CITATION: Ashcroft Urban Developments Inc. (Re), 2024 ONSC 7192
COURT FILE NO.: CV-24-98508
(Ottawa)
DATE: 20241220

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED	*David Mann K.C.*, *Alexander Bissonette* and *Sarah DelVillano*, for the Applicants
AND IN THE MATTER OF ASHCROFT URBAN DEVELOPMENTS INC., 2067166 ONTARIO INC., 2139770 ONTARIO INC., 2265132 ONTARIO INC., ASHCROFT HOMES – LA PROMENADE INC., 2195186 ONTARIO INC., ASHCROFT HOMES – CAPITAL HALL INC. and 1019883 ONTARIO INC. Applicants	*Randal Van de Mosselaer* and *Stephen Kroeger* for Grant Thornton Limited (the court-appointed monitor) *Alan Merskey, Jeremy Bornstein* and *Jamie Arabi* for ACM Advisors Ltd. *Sanjeev Mitra* and *Calvin Horsten* for CMLS Financial Ltd. and Equitable Bank *Monique J. Jilesen* and *Adam Davis* for Institutional Mortgage Capital Inc. in its capacity as general partner of IMC Limited Partnership *Haddon Murray* and *Heather Fisher* for Central 1 Credit Union *Patrick Corney* for Canadian Western Bank *Raj Sahni* for Peoples Trust Company *Fraser Mackinnon Blair* for MNP Ltd. in its capacity as court-appointed receiver of Ashcroft Homes – Eastboro Inc. and Ashcroft Homes – 108 Richmond Road Inc. *Sara-Ann Wilson*, for BDO Canada Limited in its capacity as the court-appointed receiver of Ashcroft Homes – 101 Richmond Road Inc., Ashcroft Homes - 108 Richmond Road

) Inc. and Ashcroft Homes – 111 Richmond
) Road Inc.
)
) *Fozia Chaudary*, for Canada Revenue
) Agency
)
) *Jennifer Stam*, for KSV Restructuring Inc. in
) its capacity as proposed interim receiver

)
)
) **HEARD at Ottawa:** 12 December 2024 (by
) videoconference)

REASONS FOR DECISION

MEW J.

[1] On 5 December 2024, the applicants sought and obtained from me an initial order under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("CCAA"). The stay of proceedings secured by that initial order was sought by the applicants primarily to stay and prevent enforcement actions that had been, or were anticipated to be, taken by certain secured lenders of the applicants, and potentially other creditors, thereby enabling the applicants to advance their restructuring efforts, and continue to operate their businesses as going concerns.

[2] The initial order was obtained without advance notice to all but one of the secured creditors affected by the order. The exception, Central 1 Credit Union ("Central 1"), a secured creditor of 2139770 Ontario Inc., received less than an hour's notice of the hearing, as a result of which, although counsel attended the hearing at which the initial order was obtained, Central 1 took no position on the appropriateness of the initial order and fully reserved its rights. Central 1 also advised the court that there was already in existence an order by MacLeod RSJ that if there were further breaches by 2139770 Ontario of its forbearance agreement with Central 1, an order would be made for the appointment of a receiver and manager over the property, assets and undertakings of 2139770 Ontario Inc.

[3] A comeback hearing date was set for 12 December 2024, seven days after the date of the initial order.

[4] Because the initial order was obtained without notice, the onus rests "solely and squarely" with the applicants to prove that the initial order was appropriate and that the protection afforded by the initial order should be continued through an amended and restated initial order (the "ARIO": *General Chemical Canada Ltd. (Re)*, 2005 CanLII 1079 (ON SC), at para. 2).

[5] At the comeback hearing, secured creditors representing 84% of the secured debt opposed the continuation of the CCAA proceeding, and sought instead orders for the appointment of interim receivers to protect their interests.

[6] At the conclusion of the comeback hearing, I advised the parties that, pending the release of these reasons for decision, the initial order made by me on 5 December 2024 would remain in effect on an interim basis.

Background

[7] The eight applicant companies are part of a broader group of more than 55 affiliated entities known as the Ashcroft Homes Group. The founder and controlling mind of the Ashcroft Homes Group is David Choo. The business of the Group is the purchase, development and operation of residential communities in the Ottawa area for seniors, students, and general residential markets, and the lease or sale of accommodations in those communities.

