ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

# COUNSEL/ENDORSEMENT SLIP

**COURT FILE NO.: CV-22-00678808-00CL** **DATE: May 31, 2024**

**NO. ON LIST: 1**

**TITLE OF PROCEEDING: CANADIAN EQUIPMENT FINANCE AND LEASING INC. v. THE HYPOINT COMPANY LIMITED et al**

**BEFORE: Mr. Justice Black (In Writing)**

## PARTICIPANT INFORMATION

**For the Moving Party:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| Jonathan Rosenstein | Counsel for Delrin Investments Inc. et al (the mortgagees) | jrosenstein@rosensteinlaw.com |

**For Responding Party:**

| Name of Person Appearing | Name of Party | Contact Info |
|---|---|---|
| R. Brendan Bissell | Counsel for Canadian Equipment Finance and Leasing Inc. | bbissell@reconllp.com |

## ENDORSEMENT OF JUSTICE BLACK:

[1] I heard a motion in this matter on March 21, 2024 (the "Priorities Motion") and released an endorsement dated April 3, 2024. I found that the applicant Canadian Equipment Finance and Leasing Inc., was entitled to a share of the proceeds of sale of the transaction at issue, but that it had provided inadequate evidence as to the value of the HVAC Equipment in which it claimed an interest, such that I defaulted to the valuation of that HVAC Equipment used by the purchaser for purposes of the transaction, being $100,000.00. I will continue in this endorsement to use the terms as defined in my April 3, 2024 endorsement.

[2] At this stage, I am determining the costs of the Priorities Motion, as well as the costs of the receivership application within which the Priorities Motion was brought. In his decision dated October 28, 2022, appointing a receiver (relative to the hearing before him on September 2, 2022), Osborne J. reserved costs of that hearing to the judge determining priorities in respect of the net proceeds of sale.

[3] To varying degrees, each side purports to be the successful party and entitled to costs.

[4] The respondent Mortgagees seek substantial indemnity costs of the Priorities Motion, which they calculate to be $18,357.98 (including disbursements and HST), ($12,062.75 on a partial indemnity scale).

[5] For the receivership application, the Mortgagees claim $28,404.50 on a substantial indemnity scale (again including disbursements and HST), ($18,526.04 on a partial indemnity scale).

[6] With respect to the Priorities Motion, the Mortgagees assert that they were "mainly successful". While conceding that I found that the applicant "was entitled to share in the proceeds of sale because of the manner in which the receivership orders were structured and had been enforced", the Mortgagees point out that whereas at points prior to the hearing of the Priorities Motion, the Applicant had sought amounts in a range of $500,000.00 - $848,848.00, the net result of the Priorities Motion is that the Applicant will in fact receive $50,084.58.

[7] The Mortgagees argue that the motion, "at its heart" was to determine how the sale proceeds would be split between the parties, and that inasmuch as the Mortgagees will receive 96.66% of those proceeds, they are "by any meaningful assessment" the successful parties.

[8] Whereas normally that would entitle the Mortgagees to their costs on a partial indemnity basis, the Mortgagees say that they served an offer to settle on March 15, 2024, to pay the Applicant $140,000.00, which, if accepted would have "nearly tripled" the Applicant's recovery. The Mortgagees assert that this offer "clearly attracts rule 49.10 consequences". They also point out that in July of 2023, they had "proposed a settlement discussion" that would have resulted in a payment to the Applicant "in the range of $100,000.00", but that the offer was ignored. The Mortgagees acknowledge that this offer does not comport with rule 49.10, but say that I can and should consider it pursuant to rule 49.13.

[9] With respect to the overall receivership, the Mortgagees argue that the Applicant could have foregone the receivership and simply permitted the Mortgagees to sell under power of sale, in which scenario the Applicant would have retained its security in the HVAC Equipment.

[10] The Mortgagees argue that by, instead, insisting on the receivership, the Applicant caused expenditures for all concerned out of proportion to the amount the Applicant will now receive, and that the receivership proved to be "a destroyer of value".

[11] By reference to the prescribed touchstones under rule 57.01, the Mortgagees say that to award costs of the receivership to the Applicant would be "to condone the use of this Court's process regardless of the efficacy of those processes".

