CITATION: Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2024 ONSC 1963
COURT FILE NO.: CV-22-678808-00CL
DATE: 20240403

RE: Canadian Equipment Finance and Leasing Inc., Applicant

AND:

The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe, and Chantal Block, Respondents

BEFORE: W.D. Black J.

COUNSEL: *Brendan Bissell*, for the Applicant
Caitlin Fell and Shaun Parsons, for the Receiver msi Spergel inc.
Jonathan Rosenstein, for the Mortgagees Delrin Investments Inc., Samuel Stern, Harvey Kessler, and Richard Goldberg

HEARD: March 21, 2024

ENDORSEMENT

Overview

[1] This motion raises an interesting priority contest between the applicant Canadian Equipment Finance and Leasing Inc. (the "Applicant")'s security over certain chattels affixed to a building situated on real property, on one hand, and the Mortgagees' charge over that real property and building on the other.

[2] The respondent companies, 2618909 Ontario Limited ("909") and The Hypoint Company Limited ("Hypoint" and together with 909, the "Debtors"), were involved in growing and distributing cannabis. The assets at issue – a building and surrounding land (the "Premises"), and a set of HVAC units comprising 16 large pieces of ventilation equipment and associated equipment installed and by all account significantly integrated at the building (the "HVAC Equipment") – were used in that enterprise.

[3] Delrin Investments Inc., Samuel Stern, Harvey Kessler, and Richard Goldberg (the "Mortgagees") held (mortgage) security over the Premises, and the Applicant did not. The Applicant held prior-ranking security over the HVAC Equipment, and the Mortgagees did not.

[4] The Applicant perfected its security by registering its interest as required under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("PPSA"), including registering a notice of security interest ("NOSI") on title to the Premises. In addition, the Applicant asked the Mortgagees to execute a "Mortgage Waiver and Consent", and the Mortgagees did so.

[5] The Debtors defaulted on the Applicant's loan in early 2022. A receiver (the "Receiver") was appointed on September 2, 2022.

[6] In the interim between early 2022 and the appointment of the Receiver in September of 2022, the Applicant and the Mortgagees initially cooperated on a potential disposition of their respective collateral by way of a sale (under power of sale) that, it was hoped, would see both fully repaid.

[7] At or soon after the point at which it became apparent that no sale of that size would materialize, the Mortgagees wrote to the Applicant, taking the position that if the Applicant did not remove its collateral – the HVAC Equipment - within a specified time, the Mortgagees would treat the non-removal as an "election" to abandon the HVAC Equipment (and the Applicant's interest in any subsequent proceeds of sale).

[8] In response, the Applicant immediately returned its application for the appointment of a receiver over all of the Debtors' assets used in the business, including both the Premises and the HVAC Equipment (the Applicant had originally brought that application in May of 2022, but had adjourned it during the timeframe in which the parties were seeking a purchase sufficient to cover their respective interests). In the evidence in support of the return of its application to appoint the Receiver, the Applicant's deponent explained the basis for not removing the HVAC Equipment as the Mortgagees demanded:

> In my view, it is impractical to consider removing the collateral that is subject to the Applicant's security from the building. The collateral has been extensively attached to the interior and exterior of the building. There are many exterior heating and cooling units that have been attached to the side and top of the building with cabling and mechanical connections into the building. There are also extensive interior components of the Applicant's collateral, such as piping and electrical and computer wiring for what are literally dozens of panels. …
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> I am concerned that the cost to remove all of the Applicant's collateral from the exterior and interior of the building will be extensive. I am also concerned that the process of removal may well damage one or more pieces of that collateral, much of which is sensitive mechanical and electrical equipment for precise climate control operations. I am further concerned that the effect of removal of all of that collateral from the building is likely to leave the rest of the building much worse off as well.

[9] In my view, the Applicant's deponent's explanation is undoubtedly fair and accurate. The HVAC system is comprised of 16 large units and associated equipment (including electronic controls) inside and outside the building. It is self-evident that removing such an extensive HVAC system will be expensive, destructive, and will inevitably diminish the value of not only the HVAC Equipment but also the Premises. The Mortgagees do not contend otherwise. Photographs within the materials filed for the motion show the extensive (and extensively integrated) nature of the HVAC Equipment.

[10] As discussed in more detail below, however, the Mortgagees maintain that the Applicant is nonetheless strictly limited to its available options under the PPSA, and that if the Applicant

chooses to forgo the opportunity to remove the HVAC Equipment, it must live with the consequences.

Justice Osborne's Decision Appointing a Receiver in September of 2022

[11] Against this backdrop, both parties point to Osborne J.'s decision appointing the Receiver in September of 2022, albeit the parties urge significantly diverging interpretations and conclusions.