[8] The companies and communities which comprise the Ashcroft Homes Group operate through four key brands as follows:

a. "Ashcroft Homes" – general residential, comprising master planned communities with single dwelling house areas, infill townhome neighbourhoods and condominium communities;

b. "Alavida Lifestyles" – retirement apartment and seniors' suites communities that allow for transition from independent to assisted living, with on-site health care and personal care services, amenities and other offerings and events;

c. "Envie" – student residential communities comprised of condominium platforms for lease, sale or investment; and

d. "REstays" – luxury short term rentals and hotel-like accommodation.

[9] Seven of the applicants own and operate separate residential properties, each within its own segregated operations, bank accounts, books and records, and assets. The applicants engage in inter-company transactions within the Ashcroft Homes Group, resulting in inter-company receivables and payables. Certain administrative services are provided on a centralised basis, but each entity pays for its respective share of those services. The eighth applicant is Ashcroft's head office.

[10] Four of the single purpose applicants are owned by David Choo, while three are owned by Mr. Choo and Envie Enterprises Inc., which is owned by Mr. Choo and the David and Chanti Choo Family Trust 2016.

[11] According to Mr. Choo, despite a history of generating significant revenues and having significant net equity holdings, in recent years various members of the Ashcroft Homes Group have encountered liquidity issues related to rising interest rates and a decline in occupancy rates.

This has left the applicants finding themselves in a position of insufficient liquidity to meet their current debt obligations.

[12] The applicants' current dilemma is summed up in paragraph 14 of Mr. Choo's affidavit sworn in support of the initial order:

> From late 2023 the Applicants began working with their respective lenders to address these shortfalls. That has resulted in a series of forbearance agreements and cross-guarantees being established that were designed to buy time to restore occupancy rates, including in some cases by the finalisation of construction, refinance existing lenders, and sell assets in order to pay down debt. One company in the Group recently entered in a sale for a project property for $183,000,000, resolving not only the financial position of that company, but also assisting with other debts across the Group. In recent months, however, we have received increasing numbers of demands from our lenders that make private, individual arrangements increasingly difficult to achieve.

[13] The applicants assert that the combined value of the applicants' real estate property is approximately $460,490,030, encumbered by approximately $284,511,617 in secured debt, leaving an estimated net equity of $175,978,413. As will be discussed below, the secured lenders challenge the reliability of the applicants' estimates which, they say, are based on dated appraisals that do not reflect current market values.

[14] The following table summarises the applicants, their related projects and locations, and the secured lenders for each:

Applicant	**Project**	**Location**	**Secured Lender(s)**	**Secured Debt**
Ashcroft Urban Developments	**REStays**	101 Queen Street & 110 Sparks Street, Ottawa	CMLS (EQ Bank is a "major participant" in the mortgage	$50,600,000
2067166 Ontario	**Park Place Senior**	120 Central Park Drive, Ottawa	(1) ACM (2) IMC	$26,396,895
2139770 Ontario	**Ravines Retirement**	626 Prado Private, Ottawa	Central 1	$38,173,696
2265132 Ontario	**Ravines Senior**	636 Prado Private, Ottawa	(1) ACM (2) IMC	$45,234,932

AH – La Promenade	**Promenade Seniors Suites**	130 & 150 Rossignol Drive, Ottawa (plus vacant land at 100 Rossignol Drive)	IMC	$37,000,000
2195186 Ontario	**Envie I**	101 Champagne Rd, Ottawa	Peoples Trust Company ACM	$57,853,430
AH – Capital Hall	**Envie II**	105 Champagne Avenue, Ottawa	Equitable Bank	$24,000,000
1019883 Ontario	**Head Office**	18 Antares Drive, Nepean	Canadian Western Bank	$4,134,370
			CRA	$1,118,294
TOTAL				**$284,511,617**

Lender Recovery Actions

[15] Lender recovery actions associated with the applicants are as follows:

Ashcroft Urban Developments (REStays)

[16] The financing term with CMLS Financial Ltd. ("CMLS") matured on 1 September 2023. CMLS made a demand and notice to enforce security on 15 November 2023, for failure to pay out the loan on maturity, and a further demand on 18 December 2023.

[17] A forbearance agreement was entered into on 23 February 2023, and an amended forbearance agreement on 3 July 2024, extending the time for compliance with the loan agreement to 30 September 2024, with a further extension granted on 19 November 2024 extending the time for compliance to 31 March 2025, and obliging the borrower to procure a mortgage in the amount of $20,000,000 charging the property of 2195186 Ontario Inc. (Envie I Project) and a guarantee from 219586 Ontario Inc. up to that amount, limited in recourse to its property. This further mortgage was a condition precedent to the second forbearance extension. As the mortgage was never received, CMLS takes the position that the second forbearance extension has not taken effect.

