

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

BETWEEN:

CAISSE POPULAIRE POINTE-AUX-ROCHES-TECUMSEH INC.

Plaintiff

and

**G.I. FARMS INC., VANTEC USA ONTARIO INC., 2287188 ONTARIO INC., 2027512
ONTARIO INC. and 1690169 ONTARIO INC.**

Defendants

**FACTUM OF BDO CANADA LIMITED, IN ITS CAPACITY AS COURT APPOINTED
RECEIVER OF G.I. FARMS INC.
(returnable June 28, 2018)**

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PART I - INTRODUCTION

1. GI Farms Inc.'s (the "**Debtor**") primary asset is real property municipally known as 2980 Talbot Road South, Kingsville, Ontario (the "**Property**"). The Property has two large structures on it: the first is a home that used to be occupied by Frank Porrone (one of the principles of the Debtor) and his family and the second is a 20 acre greenhouse structure together with a 30,000 square foot warehouse attached to it.¹

2. By Order of the Honourable Justice Mitchell dated May 30, 2016, BDO Canada Limited ("**BDO**") was appointed as non-CCAA Monitor (in this capacity, the "**Monitor**") of the property, assets and undertaking of all of the Defendants in this proceeding (the "**Monitoring Order**"). The Monitoring Order's powers were expanded by subsequent Orders of the Honourable Justice Hebner and the Honourable Justice Templeton, however the Monitoring Orders did not provide BDO with the authority to take possession of the Defendants' assets.²

3. On December 20, 2017, the Honourable Justice Templeton appointed BDO as receiver (in this capacity, the "**Receiver**") of much of the property, assets and undertaking of the Debtor. The Order appointing the Receiver was entered on December 22, 2017 (the "**Appointment Order**").³

4. On March 22, 2018, the Honourable Justice Grace ordered, among other things, that portions of the Receiver's first report dated March 15, 2018 (the "**First Report**"),

¹ Motion Record of the Receiver, returnable June 28, 2018 ("**RMR**"), Tab 2C, First Report of the Receiver, dated March 15, 2018 ("**First Report**"), para 14, p 51.

² RMR, Tab 2C, First Report, paras 3-5, pp 47-48.

³ RMR, Tab 2, Second Report of the Receiver, dated June 21, 2018 ("**Second Report**"), para 1, p 11; Tab2A, Order of Justice Templeton dated December 20, 2017 ("**Appointment Order**").

were approved (the "**Grace J Order**"). As the Debtor was in the process of retaining new counsel, Justice Grace adjourned certain relief sought to the next hearing date (the "**Adjourned Relief**"), namely:

(a) an Order approving the activities of the Receiver as outlined in the First Report at paragraphs 1-89 and 103-132, (including approval of the Receiver's statement of receipts and disbursements up to March 6, 2018, and as provided at Appendix "OO" to the First Report) and the confidential brief of the Receiver dated March 16, 2018 (the "**Confidential Brief**"); and

(b) requiring 2286514 Ontario Inc. ("**228**") to remit \$35,000 of the Deposit (defined and set out in more detail below) to the Receiver forthwith, said amount being a preferential payment made by GI Farms to 228 during the five days that the motion for the Appointment Order was under reserve.⁴

5. On this motion, the Receiver seeks the Adjourned Relief and also new relief, as more particularly described at paragraph 6 of the Receiver's report dated June 21, 2018 (the "**Second Report**"). This factum will focus on two specific prayers for relief therein, namely an Order:

(a) directing that the balance of the Deposit be delivered to the Receiver forthwith; and

(b) approving the second phase of the Receiver's proposed marketing and sales process of the Property as detailed in the Second Report ("**Phase 2**").

⁴ RMR, Tab 2, Second Report, paras 11-12, pp 14-15; Tab 2D, Order of Justice Grace dated March 22, 2018 ("**Grace J Order**").