[12] Justice Osborne granted the application to appoint the Receiver (pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and not under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3) over the objection of the Mortgagees, and expressly delegated to the Receiver the investigation and recommendation of how best to maximize value, saying:

> [31] …Whether, how and on what terms [i.e., together or separately] those assets should be sold can and should be determined by this Court following on a report from the receiver with respect to a proposed sale process and if the process gets that far, a sale approval motion.
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> [32] However, in circumstances where all parties agreed that all of the assets of both Hypoint and 909 should be sold to maximize recovery for all creditors, but cannot agree on the process pursuant to which that should be undertaken with the result that the entire process is stalled, I am satisfied that this represents a classic example of a situation in which it is just and convenient to appoint a receiver.
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> …
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> [34] I am concerned about the real and immediate risk of dissipation of assets and diminution in value of those assets, with the result that I am satisfied that it is important and beneficial to all creditors to accelerate the process. The fair and transparent way to do that is to have a court-appointed receiver run the process. Order needs to be brought to the chaos, and the status quo of competing processes cannot continue unsupervised.
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> [35] To do otherwise would be to permit CEF to enforce against the Collateral only and the Mortgagees to enforce as against the real property. This has potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value.
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> [36] Moreover, nothing in the appointment of a receiver now, over the assets of Hypoint and 909 together, affects or diminishes the ability of the receiver appointed to consider whether in fact recovery will be maximized by a sale of the Collateral and the Premises separately as opposed to together. Even if that were to occur, however, it can occur under a Court-supervised process, by a court-appointed receiver with obligations to all stakeholders, in an orderly and efficient manner.

[13] As noted, the parties disagree about the upshot of Osborne J.'s decision. The Applicant maintains that His Honour, at that stage, rather than restricting the Applicant's rights to the limited array of PPSA options the Mortgagees assert are the Applicant's only rights, decided instead to enlist the expertise of the Receiver to determine the best way of maximizing value for all creditors, evincing an intention to follow the Receiver's direction in that regard.

[14] The Mortgagees maintain that, rather than foreclosing their argument, His Honour expressly preserved it. They note that in paragraph 37 of Osborne J.'s endorsement, His Honour said "I should be clear that in appointing a receiver, I am not concluding that the rights of [the Applicant] defeat or somehow rank in priority to the rights of the Mortgagees. Rather, I am expressly reserving those rights for another day."

[15] I pause here to observe that as a practical matter, if, as proved to be the case, the Receiver were to recommend a sale of the Premises with the HVAC Equipment intact, and if the court were to approve that approach, the Mortgagees' insistence that the Applicant remove its collateral before a sale would effectively become academic. The Mortgagees would lose any ability to demand that remedy and the Applicant would lose any ability to pursue it.

The Receiver's Recommendation and Sale Approval by Penny J.

[16] In the event, the Receiver did in fact recommend a sale of the Premises with the HVAC Equipment in place, and that the sale be to a single purchaser.

[17] There was no objection to the sale on this basis by the Mortgagees. The Court approved the Receiver's report, its proposed sale process, and ultimately the proposed transaction (the "Transaction"). In approving the Transaction, Penny J. noted that "[a]lthough the parties accept the purchaser's allocations of the purchase price between the real and personal property for purposes of the sale approval, it is acknowledged that this is without prejudice to any outstanding allocation dispute between security holders."

[18] The Applicant argues that by using the word "allocation", which it argues is a "term of art" denoting a determination to divide between or among contending parties, Penny J. intended to signal that the Applicant would share in the proceeds of sale together with the Mortgagees. The Applicant argues that only the extent of the Applicant's share, with its entitlement to share having been confirmed, remained to be determined.

[19] The Mortgagees dispute that suggestion and maintain that the Applicant's failure to exercise certain remedies under the PPSA means that the Applicant has now lost the right to do so. They argue that Penny J.'s use of the word "allocation" does not bear the meaning and weight for which the Applicant contends, and that the Mortgagees' conception of the Applicant's rights and remedies under the PPSA should still prevail.

Summary of the Mortgagees' Argument

[20] In simple terms, the Mortgagees assert that the Applicant's remedies were and are prescribed by the PPSA, and limited. They argue that it was open to the Applicant to have allowed the Mortgagees to sell under power of sale, in which scenario the Applicant would have continued to maintain its security interest in the HVAC equipment vis-à-vis the new owner. Second, and the

Mortgagees' primary argument, they say the Applicant had the option under s. 34(3) of the PPSA to remove the HVAC Equipment from the Premises. There is a potential third option, not arising on the facts of this case, in which pursuant to s. 34(7) of the PPSA, an owner or creditor can prevent a party with a perfected interest in a fixture from removing that fixture by paying the debt at issue.

