

Court File No. CV-15-11054-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE TORONTO DOMINION BANK

Applicant

- and -

**B. GOTTARDO CONSTRUCTION LTD. AND
B. GOTTARDO SITE SERVICING LIMITED**

Respondents

**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**

**EIGHTH REPORT OF BDO CANADA LIMITED, IN ITS CAPACITY
AS COURT APPOINTED RECEIVER**

October 4, 2017

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INTRODUCTION AND PURPOSE OF THIS REPORT

1. B. Gottardo Construction Ltd. (“**Construction**”) and B. Gottardo Site Servicing Limited (“**Site Servicing**”, and collectively, the “**Debtors**”) are corporations incorporated pursuant to the *Business Corporations Act* (Ontario). The Debtors are privately owned directly or indirectly by members of the Gottardo family. Bruno Gottardo was the founder and president of Construction and Servicing (“**Bruno**”). David Gottardo (“**David**”), Bruno’s son, was the general manager of the Debtors.

2. The Debtors provided large scale construction services, frequently being infrastructure projects for municipalities and other government entities as well as site servicing for developers.

3. On application by The Toronto Dominion Bank (“**TD Bank**”), the Debtors’ senior secured lender, BDO Canada Limited was appointed as the receiver (the “**Receiver**”) without security, of the assets, undertakings and properties of the Debtors, pursuant to the order of Justice Newbould dated August 10, 2015 (the “**Receivership Order**”). Attached hereto as **Appendix “A”** is a copy of the Receivership Order.

4. All court materials filed, including previous Receiver reports, and court orders and endorsements issued in these proceedings are available on the Receiver’s website at <http://www.extranets.bdo.ca/BGottardo>.

5. In or around January 2017, the Receiver commenced an application for, among other things, a declaration that the collateral mortgages (the “**228 Mortgages**”) granted by Kleinridge Investments Inc. (“**Kleinridge**”), 615146 Ontario Limited (“**615**”) and

1043280 Ontario Limited (“**104**”), each a company related to the Debtors, in favour of 2283074 Ontario Inc. (“**228**”) are void as, *inter alia*, a fraudulent conveyance or preference (the “**Application**”).

6. Subject to the approval of this Court, the Receiver and 228 have agreed to settle the Application pursuant to the terms set out in the Minutes of Settlement a copy of which is attached hereto as **Appendix “B”** (the “**Minutes of Settlement**”). This Report is prepared and served in support of the Receiver’s motion for an order approving the Minutes of Settlement.

THE IMPUGNED MORTGAGES

7. In support of the Application, Josie Parisi, a Senior Vice President with BDO Canada Limited, swore an Affidavit on January 19, 2017 (the “**Parisi Affidavit**”). A copy of the Parisi Affidavit is attached hereto as **Appendix “C”**.

8. As set out in the Parisi Affidavit, pursuant to an order of Justice Newbould dated October 7, 2016, the Receiver, on behalf of the Debtors obtained judgment (the “**Judgment**”) against Kleinridge, Falconridge Corporation (“**Falconridge**”) and 615, among others, in the following amounts:

- a. Falconridge in the amount \$399,927.85;
- b. Kleinridge in the amount of \$2,884,584.74; and
- c. 615 in the amount of \$108,612.65.

9. The Receiver also obtained a judgment against each of Bruno and David in the amount of \$110,242.52 and \$362,191.47, respectively.

10. The Receiver did not seek to obtain judgment against 104. As described in the Parisi Affidavit, the parcel search in respect of the property owned by 104, listed at **Schedule “C”** to this Report and municipally known as 132 Ashbridge Circle, Vaughan, Ontario (“**132 Ashbridge**”) discloses that on December 12, 2003, a transfer of charge in the principal amount of \$575,000 was registered against title to 132 Ashbridge from Bank of Montreal to Construction (the “**Construction Mortgage**”). In addition, Construction’s books and records disclose a further intercompany loan made by Construction to 104 in an amount of \$20,777.82.

11. Bruno and/or David are the sole directors and officers of Falconridge, Kleinridge, 615 and 104. Kleinridge is the registered owner of the property listed at **Schedule A** hereto and municipally known as 12 Ashbridge Circle, Vaughan, Ontario (“**12 Ashbridge**”). 615 is the registered owner of the property listed at **Schedule B** hereto and municipally known as 770 Gana Court, Mississauga, Ontario (“**770 Gana**”, and together with 12 Ashbridge and 132 Ashbridge, the “**Properties**”).

228 MORTGAGES

12. Falconridge, Construction and 228 are parties to a Factor Agreement dated March 25, 2013 (the “**Factor Agreement**”). A copy of the Factor Agreement is attached hereto as **Appendix “D”**.

