials (including, without limitation, motion records, application records, facts and orders) in these proceedings on all represented parties by prepaid mail, courier, personal

delivery, telecopier or electronic transmission (including, but not limited to, emailing a PDF copy of the materials) to any interested party at their addresses as last shown on the records of the Debtors and to counsels' email addresses as recorded on the service list and that any such service or notice shall be deemed to be received the day of forwarding or if sent by ordinary mail, on the second business day following the mailing.

32. **THIS COURT ORDERS** that no party is required to serve any court materials in these proceedings on any party, other than the Debtors, who has not filed a Notice of Appearance in this proceeding or in Court File No. 08-CL-7503.

33. **THIS COURT ORDERS** that nothing in this Order or the granting of powers or authority to the Receiver herein shall be relied upon by the Debtors' employees on any application to obtain relief against the Receiver from any court or tribunal of competent jurisdiction.



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Joanne Nicoara  
Registrar, Superior Court of Justice

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

SEP 25 2008

PER/PAR: JSN

**SCHEDULE "A"**

**(assets not forming part of the "Property")**

2002 Ford Explorer - GE Lease VIN# 1FMZU72E72UA23537

2003 Olds Alero - GE Lease VIN# 1G3NF12E33C291194

2006 Chrysler 300 - GE Lease VIN# 2C3KA53G96H267609

2006 Lexus - GE Lease VIN# JTHBN96S365005291

2006 Ford Explorer - GE Lease VIN# 1FMEU74836UA90213

CATERPILLAR FINANCIAL SERVICES LIMITED - and - HARD-ROCK PAVING COMPANY LIMITED ET AL.  
Applicant Respondents

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**ORDER**

**BLAKE, CASSELS & GRAYDON LLP**  
Barristers and Solicitors  
Box 25, Commerce Court West  
199 Bay Street, Suite 2800  
Toronto, Ontario M5L 1A9

**Steven J. Weisz, LSUC #32102C**

Tel: 416-863-2616

**Katherine McEacher, LSUC #38345M**

Tel: 416-863-2566

Fax: 416-863-2653

Lawyers for Caterpillar Financial  
Services Limited