Summary of the Applicant's Argument

[21] The Applicant, in response, asserts that these rights and remedies, which it acknowledges are the rights and remedies generally available to it under the PPSA, have been overtaken and subsumed by the court's interventions here. That is, the Applicant sought to have a receiver appointed in circumstances in which the Mortgagees were "playing hardball" by insisting that the Applicant had to remove the fixtures or forgo its interest in them. The Applicant argues that the decision of Osborne J. excerpted above, the Receiver's recommendation to sell the building with the fixtures en bloc, and Penny J.'s approval of the sale on that basis, combine to create a new and different circumstance in which to value the Applicant's interest and its share of the proceeds of sale. They say that those decisions recognize the common-sense imperative to sell the Premises and the HVAC Equipment en bloc, and implicitly denounce the destructive and counterproductive notion of requiring the Applicant to remove the HVAC Equipment from the Premises.

What the Court Must Consider

[22] The determination of the dispute involves consideration of aspects of the evolution of common law and the PPSA in relation to chattels and fixtures. It also requires interpretation of certain provisions within the PPSA in circumstances in which a security interest is registered on title, to the knowledge and with the consent of the mortgagees, and in which the removal of the fixtures will be expensive and will undoubtedly lower the value of both those fixtures and the real property at issue.

[23] Finally, the determination will necessarily consider the implications of the court's delegation (and deference) to the receiver concerning the decision as to how best to maximize value for all concerned, and specifically the decision of whether that value is maximized by selling the real property with or without the fixtures in place.

Conclusion

[24] Having considered these various matters, I have concluded that, while the Mortgagees are correct about the Applicant's rights under the PPSA, the events in this case reflect a rare exception to the strict operation of the statute. Where the court, as here, suspends operation of the statutory remedies pending a determination by a receiver and ultimately the court, the court process does in fact subsume and supersede the statutory regime, and renders it academic. In the unique circumstances of this case, I find that the Applicant is entitled to share in the proceeds of sale of the Premises, to the extent of the value of the HVAC Equipment.

[25] The parties agree that there is little guidance in the case law to assist in the determination of their competing assertions of priority and that this case therefore will necessarily fall to be determined as a matter of "first impression."

Pre-Existing Common Law, and Changes Brought by the PPSA

[26] The parties agree that, at common law, before the advent of the PPSA, once a chattel was attached to real property – becoming a fixture – it lost its character as personality, and instead became part and parcel of the realty. Any security interest in the chattel became effectively moot since as a result of being affixed to the property, the once-chattel was no longer a separate thing; it was just real property.

[27] The decision of the Court of Appeal for Ontario in *Bank of Nova Scotia v. Mitz* (1979), 27 O.R. (2d) 250 (C.A.), illustrates the point in the following excerpt:

> This appeal involves the question whether horse stalls, erected on property now owned by the appellant, are fixtures and part of the land, or are chattels and therefore owned by the respondent bank by virtue of a chattel mortgage. The facts, on which there do not appear to be any major differences are, therefore, of fundamental importance.
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> …
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> [The barn] was affixed to the land showing an intention of it being a permanent affixing so long as it served those purposes, and on all the tests applicable to the relationship between the owners and the bank on the one hand and the mortgagee on the other, I can only conclude that the horse barn became part of the realty and passed to the mortgagee.

[28] The parties also agree that the PPSA changed this presumption.

[29] A report by the Ontario Law Reform Commission, which had proposed the model PPSA, confirmed that the forerunner to the current s. 34 "provides that a security interest that attached to goods (other than building materials) before they became fixtures has priority over the claim of any person having an interest in the real property. Furthermore, a security interest that attached to goods (other than building materials) after they became fixtures has certain priorities": *Summary of Recommendations* (Toronto: Ontario Law Reform Commission, 1992), at 3-7.

The Mortgagees' Characterization of the Statutory Framework

[30] The Mortgagees observe, and the Applicant agrees, that s. 34 of the PPSA contains three parts:

> (a) the provisions dealing with the conditions of the preservation of the [PPSA secured party ("PSP")'s] priority over the owner of the real property or an encumbrancer of the real property;
>
> (b) The provisions dealing with the rights and obligations of the PSP, *vis a vis* those "with an interest in the real property".
>
> (c) The provisions dealing with the rights and obligations of those "with an interest in the real property *vis a vis* the PSP

[31] The Mortgagees note, again without disagreement from the Applicant**,** that a secured party with an interest in the chattel becomes a PSP where the PPSA interest was perfected before the chattel became a fixture, or where the party with the interest in land acknowledges the PPSA interest in writing.

[32] In general, in the event of a default, the PSP has the right to take possession of the collateral that is the subject of the security interest, dispose of the collateral, and apply the proceeds of sale to satisfy the secured debt.

[33] In the case of a fixture, s. 34(3) gives a PSP the right to remove the fixture (and thereby turn it back into a chattel) on the conditions that the PSP reimburses the owner of real property or an encumbrancer for the costs of repairing any physical injury caused by the act of removal, and that the PSP provides at least 10 days' notice in prescribed form.