PART II - THE FACTS

6. The Receiver was appointed over the Debtor's property, assets and undertaking pursuant to the Appointment Order. The Appointment Order was preceded by BDO's appointment as the Monitor of all of the Defendants. As described above, BDO's powers as the Monitor were expanded on two separate occasions, largely as a result of a lack of cooperation from the Defendants.⁵

7. The Plaintiff ultimately proceeded with its application for the Appointment Order. On December 20, 2017 the Court issued reasons appointing the Receiver and on December 22, 2017 the Court entered the Appointment Order.⁶

8. On December 15, 2017, at the hearing to appoint the Receiver, the Debtor presented both the Plaintiff and the Court with an executed agreement of purchase and sale (the "APS") between the Debtor, as vendor, and 8040478 Canada Limited ("804"), as purchaser. Subsequent to the Appointment Order, the Receiver discovered that 804 is related to an entity known as the Cross-Pacific Group which is either owned or controlled by Vlad Marchuk (who, together with Mr. Porrone, are the directing minds of the Debtor).⁷

A. The Deposit Funds

9. The APS, purportedly accepted by the Debtor on December 14, 2017, contemplated a purchase price (subject to a number of conditions) of \$19,230,000, a closing date of March 15, 2018, and a "non-refundable" deposit of \$50,000 (the

⁵ RMR, Tab 2C, First Report, para 5, pp 47-48.

⁶ RMR, Tab 2A, Appointment Order.

⁷ RMR, Tab 2C, First Report, paras 55, 68-70, pp 62, 65.

“Deposit”). The Deposit was held in trust with the Debtor’s previous law firm, Lion Law.⁸

10. Following the Appointment Order, the Receiver’s counsel contacted Mr. Freiheit (former counsel for the Debtor) and requested that the Deposit be paid to the Receiver forthwith as it was property subject to the Appointment Order and, in any event, was non-refundable.⁹

11. Mr. Freiheit advised that \$35,000 of the Deposit had been delivered, at Mr. Porrone’s instructions, to 228 on account of services rendered to the Debtor and the remainder was being held by Mr. Freiheit’s firm on account of his firm’s professional fees.¹⁰

12. On further inquiry, the Receiver discovered that Chrystie Porrone, Frank Porrone’s wife, is the Officer and Director of 228. The basis for payment to Ms. Porrone’s company was a non-descript invoice, most of which related to payments that were not due until the return date of the Application to appoint the Receiver. No further explanation or documentation has been provided to support the services rendered by 228 to the Debtor.¹¹

13. Although it was not clear when the Deposit was deposited with Lion Law, the distribution to 228 must have occurred between December 14, 2018 (the date that the Deposit was available to the Debtor) and December 20, 2018 (the date that the Court granted the Plaintiff’s application to appoint the Receiver). Put differently, it is probable

⁸ RMR, Tab 2C, First Report, paras 57-59, pp 62-63.

⁹ RMR, Tab 2C, First Report, para 59, pp 62-63.

¹⁰ RMR, Tab 2C, First Report, para 59, pp 62-63.

¹¹ RMR, Tab 2C, First Report, paras 60-62, p 63.

that Mr. Porrone instructed the Debtor's counsel to pay 228 (ahead of all other creditors) while the Court had reserved on the Application to appoint the Receiver. Accordingly, Justice Grace advised Mr. Freiheit that nothing should have been done with any portion of the deposit without approval by the Monitor, Receiver or the Court.¹²

14. With respect to the remainder of the \$15,000 being held by Lion Law, Mr. Frieheit advised that it was being held on account of professional fees.¹³

15. On March 22, 2018, at the hearing before Justice Grace, Mr. Frieheit brought a motion to remove himself and Lion Law as lawyers of record for the Debtor. Justice Grace granted Mr. Frieheit's motion and ordered that he remit the \$15,000, less an amount necessary to satisfy his outstanding accounts, to the Receiver.¹⁴ Mr. Freiheit has since remitted that amount to the Receiver.¹⁵

16. The matter of the \$35,000 in Deposit funds distributed to 228 was adjourned to the next court attendance to allow the Debtor time to retain new counsel.¹⁶

B. Phase 2 of the Sales Process

17. The APS did not close, nor did 804 request an extension of time to close the APS. The APS is at an end.¹⁷

¹² Receivers Book of Authorities, Tab 5, Endorsement of Justice Grace dated March 22, 2018.