[18] When the original forbearance agreement was entered into, the borrower also provided a consent to a receivership in respect of the REStays property in the event that the borrower failed to refinance by the specified deadline. But for the stay of proceedings pursuant to the initial order, CMLS takes the position that the receiver consent that it obtained could have been activated.

[19] As at August 2024, Ashcroft Urban Developments indirectly paid the salaries of 53 employees through a related company, Ashcroft Homes – Central Park Inc.

2067166 Ontario Inc. (Park Place Senior)

[20] A first ranking mortgage was provided in November 2022 by ACM Advisors Ltd. ("ACM"), with a principal amount of $21,000,000. Security for this loan was agreed to be cross-defaulted and cross-collateralised with security under a parallel loan being provided to 2265132 Ontario Inc. (Ravines Senior). Institutional Mortgage Capital Canada Inc. ("IMC") holds a second ranking mortgage, originally for the principal amount of $11,500,000 with 2265132 Ontario Inc. (Ravines Senior) as co-borrower and jointly and severally liable under the loan agreement. As of the end of October 2024, the balance of the combined debts secured by these mortgages stood at $26,396,895. As at 16 October 2024, this borrower had other outstanding obligations of $551,590, including $391,590 in property tax arrears.

[21] On 19 July 2024, a demand letter and notice of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, was sent to 2067166 Ontario and to related guarantors in respect of the Park Place mortgage.

[22] On 5 November 2024, the parties entered into a forbearance agreement. Conditions precedent to ACM's forbearance obligations included the execution of forbearance agreements between ACM and 2265132 Ontario Inc. (for Ravines Senior) and 2195186 Ontario Inc. (for Envie I). At the time of the initial order in this proceeding, negotiations with respect to the finalisation and execution of those other forbearance agreements were ongoing.

[23] As at August 2024, 2067166 Ontario Inc. paid the salaries of 38 employees directly, and paid 50% of the salaries of five management staff through 1230172 Ontario Inc. for Park Place Retirement.

2139770 Ontario Inc. (Ravines Retirement)

[24] Central 1 Credit Union provided mortgage financing on 16 March 2015 for the principal amount of $27,500,000, which was extended to $43,500,000 on 15 October 2019. The balance of the loan debt at the end of October 2024 was $38,173,696. The loan was scheduled to mature on 24 November 2024.

[25] The borrower has other outstanding obligations totalling $1,292.300, of which $406,300 is in property tax arrears, $394,000 in debts to various vendors, and $492,000 for income tax.

[26] On 9 August 2024, Central 1 issued a final demand to 2139770 Ontario Inc. as borrower, and to Mr. Choo as guarantor, demanding payment of $38,373,232.02 by 19 August 2024. Central 1 issued a notice of application to appoint a receiver with the demand correspondence.

[27] On 25 September 2024, a forbearance agreement was signed in relation to the Central 1 loan. On 7 October 2024, Central 1 issued an amended notice of application to appoint a receiver over the property, assets and undertakings of 213977 Ontario Inc. That application was heard by Regional Senior Justice MacLeod on 17 October 2024 and resulted in the issuance of a decision

on 29 October 2024, granting a postponement of the receivership application upon compliance by 2139770 Ontario Inc. with court imposed terms, together with the other terms of the forbearance agreement: *Central 1 Credit Union v. 2139770 Ontario Inc.*, 2024 ONSC 5988.

[28] As at August 2024, 2139770 Ontario Inc. paid the salaries of 100 employees directly, including salaries of management staff for the Ravines community, which are shared equally between 2139770 Ontario Inc. for Ravines Senior, and 2265132 Ontario Inc. for Ravines Retirement.

2265132 Ontario Inc. (Ravines Senior)

[29] This is another of the properties financed by ACM and IMC. As of the end of October, the net debt on the Ravines Senior loans was $45,234,932. Other outstanding obligations of the borrower totalled $473,000 as of 16 October 2024, including $330,000 in property tax arrears.

[30] On 19 July 2024, a demand letter and notice of intention to enforce security under s. 244 of the *Bankruptcy and Insolvency Act* was sent to 2265132 Ontario Inc. and its related guarantors in respect of the Ravines Senior mortgage.

[31] On 5 November 2024, the parties entered into a forbearance agreement, one of the conditions precedent to ACM's forbearance obligations being the execution of forbearance agreements between ACM and, *inter alia*, 2195186 Ontario Inc. (Envie I). That forbearance agreement had not yet been finalised and executed at the time of the initial order.