[34] As the Mortgagees put it, "presumably, after removal, the PSP is then at liberty to dispose of the collateral and apply the proceeds of sale to satisfy the secured debt; as if it had never become a fixture in the first place."

[35] Again, the Mortgagees note that the owner of the real property or an encumbrancer has the right to prevent the PSP from removing the fixture by paying to the PSP the entire balance of the secured debt.

[36] In summary, the Mortgagees say:

(a) where s. 34(1) applies, the PSP maintains a "right of priority" to the object, even after the chattel becomes a fixture;

(b) pursuant to s. 34(3), that right of priority permits the PSP to remove the fixture, but only if they compensate the owner/mortgagee for the damage caused by removal; and

(c) pursuant to s. 34(7) the owner/mortgagee can block the PSP's s. 34(3) removal right, but only if they pay the PSP the balance of the secured debt.

[37] However, the Mortgagees acknowledge that s. 34 is silent on what happens when:

(a) The PSP chose not to exercise their s. 34(3) removal right; and

(b) The owner/mortgagee did not block the s. 34(3) removal right.

[38] In other words, the Mortgagees acknowledge, and the Applicant agrees, s. 34 does not account for the circumstances of this case.

[39] The Mortgagees say there are only two logical answers, which they characterize as follows:

(a) The PSP loses the rights that they had as against the owner/mortgagee (i.e., the Mortgagee[s'] position on this motion); or

> (b) The PSP retains its priority as against the owner/mortgagee, notwithstanding that it slept on its rights (i.e. [the Applicant]'s position on this motion.

[40] The Applicant, while denying the characterization that it "slept on its rights", agrees that these are the two possible outcomes, and that, more particularly in the second scenario – which it argues is the right and fair outcome here – its retained priority sounds in a share of the proceeds of the Transaction.

Cases Referred to by the Mortgagees, and the Applicant's Response

[41] In their argument, the Mortgagees address *G.M.S. Securities and Appraisals Ltd. v. Rich-Wood Kitchens Ltd.* (1995), 21 O.R. (3d) 761, a case to which the Applicant makes reference in its submissions.

[42] The Mortgagees point out that, in that case, the Court of Appeal found that the mortgagee sold the property under power of sale and, in so doing, prevented the PSP from exercising its removal rights. The Court held that the mortgagee had "converted that right". As a result of the conversion, the mortgagee had de facto exercised its own right to prevent the removal of the chattel, i.e., the remedy it had under s. 34(7) of the PPSA.

[43] The Mortgagees argue that it was thus not surprising that the Court ordered the mortgagee to pay the PSP the total amount of the secured debt (from the proceeds of sale). The Court said:

> Having regard to the right of the fixture financier to remove its fixture pursuant to s. [34(3)], National Trust converted that right when it sold the property pursuant to the power of sale and therefore National Trust should pay Rich-Wood the amount of its claim out of its share of the proceeds of sale.

[44] The Mortgagees assert that the facts in that case are distinguishable on that critical point. Here, they say, it is not a matter of the Applicant's removal rights having been blocked as a consequence of the sale. On the contrary, they continue, the Applicant was invited to exercise those rights and chose not to. In the result, the Mortgagees say, the *GMS* case is of little assistance to the matter at hand.

[45] Acknowledging the factual differences, the Applicant says that the *GMS* case stands for the proposition that a secured creditor with a valid priority interest in a fixture was entitled to priority recovery for the value of the fixture over the interests of a mortgagee when the fixture had been sold along with the land.

[46] I find that the *GMS* decision is not directly applicable here. While it confirms the priority interest of a PSP in a fixture when the fixture is sold along with the land, the distinction that the PSP was not given an opportunity to exercise its removal rights means that the court was not, in that case, grappling with the Mortgagees' contention in the case before me, i.e. that when the PSP is given the choice and chance to remove its collateral, and chooses not to do so, it is then disentitled to participate, at least on a priority basis, in the proceeds of sale. There is, however, a parallel to the *GMS* case inasmuch as, once Penny J. approved the sale recommended by the Receiver, the Applicant's removal rights became moot.

[47] The Mortgagees next cite this court's decision in *Home Trust Co. v. Kitchener (City)*, 2013 ONSC 2190, 31 R.P.R. (5th) 321. In that case, Kitchener installed an air conditioner at a house at which Home Trust held a mortgage. The air conditioner was stolen by an unknown party prior to the sale by Home Trust under power of sale.

[48] Justice Cavarzan held that there was in fact no priority dispute before him because Kitchener had not protected its interest under s. 34(1) of the PPSA and because, since the equipment had been stolen, it could not be part of what was sold. His Honour observed that the remedy to a secured party who has priority under s. 34(1) of the PPSA is found in subsections 3 and 7 of s. 34; and that the Ontario Court of Appeal's decision in *GMS* supports the proposition that s. 34 "does not create rights in real property."