[12] They say that for the same reason, the Mortgagees should be awarded their costs. If instead of seeking a receivership the Applicant had sought an entitlement to share in the proceeds of sale of the Mortgagees

proposed power of sale proceeds, and had the court made that order instead of the receivership order, the parties would have entirely saved the costs of the receivership.

[13] The Applicant, for its part, maintains that it should be awarded the costs of the receivership application, and that no costs should be awarded for the Priorities Motion.

[14] It argues that it was successful on the issues argued before Osborne J. on September 2, 2022. His Honour rejected the Mortgagees' request to sell the property by power of sale, and instead appointed a receiver as urged by the Applicant.

[15] Inasmuch as the receiver then recommended the approach that the Applicant had contended was the prudent way to realize on the assets, the Applicant argues that the receiver's view, in effect, provided independent confirmation of the reasonableness and appropriateness of the Applicant's position.

[16] The Applicant argues that therefore the Mortgagees are not entitled to the costs of the receivership application because:

(a) They were not successful in the position they asserted before Osborne J., and their after-the-fact economic analysis of the receivership suggesting that the result without a receiver would have been better for all concerned, is imprecise and fails to account for the Mortgagees' attempt at the outset to exclude the Applicant from recovering any proceeds at all;

(b) The Mortgagees now purport to claim costs of the entire receivership, which is not what Osborne J. reserved to be dealt with at this stage; and,

(c) There is in any event no basis for a higher award of costs than partial indemnity.

[17] The Applicant also argues that, on the Priorities Motion, success was divided.

[18] It disputes the Mortgagees' characterization of the Applicant's position on the Priorities Motion, noting that at no point did the Applicant contest the Mortgagees' priority to the proceeds of sale referable to the real estate, and that, in contrast, the Mortgagees took the position that the Applicant should have no interest in or priority to the proceeds of sale referable to the HVAC Equipment.

[19] The Applicant points out that most of the Mortgagees' written and oral submissions were devoted to that position (that the Applicant had no interest or priority in the HVAC Equipment), and that the issue was in fact decided against the Mortgagees.

[20] The Applicant concedes that it was unsuccessful on its position as to the value of the HVAC Equipment, but disputes that the "offers" to which the Mortgagees point qualify as offers triggering the costs consequences under rule 49, noting that the "offer" that the Mortgagees say triggers consequences under rule 49.10 was in fact an email, which did not "even contain the rudimentary statement of whether it was open for acceptance until the hearing".

[21] I find, for purposes of my determination of costs, as follows:

(a) In terms of the parties' positions going into the hearing before Osborne J. on September 2, 2022, His Honour's decision upholds the Applicant's position and not that of the Mortgagees. It is also fair to observe, however, that, given the ultimate result, the Applicant (and indeed the parties and the entire process), would have been better off economically had the Applicant's position not prevailed;

(b) At the time of that hearing, though, the Applicant could not have concluded that the value ultimately assigned to the HVAC Equipment (in my April 3, 2024 endorsement 18 months later), would be as low as it proved to be, and the Applicant at that time was confronted with the Mortgagees' position that the Applicant was not entitled to any share of proceeds of sale;

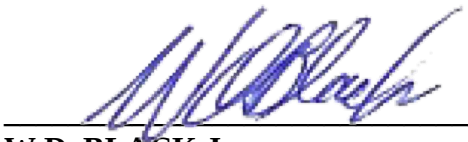
(c) Similarly, in terms of the results of the Priorities Motion, the Applicant prevailed in terms of the priority dispute, which was the issue on which the parties spent the majority of their submissions (both written and oral);

(d) On the other hand, owing to shortcomings in the evidence provided by the Applicant as to the value of the HVAC Equipment, the Applicant's victory on the priority dispute proved to be Pyrrhic;

(e) I find that the Mortgagees' offers do not qualify as formal offers for purposes of rule 49.10, but are matters that can be taken into account and considered under rule 49.13;

(f) Given that the Applicant prevailed on the main legal issue being contested in the Priorities Motion – the question of priorities to the proceeds of sale – the effect of an offer by the responding party (here the Mortgagees), is typically that the party who failed to accept an offer which would have been better for it than the actual result proved to be, would be to deprive that notionally successful party of the costs that it would otherwise receive;

(g) In terms of the overall result, taking all of that into account, I find that the success is sufficiently cloudy and divided that each side should bear its own costs.



**W.D. BLACK J.**

**DATE: MAY 31, 2024**