

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

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

-and-

LIQUIDATION KING INC.

Defendant

**FACTUM OF ROYAL BANK OF CANADA
(Moving Party)**

December 9, 2016

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ROYAL BANK OF CANADA

Plaintiff

-and-

LIQUIDATION KING INC.

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PART I – THE MOTION

- 1) The Plaintiff, Royal Bank of Canada (the “**Bank**”), seeks:
 - a. An Order substantially in the form attached as Schedule “A” to the Notice of Motion appointing BDO Canada Limited (“**BDO**”) as receiver (the “**Receiver**”) without security of all the assets, undertakings and properties of the Defendant, Liquidation King Inc. (“**LKI**” or the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor including a 2011 Maserati automobile.
 - b. An order dispensing with notice of the within motion or abridging the time for service, filing and confirming this motion, if necessary; and,
 - c. Such further and other relief as to this Honourable Court may seem just.

PART II – OVERVIEW/FACTS

- 2) The Debtor carries on business as a retail liquidator with their head office being from a leased premises known municipally as 1001 Langs Drive – Unit 1, Cambridge, Ontario. LKI has further Ontario locations including in St. Catharines, Arthur, Niagara Falls, Port Colborne and Paris.

**Affidavit of Jim Sheehy, sworn December 7, 2016 at paragraphs 2-3 and Exhibit "A"
[the "Sheehy Affidavit"]**

- 3) Richard King ("**King**") is the principal of LKI and the guarantor of the loans made by the Bank to LKI.

Sheehy Affidavit, paragraph 4

- 4) As of November 25, 2016, LKI is indebted to the Bank in the amount of \$952,546.39 plus accruing interest and the Bank's costs of enforcement (collectively the "**Indebtedness**") in respect of certain credit facilities (the "**Financing**") advanced to LKI pursuant to the terms of a Letter Agreement dated August 17, 2016 (the "**Letter Agreement**"), which included a Revolving Demand Facility (the "**Demand Loan**") payable on demand.

Sheehy Affidavit, paragraphs 5, 6, 12 and Exhibits "B" and "C"

- 5) As security for the Financing and pursuant to the Letter Agreement, the Bank was granted the following security by LKI and King:
- a. General Security Agreement dated March 16, 2015 (the "**GSA**");
 - b. Lease Agreement (the "**Lease Agreement**") with attached Leasing Schedule each dated June 23, 2015;
 - c. A contract (the "**Contract**") evidencing the financing of a 2011 Maserati Gran Turismo Convertible bearing VIN ZAM45KMAXB0055359 (the "**Maserati**"); and,
 - d. Guarantee and Postponement of Claim from King in the amount of \$450,000 dated March 16, 2015 (the "**Guarantee**");
 - e. Postponement and Assignment of Claim from King dated March 16, 2015.

(collectively the "**Security**").

Sheehy Affidavit, paragraphs 7 and 9 and Exhibits "D" to "F"

- 6) Several Financing Statements were registered in favour of the Bank pursuant to the provisions of the *Personal Property Security Act* (Ontario) ("**PPSA**") to perfect its security interest the following:
- a. All personal property, assets and undertakings of LKI pursuant to the GSA;
 - b. In relation to the Contract, in relation to Consumer Goods, Other Motor Vehicle and specifically the Maserati as against LKI and King; and,
 - c. In relation to the Lease Agreement against Inventory, Equipment, Accounts and Other as against LKI.