[49] The Applicant, in responding to the Mortgagees' assertions about Home Trust, emphasizes that in that case, while agreeing that the interest of *Kitchener* in a fixture (the air conditioner) would have been subordinate to the interests of a mortgagee, that was because the City's interest … attached only after the equipment had become affixed, and because the mortgagees had not consented in writing to the City's security interest or disclaimed an interest in the fixture within the meaning of s. 34(1)(b) of the PPSA. "Impliedly," argues the Applicant, "had the City's interest attached before goods became a fixture, or had the mortgagee consented to that interest, the result would have been different" (subject to the unrelated issue about the air conditioner having been removed and stolen prior to the sale).

[50] In my view, the Applicant correctly construes Cavarzan J.'s implicit finding, but his decision again does not squarely address the issue at the nub of this case: what happens where a PSP is invited to remove its collateral before a sale but declines to do so?

[51] The Mortgagees also refer to this court's decision in *Grant Thornton (as Receiver) v. 1902408 Ontario Ltd.*, 2021 ONSC 1237, 13 P.P.S.A.C. (4th) 532. In that case, involving a question of what limitation period should apply to a priority interest in a pipe organ installed in a church, Cavanagh J. found that the claim was properly understood as a personal one:

> [27] Sluyter argues that the *PPSA* applies to land because, pursuant to the exclusion is s. 4(1)(e), it applies to fixtures. I disagree. The *PPSA* recognizes that goods attached to real property may retain their discreet character as personal property. The *PPSA* allows a secured party to take a security interest in tangible personal property, "goods" which become fixtures, something that was not allowed at common law. The security interest that the *PPSA* permits a secured party to take in goods which are fixtures is an interest in personal property. It is not an interest in real property.

[52] I do not understand the Applicant to be arguing that its interest is in the real property per se. It says in its factum: "It is correct to say that the PPSA does not create an interest in the land or property." However, the Applicant goes on, "[t]he problem with that [proposition] for this matter is that it does not address whether the Applicant had a several security interest (indeed a prior-ranking one) in the chattels that had become fixtures."

[53] Again, therefore, the case is of limited utility to deciding the matter at hand.

The Mortgagees' Argument that s. 34 Limits the Applicant's Options

[54] The crux of the Mortgagees' argument is that the priority interest created under s. 34 of the PPSA accords no benefit other than the right to turn a fixture back into a chattel – under s. 34(3) – and that if the PSP does not exercise that specific right, then the fixture remains a fixture.

[55] They argue that this priority survives a transfer to a third party such that if a mortgagee is exercising its right to sell real property under power of sale, the PSP has the choice of exercising its rights to remove the fixture prior to the sale, or of continuing to hold the same priority, with respect to the same fixture, in the hands of the new purchaser.

[56] What the PSP cannot do, say the Mortgagees, is to do nothing and then claim that the mortgagee has "converted" the PSP's right of removal, or to claim that the purchase price paid by the purchaser for the real property includes a portion for "its" fixtures, and that the mortgagee must remit that portion to the PSP.

[57] The Mortgagees say that to uphold this notion would be to interfere with the Mortgagees' rights under the *Mortgages Act*, R.S.O. 1990, c. M.40, and would effectively turn the Mortgagees into the PSP's collection agents.

[58] The Mortgagees acknowledge that there are circumstances, of which this is one, in which the costs of removal of the fixture and repair to the property will be prohibitive, and will cause a substantial reduction in the value of the chattel and likely of the real property as well.

[59] The Mortgagees also acknowledge in passing that the Commercial List's model vesting order departs from the priority regimes in the *Mortgages Act* and the PPSA. In particular, rather than security continuing in any collateral even after transfers, it deems the transfer to be free and clear of all encumbrances and transfers the priorities, contained in those regimes, on the proceeds of sale.

[60] In so doing, the Mortgagees argue, the model order does not account for the unique (and limited) rights of a PSP under s. 34, and the fact that the s. 34 priority does not give the PSP a right to share in the proceeds of sale of the real property, but rather the right to detach its collateral from the real property and to realize it in that fashion.

[61] The Mortgagees contend that because of the particular features of the s. 34 priority, it "does not comfortably transfer to the 'proceeds of sale'". They argue that, previously, "the priorities attached to separate *things*. Now, they are comingled in fungible cash."

[62] Taking these elements together and applying them to the case at hand, the Mortgagees allege that the Applicant has deliberately elected not to pursue the remedies open to it as a PSP under s. 34 and has made that election precisely because of the cost and inconvenience of exercising those very options. The Mortgagees assert that the Applicant did so because, when confronted with its options under s. 34, it came to regret the deal it had made.

[63] More particularly, the Mortgagees say that absent the receivership over the equipment, the Applicant was faced with three unattractive options.