13. The Factor Agreement provides that 228 agreed to provide financing to Falconridge by purchasing the accounts described in Schedule A to the Factor Agreement. Schedule A to the Factor Agreement lists only one invoice bearing number J001001 dated March 4, 2013 with the face value of \$3,955,000 owing by Construction

to Falconridge. Construction appears to be a signatory to and an obligor under the Factoring Agreement.

14. In connection with the Factor Agreement, 228 also provided a copy of a direction executed by Bruno on behalf of Construction addressed to the Corporation of the City of Mississauga, directing the City to pay the sum of \$3,500,000 to 228 from any proceeds owed by the City to Construction (the “**Construction Receivable**”). The direction was not signed by the City of Mississauga. The Receiver understands that at the time this direction was provided, TD Bank had a general security interest in all of Construction’s assets, property and undertakings, including all accounts receivable.

15. The Receiver was advised by TD Bank that it had no knowledge of the purported assignment of the Construction Receivable until it was provided with the supporting documents for 228’s mortgage by the Receiver and its counsel in late December 2016.

16. Neither Kleinridge, 104 or 615 guaranteed Falconridge’s obligations under the Factor Agreement at the time that the agreement was entered into.

17. The Receiver was appointed by the Court on August 10, 2015. On or around August 31, 2015, Falconridge, among others, entered into a Forbearance Agreement a copy of which is attached hereto as **Appendix “E”**. Construction is not a signatory to the Forbearance Agreement.

18. In connection with the Forbearance Agreement Kleinridge, 615 and 104 provided secured guarantees of Falconridge’s obligations to 228.

19. The guarantee executed by Kleinridge describes the consideration received by Kleinridge for entering into the guarantee as follows:

“It is in the interests of Kleinridge Investments Inc. (the “Guarantor”) that the Creditor [228] extend credit (or continue to extend credit) to the Debtor [Falconridge] and therefore the Guarantor is prepared to issue its Guarantee to the Creditor;

20. Identical provisions are contained in the guarantees executed by 104 and 615.

21. As set out in the Parisi Affidavit, it is unclear to the Receiver what benefit, if any, 615, Kleinridge or 104 derived from providing secured guarantees to 228 given that they were not guarantors or otherwise obligated to 228 under the Factor Agreement. Based on the Receiver’s review of the documents provided by 228, it appeared that there was no fresh advance of funds made to Falconridge or any of the guarantors in return for the mortgages.

22. The 228 Mortgages were granted shortly after the date of the Receivership Order at a time when 228 knew or ought to have known that the Construction Receivable was subject to TD Bank’s first ranking security interest and that there was little, if any, realizable value to the Construction Receivable for 228.

BDC’s MORTGAGES

23. At the time that the 228 Mortgages were registered, the Properties were already encumbered in favour of Business Development Bank of Canada (“**BDC**”). In particular,

- (a) a search of the parcel register in respect of 770 Gana dated January 16, 2017 discloses that BDC registered two mortgages against 770 Gana in the principal amounts of \$4.8 million (registered on August 5, 2011) and \$2.7 million (registered on November 15, 2013);
- (b) a search of the parcel register in respect of 132 Ashbridge dated January 16, 2017 discloses that BDC registered a mortgage against 132 Ashbridge in the principal amount of \$2.7 million (registered on November 15, 2013);
- (c) a search of the parcel register in respect of 12 Ashbridge dated January 16, 2017 discloses that BDC registered two mortgages against 12 Ashbridge in the principal amounts of \$4.8 million (registered on August 5, 2011) and \$2.7 million (registered on November 15, 2013).

24. The mortgages granted by Kleinridge, 615 and 104 in favour of BDC are in default. BDC issued Notices of Sale under its mortgages and has completed the sale of 132 Ashbridge. BDC is in the process of marketing 12 Ashbridge and 770 Gana for sale under power of sale.

THE APPLICATION

25. The Receiver commenced the Application on January 31, 2017 by issuing its Notice of Application, as amended, a copy of which is attached hereto as **Appendix "F"**.

26. 228 defended the Application and delivered a Responding Affidavit of Ian Harvey, sworn February 2, 2017 and a Supplementary Affidavit of Ian Harvey sworn

April 20, 2017. Copies of Mr. Harvey's affidavits without exhibits are collectively attached hereto as **Appendix "G"**.

27. Among other things, the Receiver sought an order declaring that the granting of the 228 Mortgages by Kleinridge, 615 and 104 was oppressive, unfairly prejudicial or unfairly disregarded the interests of their creditors. Kleinridge, 615 and 104 are also named as respondents in the Notice of Application. Kleinridge, 615 and 104 have not filed any responding materials in connection with the Application.