Sheehy Affidavit, paragraphs 8 to 10 and Exhibits "G" and "H"

- 7) As of November 25, 2016, LKI was in default of the terms of the Financing in several respects, including:
- a. The Demand Loan was at its limit as of November 25, 2016 with no further credit available to LKI;
 - b. HMQ in Right of Ontario as represented by the Minister of Finance had registered an interest as against LKI under the PPSA, constituting a breach of the Standard Terms appended to the Letter Agreement;
 - c. The Debtor maintained a Business Account (the '**Business Account**') with the Bank. The Bank detected unusual activity with respect to cheques drawn on and deposited to the Business Account, including, *inter alia*:
 - i. On November 3, 2016, a deposit to the Business Account of \$25,000.00 which consisted of a cheque drawn by LKI on TD Canada Trust account #00772-004-74055217550 (the "**TD Account**"), followed by a cheque drawn on the Business Account in the amount of \$26,000.00 on November 4, 2016 back to LKI to the TD Account. On November 7, 2016 a deposit to the Business Account for \$15,000.00 consisting of a cheque drawn on The TD Account to cover the excess on the Business Account of \$13,947.63; and,

- ii. On November 15, 2016, a deposit to the Business Account for \$44,565.00 consisting of a cheque for \$36,000.00 from LKI drawn on the TD Account, followed by a cheque written in the amount of \$34,000.00 on the Business Account on November 16, 2016 back to LKI to the TD Account., and returned as NSF the same day due the excess on the Business Account.

Sheehy Affidavit, paragraphs 12 to 16 and Exhibit “I”

- 8) On November 18, 2016, LKI presented cheques to the Bank on the Business Account, which if cleared, would have created an excess on the Demand Loan. Additional deposits made by LKI to the Business Account were returned for non-sufficient funds. As a result of this activity and due to the risk to the Bank of LKI drawing cheques on the Business Account without sufficient funds, the Bank placed the Business Account on deposit-only on November 23, 2016.

Sheehy Affidavit, paragraphs 17 to 18

- 9) On November 24, 2016, the Bank received an email from counsel for LKI demanding that the Business Account be unfrozen. The Bank responded to counsel within the same day outlining the Bank’s concerns and the reasons for placing the Business Account on deposit-only.

Sheehy Affidavit, paragraphs 19 to 20 and Exhibits “J” and “K”

- 10) On November 25, 2016, the Bank delivered a demand for payment and a Notice of Intention to Enforce Security under the *Bankruptcy and Insolvency Act* (“**BIA**”) to LKI in relation to its obligations owing to the Bank (collectively the “**LKI Demand**”). On November 25, 2016, the Bank also delivered a demand for payment to King pursuant to the Guarantee (the “**King Demand**”). Copies of the LKI Demand and the King Demand were emailed to counsel for LKI on November 25, 2016.

Sheehy Affidavit, paragraphs 21, 22 and 24 and Exhibits “L”, “M”, and “O”

- 11) In relation to the TD Account, counsel to the Bank notified TD Canada Trust (“**TD**”) that the GSA attached to all funds deposited by LKI with TD, and that the LKI and King Demands had been issued.

Sheehy Affidavit, paragraphs 25 to 27 and Exhibits “P”, “Q” and “R”

- 12) On December 6, 2016, counsel for the Bank notified counsel for LKI that the demands had expired, requested information regarding the Debtor's plans to repay the Indebtedness, and advised that the Bank would move to appoint a Receiver in the absence of a meaningful response.

Sheehy Affidavit, paragraph 28 and Exhibit “S”

- 13) LKI remains substantially indebted to the Bank pursuant to the terms of the Financing, and is in default of the terms of the Letter Agreement. LKI has no capital to fund operations and the Business Account has been marked deposit-only due to the Bank's reasonable concern with the activity outlined at paragraph 7 of this factum. LKI has no further access to credit from the Bank.

Sheehy Affidavit, paragraphs 29, 32, 33

- 14) The Indebtedness has not been paid and all notice periods in relation to the LKI Demand and the King Demand have expired.

Sheehy Affidavit, paragraph 30

- 15) The Security held by the Bank contains express language providing for the appointment of a Receiver on the default of LKI.

Sheehy Affidavit, paragraph 31

- 16) The Bank seeks the appointment of a receiver to deal with the assets and property of LKI, to protect the interests of the Bank as senior secured creditor of LKI, and the interests of all creditors of LKI.
- 17) The Order sought by the Bank is in the form of the template Order of the Ontario Court of Justice – Commercial List Model Order Committee.