[64] First, it could remove the equipment pursuant to s. 34(3) and suffer the cost and inconvenience of doing so.

[65] Second, it could leave the HVAC Equipment in place, creating a similar scenario with the new owner (i.e., it would still only have the s. 34(3) removal option against the new owner.

[66] Finally, it could seek to negotiate a purchase of the HVAC Equipment by the new owner, in a situation in which the new owner would have significant negotiating leverage.

[67] The Mortgagees maintain that by resorting to the receivership, the Applicant is seeking to circumvent those options for which it contracted, and to obtain a remedy to which it was not otherwise entitled, namely, a compelled sale of the HVAC Equipment without the need to remove it from the Premises.

[68] In so doing, the Mortgagees say, the Applicant is also effectively seeking to penalize the Mortgagees by arguing that "having sidestepped the unattractive options previously open to it, the receivership has somehow also primed them to the Mortgagees."

[69] The Mortgagees make a policy/floodgates argument that if this ploy of the Applicant to avoid its statutory choice and thereby improve its position is countenanced, it will create a powerful incentive for PSPs, inasmuch as:

(a) It will always be relatively costly and inconvenient to recover fixtures under s. 34;

(b) PSPs will always seek a receivership for a bulk sale of the real property and the fixtures;

(c) PSPs will always prime the mortgagee; and,

(d) PSPs will always avoid the burdens that necessarily come with the form of security that they have taken under the PPSA.

[70] The Mortgagees say that, by this "inversion of their rights," PSPs in the shoes of the Applicant will effectively transform their rights from an interest in the fixture only into an interest in the real property itself by always sharing in the proceeds of the sale of the real property itself.

[71] They conclude by pointing out that if the Applicant is dissatisfied with the rights available to it under s. 34, for which it bargained, the remedy lies with the legislature and not in the court. They assert that the Applicant is simply not entitled to a self-help remedy not provided for in the statute.

The Applicant's Argument as to Why this Case is an Exception to the s. 34 Options

[72] In its response, the Applicant begins by reiterating that its interest in the HVAC Equipment attached before the HVAC Equipment became fixtures to the Premises, that the Applicant registered its NOSI before the Mortgagees registered their mortgage, and that the Mortgagees signed a waiver in favour of the Applicant's security interest. As such, the Applicant argues, there

is no basis to say that its several interests in the HVAC Equipment did not persist or have priority over the interests of the Mortgagees before the Transaction.

[73] The Applicant agrees with the Mortgagees' contention that a remedy for someone with a priority interest in a fixture is to remove it from the property (unless someone with a subordinate interest in the fixture, such as the owner or a mortgagee, elects to retain the fixture by paying the indebtedness under s. 34(7) of the PPSA).

[74] The Applicant does not agree, however, that the removal of its collateral is the only remedy open to it.

[75] It acknowledges that here, as in the *GMS* case, the Applicant did not follow the route contemplated in s. 34(3). However, it says, this was not by indolence or lack of action on the part of the Applicant as alleged by the Mortgagees. Rather, the Applicant maintains, when the Mortgagees stopped cooperating with the Applicant in late August of 2022, and purported to force the Applicant to "remove the highly integrated HVAC Equipment," the Applicant instead sought the appointment of a receiver over all the assets.

[76] In granting the receivership, Osborne J. found that having the Applicant enforcing against the HVAC Equipment and the Mortgagees separately enforcing against the land "has the potential in the circumstances for further conflict requiring further Court intervention, delay, increase in cost and decrease in asset value."

[77] Despite expressing this concern, His Honour did not prejudge whether the HVAC Equipment and the Premises should be sold together or separately but rather expressly left it for the Receiver to "consider whether in fact recovery will be maximized by a sale of the [HVAC Equipment] and the Premises separately as opposed to together".

[78] The Receiver undertook the analysis and recommended a sale of the assets together. It conducted a sale process and sought approval of the sale on that basis. The Mortgagees did not object, and Penny J. approved the en bloc sale.

[79] The Applicant argues that thus, the notion that the Applicant was, or ought to have been limited to removal of the HVAC Equipment as its only remedy was effectively rejected in the decision of the court appointing the Receiver and expressly delegating to it the decision about separate or joint marketing of the assets. It was open to the Receiver to determine that the HVAC Equipment should be removed before a sale of the Premises. It decided and recommended otherwise. In seeking now to revisit the Receiver's choice, and to say that the assets ought to have been uncoupled, the Mortgagees, says the Applicant, are attempting to relitigate an issue that has already been decided.

Particular Considerations Leading to the Court's Conclusion

[80] While I accept that generally speaking a PSP's rights under s. 34 of the PPSA are as the Mortgagees characterize them, I find, in the unusual circumstances of this case, that the Applicant has the right to share in the proceeds of the transaction.

