Court of King's Bench of Alberta

Citation: Bank of Nova Scotia v Smiling Simba Learning Academy Inc, 2025 ABKB 11

Date: 20250110
Docket: 2401 04463
Registry: Calgary

Between:

Bank of Nova Scotia

Plaintiff/Applicant

- and -

Smiling Simba Learning Academy Inc.,
Uma Pujari and Prince Chahal

Defendants/Respondents

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

[2] For the reasons set out below, the receivership order requested is granted.

II. Background

[3] BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as

"Special Purpose – Community Service (S-CS)", which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

[4] BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of $8.2 million.

[5] From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal's involvement in the potential childcare operator in March 2023.

[6] SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

[7] The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the "**Loans**".

[8] By March 31, 2024, the amount outstanding on the Loans was over $9 million.

[9] The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS's security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

[10] SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

[11] On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[12] On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to "collateralized debt" in the amount of approximately $900,000. SSLA did not obtain BNS' consent to this registration.

[13] On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of $200,000. SSLA did not obtain BNS' consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was $164,487.56 (based on Mortgagequote's Statement of Claim against SSLA).

[14] In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

[15] On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

[16] On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024.[1] Chahal's evidence is that the tenant is currently paying monthly rent of $28,200[2]. SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

[17] On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

[18] On April 2, 2024, BNS filed a receivership application in respect of SSLA.

[19] The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

[20] In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of $9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

[21] SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

[22] SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

[23] On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

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[1] The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

[2] The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

[24] As of December 30, 2024, the amount outstanding under the Loans was $10,170,652.26.

[25] The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

[26] The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

[27] The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

[28] The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24.

[29] As noted in ***Higgerty***, at para 25, which I adopt:

> [25] A receivership order "should not be lightly granted": ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[30] Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd***, 2024 ABKB 635 at para 65 [***Mayfield***]; ***Worth Ventures Ltd v MegaSys Enterprises Ltd***, 2024 ABKB 385 at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd***, 2023 ABKB 718 at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at para 33; ***Schendel Management Ltd***, 2019 ABQB 545 at paras 44-45; ***Murphy v Cahill***, 2013 ABQB 335 at para

71; ***Kasten*** at para 13; ***Romspen Investment Corporation v Hargate Properties Inc***, 2011 ABQB 759 at para 20; ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27. Those factors include:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver; and

(q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

[31] In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: ***Mayfield*** at para 40. The applicable principles were summarized by Justice Lema in ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 60-63 (footnotes omitted):

> [60] On how to approach a consent order, the guiding principles are as follows:
>
> • the Court is not obliged, from the mere fact of consent, to grant a consent order; and

- the Court must be satisfied (at minimum) that:
    - it has the jurisdiction to grant the order;
    - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
    - consent has actually been provided;
    - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
    - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
    - the proposed relief does not exceed that consented to; and
    - consent aside, the ordered relief is warranted in the circumstances.

> [61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.
>
> [62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.
>
> [63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

[32] In assessing the effect of a debtor's consent to a receivership order, Justice Lema went on to point out in ***Servus***, at para 66 (emphasis in original): "by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*". In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

[33] No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what

should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

[35] I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

[36] BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in ***Paragon***, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

[37] Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 1953 at para 43; ***Murphy*** at para 72.

b. Risk to Security

[38] SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

[39] SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

[40] I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: ***Braile v Calgary (Police Service)***, 2018 ABCA 109 at para 23; ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2005 ABCA 46 at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was $6,790,000 (and the Property is in tax arrears of $359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

[41] While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

[42] It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

c. Nature of the Property

[43] BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

[44] SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

[45] Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): ***Mayfield*** at para 40; ***Servus*** at paras 42-50; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

[46] I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

[47] This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

[48] SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

[49] SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

[50] A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

[51] SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

[52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: ***Bank of Montreal v Haro-Thurlow Street Project Limited Partnership***, 2024 BCSC 47 ***[Haro-Thurlow Street Project***]at para 95.

[53] In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: ***Haro-Thurlow Street Project*** at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

[54] SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

[55] SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

3. Conclusion re: Receivership

[56] For those reasons, I find the appointment of a receiver is just and convenient.

[57] Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

[58] I grant the receivership order as proposed by BNS.

Heard on the January 6th and 9th, 2025.
Dated at Calgary, Alberta this 10th day of January, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Natalie Thompson
for Bank of Nova Scotia

Randolph W. Mitchell
for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal

Cale W. Ellis Toddington (January 9, 2025 only) and Madona Markaj (student-at-law)
for Mortgagequote Canada Corp.

Anthony Merah
for 2499311 Alberta Ltd

Derek Pontin (January 9, 2025 only)
for the proposed receiver