[32] As at August 2024, 2265132 Ontario Inc. paid the salaries of 41 employees directly, plus 50% of the costs of the management staff whose salaries are paid directly by 2139770 Ontario Inc. (Ravines Retirement).

Ashcroft Homes – La Promenade Inc. (Residences Promenade Seniors Suites)

[33] The borrower obtained mortgage finance from IMC on 24 September 2024 for an initial advance of $37,000,000 and a maximum loan amount of $42,000,000. An extension of the loan agreed on 22 December 2022 provided for maturity on 1 February 2024. The loan has not been repaid and the balance, as at the end of October 2024, is said to be $37,000,000.

[34] On 29 October 2024, Ashcroft Homes – La Promenade became guarantor on a $17,800,000 credit facility from Pillar Capital Corp. to another company in the Ashcroft Homes Group, 2181291 Ontario Inc. IMC was asked for its consent to the credit arrangement made with Pillar, but had not provided that consent at the time that credit facility was entered into.

[35] As at August 2024, Ashcroft Homes – La Promenade paid the salaries of 41 employees directly and paid for 50% of the salaries of five management staff with 1971446 Ontario Inc. for Promenade Retirement.

2195186 Ontario Inc. (Envie I)

[36] The first mortgage on this property was provided by Peoples Trust Company for the principal sum of $55,634,035, maturing 1 March 2028. A second priority loan was obtained from ACM Commercial Mortgage Fund in the principal amount of $11,200,000. As of the end of October 2024, the current balance of those loans was $57,853,430.

[37] The property is currently listed for sale. According to Mr. Choo, based on the broker's underwriting value, the net equity after all closing costs and repayment for secure debts is expected to be in excess of $50,000,000. There are, however, other outstanding obligations, totalling $7,480,470, of which $7,210,000 is said to be owing to the Canada Revenue Agency (although this debt is contested and listed for hearing in the Tax Court of Canada in 2025).

[38] As of August 2024, 2195186 Ontario Inc. paid the salaries of 47 employees through Ashcroft Homes – Central Park Inc.

Ashcroft Homes – Capital Hall Inc. (Envie II)

[39] This borrower obtained first mortgage financing from Equitable Bank on 1 September 2022 in the amount of $23,200,000. The current balance of the loan as at October 2024 is $23,200,000 plus outstanding interest of approximately $800,000.

[40] Equitable Bank issued a letter of demand on 9 October 2024 demanding payment of $24,296,447 forthwith and serving a notice of intention to enforce security. The loan is set to mature in January 2025.

1019883 Ontario Inc. – Head Office

[41] On 21 April 2022, 1019883 Ontario obtained mortgage financing from Canadian Western Bank ("CWB") in the amount of $4,500,000. The current debt owing on the loan is $4,134,370. There is also a lien registered on the title of the property for $1,029,987 in favour of the Canada Revenue Agency.

[42] On 16 August 2024, Canada Western Bank wrote to the borrower advising of defaults under the loan, including in respect of reporting requirements and payments of principal and interest. On 19 November 2024, Canada Western Bank offered to amend the loan terms with payment required in full by February 2025, approximately two years before the loan was set to mature.

[43] CWB sent a letter to 1019883 Ontario on 19 November 2024 advising that it wished to exit its banking relationship and proposing to amend its commitment letter. That proposed amending agreement was signed back by Mr. Choo (on behalf of 1019883 Ontario Inc. and as personal guarantor and, on behalf of Ashcroft Homes Inc., as corporate guarantor) on 29 November 2024, four business days before the applicants applied for CCAA protection. On 11 December 2024, CWB made a written demand for repayment of the indebtedness and provided 1019883 Ontario with notice of its intention to enforce CWB's security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*.

[44] As of October 2024, there were 50 employees providing support and administrative services to the Ashcroft Homes Group, including administration, finance and accounting, marketing and sales, human resources, payroll and construction management services.

CCAA Application

[45] The notice of application in this matter was filed with the court on 3 December 2024.

[46] The affidavit of Mr. Choo, filed in support of the application, explained how, beginning in early 2023, the applicants had begun working with their lenders in an effort to address developing liquidity shortfalls. While some of those discussions had been successful, others had not. Ongoing cross-collateralisation requirements and pressure from existing lenders for more security, were stressing the projects. Further, what were described as significantly enhanced reporting requirements to lenders under forbearance terms had added a further burden on the applicants' infrastructure.