¹³ RMR, Tab 2C, First Report, para 64, p 64.

¹⁴ RMR, Tab2D, Grace J Order.

¹⁵ RMR, Tab 2, Second Report, para 23, p 17.

¹⁶ RMR, Tab 2, Second Report, para 24, p 17.

¹⁷ RMR, Tab 2, Second Report, paras 20-21, p 16.

18. Pursuant to the Appointment Order, the Receiver is authorized to market the Property for sale, including negotiating such terms and conditions of sale as the Receiver in its discretion deems appropriate.¹⁸

19. As detailed in paragraphs 90 through 102 of the First Report, and pursuant to paragraph 10 of the Grace J. Order, the Receiver (with the assistance of BDO's Transaction Advisory Services Practice) implemented a sales process that concluded on May 31, 2018. As detailed in the second confidential brief of the Receiver (the "**Second Confidential Brief**"), the original sales process did not yield a satisfactory result.¹⁹

20. As detailed in paragraphs 39 through 42 of the Second Report and in the Second Confidential Report, the Receiver is recommending proceeding with Phase 2 of the sales process, whereby it retain a commercial realtor, Ronald Derksen of Royal LePage Binder Real Estate, to market the Property for sale.²⁰

PART III - ISSUES AND THE LAW

21. The issues addressed in this factum are:

- (a) should the remainder of the Deposit be remitted to the Receiver forthwith; and
- (b) is the proposed Phase 2 of the Sales Process appropriate in the circumstances.

¹⁸ RMR, Tab 2A, Appointment Order, para 3, pp 25-27.

¹⁹ RMR, Tab 2, Second Report, para 38, pp 19-20.

²⁰ RMR, Tab 2, Second Report, para 39-42, p 20.

A. Receiver's Entitlement to the Remainder of the Deposit

22. The Court has generally taken a dim view of debtors who, while subject to a monitoring or receivership order, abscond or cause funds to be diverted without full disclosure to the Monitor or Receiver. In these instances, the Courts have held that it has the inherent power to issue Orders against third parties and repatriate the funds in question.

23. An example of the Court's power to repatriate funds back to the Receiver is *Business Development Bank of Canada v Aventura II Properties Inc.*²¹ In *Aventura*, the Receiver discovered that the directing minds of the Debtor purportedly transferred corporate HST refunds to related parties without disclosing to a non-CCAA monitor. When it came to "repatriation" of the HST Refund by the debtor's principal to a related party (in that case the principal's wife), Hainey J. held that:

[the HST Funds] are assets that are subject to the Receivership Order. The Receiver is, therefore, entitled to possession of the HST Funds under the terms of the Receivership Order.

For these reasons the Receiver's motion to repatriate the HST Funds is granted.²²

24. The facts in *Aventura* are virtually identical to the facts as between Mr. Porrone, the Debtor and their transfer of \$35,000 to Ms. Porrone and her company, 228. Specifically, the principal of the Debtor made a payment to his spouse (or, in this

²¹ *Business Development Bank of Canada v Aventura II Properties Inc.*, 2016 ONSC 1545, aff'd 2016 ONCA 300 ("*Aventura*")

²² *Aventura*, paras 20 & 21

instance, his spouse's company) without disclosing that payment to the Monitor. After its appointment, the Receiver discovers the payment and demands return of the payment. A court order directing 228 to remit to the Receiver the \$35,000 paid to it by the Debtor (while the Plaintiff's receivership application was under reserve no less) is appropriate in the circumstances.