28. The next step in the Application proceeding would be for the Receiver to conduct cross-examinations of Ian Harvey on his affidavits and Bruno and David in their capacities as directors and/or officers of Falconridge, Kleinridge, 615 and 104. Before the examinations were scheduled, the Receiver and 228 entered into settlement negotiations of the Application which culminated in the Minutes of Settlement.

THE MINUTES OF SETTLEMENT

29. The Receiver proposes to settle the Application pursuant to the terms of the Minutes of Settlement. A summary of the salient terms of the Minutes of Settlement is set out in this section of the Report. Capitalized terms not otherwise defined in this Report, shall have the meaning ascribed to such term in the Minutes of Settlement.

30. The Receiver and 228 agree that BDC shall sell the Properties under its power of sale proceedings. The Parties agree that the net proceeds from the sale of 770 Gana and 12 Ashbridge shall be distributed immediately following completion of the sale of each of these properties in accordance with the following order of priorities:

- (a) first to BDC up to the full amount owing to BDC under the BDC 12 Ashbridge Mortgage and the BDC 770 Gana Mortgage, inclusive of principal, interest, fees and costs of enforcement and sale;
- (b) second to the Receiver to the maximum amount of \$2,000,000 payable immediately following the completion of the sale of 12 Ashbridge and/or 770 Gana and after payment of the BDC Mortgages described in paragraph (a) hereto; and
- (c) the balance to 228 up to the full amount owing to 228 by Falconridge under the 228 12 Ashbridge Mortgage and the 228 770 Gana Mortgage.

31. Based on the expressions of interest received by BDC for 12 Ashbridge during its power of sale process and the appraised values of 12 Ashbridge and 770 Gana, the Receiver believes that it will recover the \$2,000,000 in full from the sale of 12 Ashbridge and/or 770 Gana.

32. In addition, 228 agreed to postpone and subordinate its mortgages registered against 12 Ashbridge and 770 Gana in favour of the Receiver to give effect to the priorities described in paragraph 28 of this Report.

33. The parties have agreed that the Receiver will not share in the proceeds from the sale of 132 Ashbridge. The Receiver believes that this is reasonable as:

- (a) the intercompany loan recorded in the Debtors' books and records as owing by 104 to Construction is nominal; and

(b) there does not appear to be any money owing by 104 to Construction under the Construction Mortgage.

34. In addition, pursuant to the Minutes of Settlement, the Receiver shall be entitled to the first \$250,000 realized pursuant to the Parties judgments and executions against David and Bruno.

35. The Receiver is of the view that the Minutes of Settlement are fair and reasonable for the following reasons:

(a) pursuant to the Minutes of Settlement, the Receiver will be able to recover between 68% and 78% of the value of its judgment against Kleinridge and 615;

(b) the Minutes of Settlement will provide a cost effective resolution of the Application; and

(c) TD Bank which is the only party with an economic interest in these proceeds consents to the settlement pursuant to the Minutes of Settlement and supports the relief sought by the Receiver.

36. As a result of the foregoing, the Receiver recommends that the Court approve the Minutes of Settlement.

All of which is respectfully submitted this 4th day of October, 2017.

**BDO CANADA LIMITED Court Appointed Receiver
of B. Gottardo Construction Ltd. and B. Gottardo Site
Servicing Limited**



Per: _____
Name: Josie Parisi, CPA, CA, CBV, CIRP, LIT
Title: Senior Vice President

SCHEDULE "A"**12 ASHBRIDGE**

PIN: 03311-0840 LT

DESCRIPTION: PCL 1-2 SEC M1943; FIRSTLY: PT LT 1 PL M1943 PT 1 65R8866;
SECONDLY: PT BLK 10 PL M1943, PT 2 65R8866; VAUGHAN

PIN: 03311-0841 LT

DESCRIPTION: PCL 9-1 SEC M1943; LT 9 PL M1943; VAUGHAN

PIN: 03311-0843 LT

DESCRIPTION: PCL BLOCK 10-2 SEC M1943; PT BLK 10 PL M1943, PT 1 65R4223;
VAUGHAN

PIN: 03311-0844 LT

DESCRIPTION: PCL BLOCK 10-2 SEC M1943; PT BLK 10 PL M1943, PT 3, 65R4223;
VAUGHAN

SCHEDULE "B"
770 GANA

PIN: 14300-0063 LT

DESCRIPTION: PCL 6-1, SEC 43M706; LT 6, PL 43M706; S/T LT1044102,
LT686427; CITY OF MISSISSAUGA

SCHEDULE "C"
132 ASHBRIDGE

PIN: 03311 – 0836
DESCRIPTION: PCL 3-1 SEC M1943; LT 3 PL M1943; VAUGHAN