

22. Aug - 2018

Court File No. CV15-11054-00CL

August 22/18 as per counsel slip -

The Receiver, BDO, brings a motion for distribution of funds collected by it for the debtor companies. The only funds at issue before me are the \$2 million paid to BDO pursuant to minutes of settlement between BDO v "Harcap" approved by this court on Dec 6/17. The MOS resolved BDO's action against Harcap that sought to invalidate its collateral mortgages from Kleinridge, 615146 and 1043280. Re the MOS, it was agreed that Harcap would postpone its rights under the mortgages for 12 months v-7706 and to the extent of \$2 million in favour of BDO. All 3 parties were in the process of power of sale proceedings and have now been sold. BDC, the 1st mtggee on the properties, has been paid out. Harcap, the 2nd mtggee, has been paid out. BDO has the \$2 million paid to it under the MOS. I should note that at the time of the MOS, BDO was a judgment creditor of all 3 companies, the largest of which was \$2.8 million ^{million} owed by Kleinridge. In effect, the MOS provided that BDO would be paid \$2 million for its judgment against Kleinridge before Harcap received any payment on its mortgage from that company.

The approval of the MOS was w/d prejudice to the GST and as argued in their evidence to the \$2 million. That is the position being taken

Doc#4244256v1

ONTARIO
 SUPERIOR COURT OF JUSTICE
 (COMMERCIAL LIST)

Proceedings commenced at Toronto

MOTION RECORD

(Distribution of the Harcap Settlement returnable August 22, 2018)

CHATONS LLP

5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton (LSUC #21592F)

Tel: (416) 218-1129

Fax: (416) 218-1849

E-mail: harvey@chaitons.com

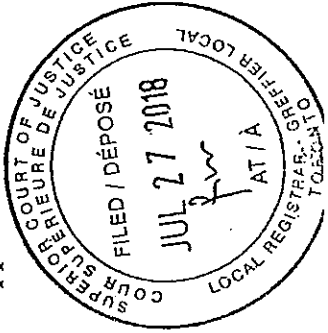
Maya Poliak (LSUC # 54100A)

Tel: (416) 218-1161

Fax: (416) 218-1844

E-mail: maya@chaitons.com

Lawyers for BDO Canada Limited,
Court-appointed Receiver



before me. Specifically 615146 (owner of the Bana property) argues that because of the MOS that paid out \$2 million to BDO ahead of Harcap's mortgage, that left H with a deficiency that cause' up to unnecessarily sell 615's property (770 Bana) and to retain more of the proceeds of 770 Bana w/o giving ~~on~~ the appropriate amount of credit to 615. Therefore, 615 argues, it should receive back the \$2 million or at least receive credit for it from Harcap.

It is my view that none of the arguments advanced by 615 give it any entitlement to the \$2 million that was paid to BDO pursuant to the MOS. Rather, these appear to be accounting issues as between Harcap & 615 for the amount of credit to be given to 615 against its debt to Harcap.

First, the MOS were approved by this court. There is no basis to go behind or to question the legitimacy of the settlement at this point. I reject any attempt by 615 to undermine H's agreement to settle the litigation against it on the terms in the MOS. Second, all of the funds paid out from the sale of 12 Ashworth (Kleinridge's property) were to creditors of Kleinridge, namely BDC, Harcap & BDO. These were Kleinridge funds used to pay Kleinridge creditors. These were not, as 615 argues, its funds used to pay Kleinridge creditors. As noted above...

against Kleinridge for \$2.8 million. It accepted a payment of \$2 million from K pursuant to the settlement.

Third, ~~to the extent that BIS is arguing that~~ to the extent that BIS is arguing that Harcap retained more of the 615/Bana proceeds than it should have, that is an accounting issue as between 615 & Harcap. That issue is not before me.

In summary, 615 has failed to establish any entitlement to the \$2 million held by BDO. Those funds may be distributed by BDO to TD, the senior secured lender of the Guttered debtor companies.

Costs payable by the 3 companies (Klein, 615 & 104), jointly & severally, to the Rec & TD in the collective amount of \$15,000, all in. That amount is payable to BDO ~~for~~ on behalf of BDO & TD.
OTG as signed by me.

Conway J.