B. Sales Process Approval

25. As described above and in the Second Report, the Receiver is recommending the property be listed with a commercial real estate broker for \$10,500,000 and a three-month listing period.²³

26. The Receiver is recommending this form of sales process based on its discussions with the mortgagees together with its assessment of the information contained in the Second Confidential Brief and the outcome of the previous sales process. Among the Receiver's considerations are:

- (a) Phase 2 contemplates a sale before the end of September, 2018;
- (b) maintenance costs for the Property increase significantly in the winter months;
- (c) the Property is not a revenue generating asset at this time; and
- (d) the plaintiff, who has been funding the Receivership, has not committed to funding maintenance costs throughout the winter months.²⁴

²³ RMR, Tab 2, Second Report, para 40, p 20.

²⁴ RMR, Tab 2, Second Report, para 41, p 20.

27. Further of the Receiver's considerations are detailed in the Second Confidential Brief.

28. In *CCM Master Qualified Fund, Ltd v Blutip Power Technologies Ltd*, Brown J. (as he was then) articulated a three part test that Courts should consider when reviewing a sales process in a receivership.²⁵ The principles enunciated in CCM have been cited with approval by other Courts in Canada.²⁶ Brown J. (as he then was) held that the Court should assess:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.²⁷

29. In CCM, the Court specifically noted that the lack of funding can be an important factor in assessing the method and length of a proposed sales process.²⁸ The fact that the Property is not an income generating asset and the Receiver is incurring significant expenses in maintaining the Property and the Greenhouse militate in favour of a quick and cost effective sales process. This is particularly so when the primary asset is unique in nature with a relatively small group of prospective purchasers.

30. The Court has the authority to modify, amend or create a supplementary sales process. In fact, one of the purposes of maintaining a confidential brief, which has

²⁵ *CCM Master Qualified Fund, Ltd v Blutip Power Technologies Ltd*, 2012 ONSC 1750 ("**CCM**").

²⁶ See, e.g., *Re: Walter Energy Canada Holdings, Inc.*, 2016 BCSC 107 at paras 20 and 21.

²⁷ *CCM* at para 6.

²⁸ *CCM* at para 14.

become standard practice in sales processes conducted in a receivership, is to protect the integrity of any future sales process should the original sales process not generate the desired result.²⁹

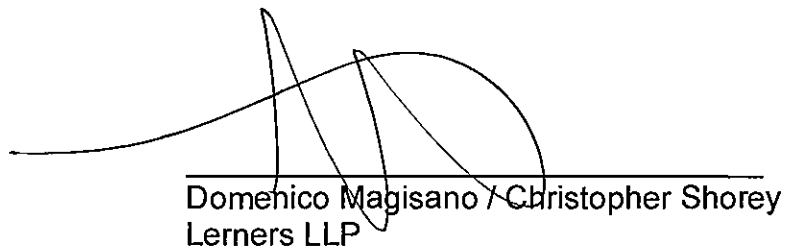
31. For the foregoing reasons it is respectfully submitted that the proposed sales process meets the criteria as outlined by Brown J. in CCM and should be approved.

PART IV - ORDER REQUESTED

32. The Receiver respectfully requests an Order substantially in the form attached at Tab 3 of its motion record. Specifically, the Receiver seeks, amongst other things, an Order for:

- (a) payment of the remainder of the Deposit forthwith; and
- (b) approval of the sales process as outlined at paragraphs 37 through 42 of the Second Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2018.



Domenico Magisano / Christopher Shorey
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Lawyer for BDO Canada Limited, in its capacity
as Court Appointed Receiver of G.I. Farms Inc.

²⁹ See, e.g., *Business Development Bank of Canada v Marlwood Golf & Country Club Inc*, 2015 ONSC 3909 at para 10.

SCHEDULE "A"
AUTHORITIES

1. *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONSC 1545, motion for leave to appeal dismissed 2016 ONCA 300
2. *CCM Master Qualified Fund, Ltd v Blutip Power Technologies Ltd*, 2012 ONSC 1750
3. *Re: Walter Energy Canada Holdings, Inc*, 2016 BCSC 107
4. *Business Development Bank of Canada v Marlwood Golf & Country Club Inc*, 2015 ONSC 3909

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Court File No.: 35-1842432T

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Proceeding commenced at LONDON

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