PART III – LAW AND SUBMISSIONS

The Appointment of a Receiver

18) Section 243(1) and (1.1) of the *Bankruptcy and Insolvency Act* 1985, C. B-3, as amended (the “*BIA*”) provide as follows:

(1) **Court may appoint receiver** – Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) Take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) Exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or

(c) Take any other action that the court considers advisable.

(1.1) **Restrictions on appointment of receiver** – In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Reference: Section 243 (1) and (1.1) of the *BIA*, Plaintiff’s Book of Authorities, Tab 1

19) The Defendant, LKI, is in default of its obligations to the Bank pursuant to the terms of the Letter Agreement. The 10-day period under s. 243 of the *BIA* has expired.

20) Section 101 of the *Courts of Justice Act* R.S.O. 1990, c. C.43 (the “*Courts of Justice Act*”) provides as follows:

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or

convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Reference: Section 101 of the Courts of Justice Act, Plaintiff's Book of Authorities, Tab 2

21) The Court has the power to appoint a receiver where it is just or convenient to do so. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.

Reference: Bank of Montreal v. Carnival National Leasing Ltd. (2011) 74 C.B.R. (5th) 300 at paragraph 24, Plaintiff's Book of Authorities, Tab 3

22) It is not essential that the moving party secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

Reference: Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated (1995), 30 C.B.R. (3d) 49 at paragraph 28, Plaintiff's Book of Authorities, Tab 4

23) This Court must undertake an examination of all of the circumstances, including the potential costs, the relationship between the debtor(s) 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.

Reference: The Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328 at paragraph 13, Plaintiff's Book of Authorities, Tab 5

Reference: Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited, (2007), 27 C.B.R. (5th)1 at paragraph 11, Plaintiff's Book of Authorities, Tab 6

Submissions

24) It is respectfully submitted that the present circumstances are an appropriate case for the appointment of a receiver, including the following:

- a. The Bank holds a general security interest over, *inter alia*, all personal property of LKI, including the Maserati in particular;
- b. LKI is in default of the terms of the Letter Agreement and is substantially indebted to the Bank;

- c. The Bank is concerned with LKI's activities in relation to the Business Account;
- d. The Bank has issued the LKI Demand and the King Demand to LKI and King, respectively;
- e. The notice periods under section 244 of the BIA have expired;
- f. The Security granted in favour of the Bank provides the Bank with the right to appoint a receiver over the property of LKI on default;
- g. LKI is unable to operate without further credit from the Bank, and the Bank is not willing to provide further credit to LKI;
- h. The appointment of a Receiver is necessary and just for the creditors of the Debtor to permit the orderly realization on the assets of the Debtor.

25) It is respectfully submitted that the appointment of a receiver is just and equitable and is necessary for the protection of the estate of LKI and the interests of the Bank and other stakeholders.

PART IV – THE ORDER REQUESTED

26) The Bank seeks an Order substantially in the form attached as Schedule "A" to the Notice of Motion appointing BDO Canada Limited as Receiver without security of all the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor including a 2011 Maserati automobile.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th day of December, 2016



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SCHEDULE "A"

LIST OF AUTHORITIES

Bank of Montreal v. Carnival National Leasing Ltd. (2011) 74 C.B.R. (5th) 300

Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated (1995), 30 C.B.R. (3d) 49

The Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328

Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited, (2007), 27 C.B.R. (5th) 1

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Section 101 of the *Courts of Justice Act*

101.(1)In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Section 243(1) and (1.1) of the *Bankruptcy and Insolvency Act*:

(1) Court may appoint receiver – Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) Take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) Exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) Take any other action that the court considers advisable.

(1.1) Restrictions on appointment of receiver – In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

ROYAL BANK OF CANADA

v. **LIQUIDATION KING INC.**

Plaintiff

Defendant

Court File No.35-2035461T

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at London

FACTUM

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