[81] Of particular importance, in my view, is that Osborne J., who clearly had before him the Mortgagees making the argument that the only option open to the Applicant was to remove its collateral – turning a fixture back into chattels – under s. 34(3), declined to impose that result.

[82] Justice Osborne expressly recognized the potential for dissipation and diminution in the value of the assets if the disagreement raged on, and the potential for chaos if two different realization strategies were allowed to compete. In the circumstances, without making a determination as to the best approach, His Honour deferred, as is often and prudently done, to the superior expertise of the Receiver to weigh the competing costs, benefits, and maneuvers involved, and to make a recommendation to the court.

[83] The Receiver did so and recommended that the Premises be sold with the HVAC Equipment intact. It embarked on a sale process and identified a buyer.

[84] Justice Penny approved the sale of the Premises with the HVAC Equipment in place, and expressly left it to the parties to agree or litigate the appropriate allocation of the proceeds of sale.

[85] In my view, once the Receiver was appointed and the analysis and subsequent sale process and sale ensued, there was no longer any realistic option for the Applicant to exercise the only option to which the Mortgagees claim it had recourse.

[86] I appreciate that the Mortgagees claim that the Applicant in fact orchestrated this result, but there is no evidence that at any point thereafter (at least until now) the Mortgagees took any exception to the Court-ordered process, and certainly no evidence that they opposed the approval of the sale en bloc ordered by Penny J.

[87] Moreover, in my view, in the specific situation at hand, it would have been counterproductive to the point of destructive to insist, as the Mortgagees purported to do here, on a removal by the Applicant of their collateral.

[88] That is, the uncontested evidence is that the HVAC Equipment is extensive – comprising 16 Air-conditioning units coupled with extensive and integrated electronic and other equipment.

[89] Common sense dictates that: it would have been expensive to remove the HVAC Equipment; it would have caused damage to do so that likely would have been expensive to repair; and that in the result, both the HVAC Equipment and the Premises would have been reduced in value, perhaps dramatically.

[90] While I appreciate that common sense should not trump statutory remedies, and while I recognize the limits on my own ability to make an informed assessment about the costs and benefits of the available options, I find that once Osborne J. delegated to the Receiver the investigation of which method was best – selling the Premises and HVAC Equipment together or separately – leading to the Receiver's recommendation of a sale together, it was no longer feasible for the Mortgagees to continue to insist that the Applicant's only recourse was to remove its collateral.

[91] Nor do I fault Osborne J. for enlisting the Receiver to make a recommendation. It is clear from His Honour's decision that he was alive to the potential problems with allowing matters to

proceed unchecked, and alive to the benefits of having an independent evaluation from a court officer of the best way to maximize value.

[92] I recognize that the language of s. 34 militates in favour of restricting a PSP to the remedies set out therein. That said, I do not put much credence in the "floodgates" argument that the Mortgagees advance.

[93] I expect that in most instances, the relative costs of removing fixtures from real property will not be prohibitive, and will not justify the cost of seeking a receivership in order to avoid that scenario. Moreover, I expect that in cases where it is not self-evident that a sale of real property with fixtures intact will likely lead to a higher realization of value, courts will tend to interpret s. 34 strictly, and restrict PSPs to the limited array of options available under that provision.

[94] I also expect that in the rare cases in which a PSP seeks a receivership, not all such applications will be granted, and, for those that are, not every receivership will invariably lead, as here, to the result that real property and fixtures will be sold together.

[95] Conversely, when that recommendation (of a sale together) is made, I expect that it will be because the economics of the particular situation at issue will drive the decision, and that therefore, by definition, such sales will only be ordered when it will maximize the value for all concerned to proceed in that way.

[96] I expect that there will be relatively few instances where the combination of circumstances and cost-benefit analysis will lead, as in this case, to a court order that the real property and fixtures be sold together. When courts do so order, I expect such orders will be made on a sound evidentiary basis.

[97] Again, where, as here, the court has made that specific Order, in my view, that Order supersedes the competing arguments about a PSP's or a mortgagee's rights and remedies under s. 34. The court will, as here, take into account the full array of competing considerations to fashion the appropriate remedy.

[98] For these reasons, I find that the Applicant is entitled to a share of the proceeds of sale flowing from the Transaction.

The (Limited) Evidence About the Value of the HVAC Equipment

[99] The evidence available from which this court can make an informed calculation as to the amount of the Applicant's share is exceedingly thin.

[100] The Mortgagees argue that, in the event that the court allows the Applicant to share in the proceeds of the Transaction, the most reliable evidence of the value of the HVAC Equipment, in situ at the time of the Transaction, is the value specifically ascribed to the HVAC Equipment by the purchaser.

[101] That value, of a total purchase price of $6 million, was $100,000.00.

[102] The Premises were valued at $5.8 million.