[47] The applicants proposed the appointment of Grant Thornton Limited as Monitor and Hawco Peters and Associates Inc. ("Hawco Peters") as Financial Advisor. In addition to a stay of proceedings against the applicants, stays were also sought in respect of certain "Additional Stay Parties" (all either affiliates, or directors and officers of one or all of the applicants).

[48] The applicants also sought approval of an initial Administration Charge up to a maximum amount of $200,000 over the applicants' properties to secure the fees and disbursements of the Monitor, the Financial Advisor, and their – and the applicants' – respective lawyers, to rank in priority after the existing secured lenders of any applicants in respect, and to the extent, of such lender's registered mortgage; and any taxing authority in respect, and to the extent, of such authority's statutory charge.

[49] Under the proposal, Mr. Choo would provide a debtor-in-possession credit facility (the "DIP Facility") of $1,500,000 without fees or interest, and with the proviso that the DIP lender's charge would rank in priority behind the securities of the secured lenders, any taxation authority to the extent of their statutory charge, and the Administration Charge, and would not secure obligations prior to these proceedings.

Initial Order Hearing

[50] Counsel for the applicants, for the proposed monitor, and for Central 1, appeared by video conference at 2:00 p.m. on 5 December 2024 (although in the case of counsel for Central 1, she advised that she had received less than an hour's notice of the hearing).

[51] At the 5 December hearing, counsel for the applicants advised the court that it had been his intention to get application materials out to the affected parties earlier in the week. However, this had been thwarted by the need for the proposed monitor to clear a potential conflict of interest, which had only been achieved shortly before the hearing began. As a result, for all intents and purposes, the initial order hearing proceeded *ex parte*.

[52] The applicants submitted that the CCAA proceedings and the stays of proceedings sought were the only viable means by which the applicants' businesses could be preserved and maximised for the benefit of all of the applicants' stakeholders, including not only secured lenders and other creditors, but also over 1,000 residents in the communities, over 500 employees, and the equity holders. Counsel described the relief sought as "surgical", only doing what was necessary, in order to preserve the *status quo* and continue the businesses in the ordinary course and to enable the applicants' retained financial advisors, Hawco Peters, to continue their work assisting the applicants with the financing and restructuring efforts. The court was advised that none of the secured creditors would be primed by the proposed arrangements. Nor, it was submitted, were the applicants seeking to "get a jump" on any of the secured lenders.

[53] The applicants had retained Hawco Peters on 26 July 2024 to assist in the sourcing and securing of additional capital for refinancing and restructuring within the Ashcroft Homes Group (including the applicants), and to provide advisory services, and sought a continuation of that retainer during the CCAA creditor protection process.

[54] After hearing the submissions of counsel, reviewing the materials filed, and considering the jurisdiction provided to the court by s. 11.02 of the CCAA to impose a stay of proceedings for a period of not more than ten days if satisfied that circumstances exist to make that order appropriate, I made the initial order as requested, setting a comeback date of 12 December 2024. I was satisfied that the applicants were insolvent and had liabilities in excess of $5 million and therefore eligible for the protection afforded by the CCAA. My order included, for the reasons articulated by this court in *Timminco Limited (Re)*, 2012 ONSC 506, at para. 66, provision for a charge over the applicants' property in the amount of up to $200,000, to secure the professional fees and disbursements of the proposed monitor, along with the lawyers of the Monitor, the lawyers of the applicants, and the Financial Advisors.

Comeback Hearing

[55] At the comeback hearing, the applicants sought an extension and expansion of the relief provided under the initial order to facilitate and advance the CCAA proceedings, through an ARIO providing, among other things, for:

a. Extension of the initial stay period up to and including 21 February 2025;

b. Authorising, but not requiring, the applicants to pay, with the consent of the Monitor, certain amounts owing for goods and services supplied to the applicants prior to the date of the initial order;

c. Expanding the applicants' restructuring authority, and the respective ability of the Financial Advisor and the Monitor, to assist with the applicants' restructuring efforts, beyond the limited required relief included in the initial order to ensure the applicants' ability to make payments and enter into contracts necessary to continue the normal course of operations and complete, or otherwise deal with, the applicants' projects;

d. Granting the applicants the right to:

    i. Dispose of redundant or non-material assets not exceeding $20,000 in any one transaction, or $100,000 in the aggregate;

    ii. Close the sale of any residential and commercial units to arm's length third parties for fair market value in the ordinary course of business, subject to the approval of the Monitor;