[103] The Applicant emphasizes and relies on Penny J.'s specific proviso, in approving the Transaction, that "[a]lthough the parties accept the purchaser's allocation of the purchase price between the real and personal property for purposes of the sale approval, it is acknowledged that this is without prejudice to any outstanding allocation dispute between security holders."

[104] For the purposes of its evaluation of the assets and ultimately for purposes of the Transaction, the Receiver obtained copies of two appraisals that the Mortgagees had obtained. Although they value the Premises as of the same date, September 21, 2022, these appraisals ascribe values to the Premises of $4,120,000.00 and $5,975,000.00, respectively. These valuations appear reasonably comprehensive.

[105] The Receiver did not ask the Applicant for a valuation of the HVAC Equipment. However, the Receiver obtained from Platinum Asset Appraisals ("Platinum") a "forced liquidation" valuation of the HVAC Equipment (described by Platinum as the "dehumidification equipment").

[106] Platinum explained the "forced valuation" valuation method as assuming, among other things, that "All assets are to be sold on a piecemeal basis 'as is, where is' with the purchaser being responsible for removal of the assets at their own risk and expense."

[107] Consistent with this "piecemeal" assumption, the components of the HVAC Equipment are listed in a schedule attached to the Platinum report, and in each case a range of value is established by setting out a "low" value and a "high" value for the component in question.

[108] In this way, by simply adding the "low" values and the "high" values, Platinum calculates a range of value for the HVAC Equipment from $95,000.00 to $280,000.00.

[109] I do not find this valuation to be particularly sophisticated or enlightening. There is no particular discussion of the proposed values of the component parts, nor any resort to methodology to test the purported values using other approaches or parameters. There is also no basis to say, in each case, whether the component falls into the "low" end of the range or the "high" one.

[110] Recognizing the shortcomings of the Platinum valuation, the Applicant attempted to obtain a valuation of the HVAC Equipment after the Transaction, but was not able to do so. It did obtain, and uploaded to Caselines a few days before the hearing of the motion, information from the manufacturer about the normal lifespan of the HVAC Equipment (15-20 years) and information from a CPA firm about the typical approach to the depreciation of value of "asset[s] like the HVAC equipment". Combining these inputs, the Applicant suggests that the HVAC Equipment should be valued at between $898,600.00 and $958,717.00.

[111] The Mortgagees object to the admission, and the court's consideration, of the purported valuations of the HVAC Equipment. The Mortgagees note that the Applicant's materials were delivered well after a deadline set by Cavanagh J., which deadline was set in the context of the Applicant seeking and being granted an adjournment of the original date for this motion (on December 18, 2023). There is a debate about whether or not, and at what stage, the Mortgagees had the substance of the information in the appraisals, which I am advised were originally sealed.

[112] While I acknowledge the Mortgagees' concern, as a practical matter the Mortgagees' objection is unnecessary. That is, I do not find the purported valuations to be helpful. The Platinum

valuation suffers from the shortcomings described above. In the other late-breaking valuation, the purported combination of the expected lifespan of the HVAC Equipment and an accounting approach that might be used to depreciate the assets "like" the HVAC Equipment over the course of that presumed lifespan is vague, uncertain, and ultimately unhelpful. There is no effort to explain why assets "like" those at issue are an appropriate comparator (how they are similar, how they are different, why they were chosen, etc.) and no effort to generate a value based on anything more than these high-level assumptions.

[113] The court has no expertise in valuing such assets and therefore depends on reliable expert evidence being provided to assist in that exercise.

[114] While it is clear that the Applicant has made efforts to obtain such evidence, what it has managed to cobble together is not sufficient.

Conclusion re Values

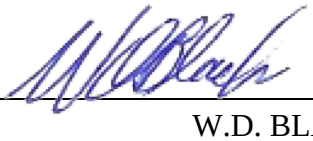
[115] Accordingly, with no ability to reliably assess the value of the HVAC Equipment otherwise, and even though it is possible that the assets may be worth more, I necessarily default to adopting the value that the purchaser used for purposes of the transaction, being $100,000.00.

[116] For the value of the Premises, I accept the submissions of the Applicant that I should pick a midpoint of the two valuations at September 21, 2022. The Applicant suggests that that number ought to be $4,750,000.00. I note that this number is in fact below the midpoint, and see no reason why the actual midpoint ought not to be chosen (appreciating that this represents an unsophisticated "rough and ready" approach, but again without evidence that would allow the court to dig any deeper). As such, for the Premises, I find that $5,047,000.00 should be the number used.

[117] I am advised by counsel that with these numbers, the parties can allocate the proceeds of sale, and I leave it to them to do so.

Costs

[118] Counsel also advised that they will endeavor to agree on costs. I ask that they endeavor to do so within two weeks of the date of release of this endorsement. If they are not able to agree, I may be spoken to with a view to devising a mechanism to deal with the costs issue.



W.D. BLACK J.

Date: April 3, 2024