    iii. Continue or establish such listings for sale of subject properties for fair market value in the ordinary course of business, subject to the approval of the Monitor;

    iv. Enter into any new contractual arrangements for sale and thereafter close the sale of, parts of any property to arm's length third parties for fair market value in the ordinary course of business, which the applicable secured lender(s) and the Monitor, each acting reasonably, deem necessary or appropriate;

    v. List the whole of the Envie II property for sale on such terms and conditions as may be agreed by the secured lender, Equitable Bank, and the Monitor;

    vi. List the whole of the Promenade Seniors' Suites property for sale, separately or in conjunction with the property owned by affiliated corporation 1971446 Ontario Inc., at 110 Rossignol Drive, Ottawa (the Promenade Retirement Residence property) on such terms and conditions as may be agreed to by Ashcroft Homes-La Promenade Inc. (a secured lender to the Promenade Seniors' Suites property) and the Monitor;

e. Continuing the appointment of Hawco Peters and Associates Inc. as financial advisor to the applicants until further order of the court and securing the financial advisor's fees and costs under the Administration charge;

f. Approving the applicants' ability to borrow under a DIP Facility to be provided by Mr. Choo to finance their work and capital requirements and other general corporate purposes, post-filing expenses and costs, including granting a charge over the property to secure all amounts advanced under the DIP Facility;

g. Increasing the maximum amount of the Administration Charge from $200,000 to $700,000;

h. Approving milestones to advance the refinancing of the Ravines retirement residence to allow all indebtedness to be paid out to Central 1 by 30 June 2025; and

i. To seek such advice and direction as the applicants may advise to address issues concerning specific projects.

Applicants' Position

[56] The applicants are clear about their purpose in seeking CCAA protection:

> Here, the Stay of Proceedings is intended primarily to stay and prevent enforcement action that has and will be taken by the Secured Lenders and potentially other creditors. The Stay of Proceedings will preserve the *status quo* and afford the Applicants the breathing space and stability required to advance their restructuring efforts, in consultation with the Financial Advisors, including seeking approval of a DIP, further developing strategies to increase occupancy levels and/or sales of properties, exploring other restructuring alternatives and/or developing a plan of compromise or arrangement.

[57] The applicants further submit that the continuation of the creditor protection provided for under the initial order is essential, having regard to the current financial circumstances of the applicants; the "devastating effects" that bankruptcy, liquidation or uncoordinated enforcement actions would have on the projects and their residents, employees and other stakeholders; and, the value and potential value of each project and for the head office company to the applicants and the Ashcroft Homes Group as a whole.

[58] The applicants claim that, with the assistance of Hawco Peters, they have sourced replacement funding for two of the group's projects (non-applicant affiliates) and "anticipate" receipt of multiple term sheets by mid-December with a cumulative value in the range of $100,000,000 to $230,000,000 to replace multiple lenders. The stated goal and structure of this financing is to provide the applicants with sufficient time to complete started projects, improve occupancy numbers and "settle the waters currently muddied with demands and forbearances". The applicants continue:

> It is envisaged that this strategy will allow sufficient time to allow for the continued sell down of assets which will further deleverage the Ashcroft Homes Group, including the Applicants, and with the continuation of reducing interest rates will lead to traditional long term financing for the remaining real estate portfolio.

[59] According to the applicants, since the initial order was made, they have engaged in communication with various parties, including the secured lenders, either directly or through lawyers and the Financial Advisor related to:

a. Continuing commitment to a timeline for refinancing to allow Central 1 to be paid out and exit as secured lender to 2139770 Ontario Inc. (Ravines Retirement);

b. The proposed sale of the Promenade properties together and as a going concern with the secured lender to AH Ashcroft Homes – La Promenade, IMC, and the secured lender to 197446 Ontario Inc. (RBC); and

c. With CMLS on the REStays loan and in relation to the sale of the whole of the Envie II property.

[60] The applicants argue that the extension of the stay of proceedings will preserve the *status quo* and allow them to, among other things:

a. Operate the business in the ordinary course without disruption;

b. Avoid uncoordinated and stress sales or forced liquidations of the subject properties and projects, which would be value deteriorative and contrary to the best interests of the applicants' stakeholders, employees, tenants and other residents;

c. Preserve their existing tenant relationships and protect such tenants from "forced entries and other improper and disruptive conduct which might be taken by or on behalf of aggressive lenders";

d. Continue to pursue compensatory financing, sale and restructuring transactions capable of underpinning a consensual plan of compromise or arrangement and advance ongoing discussions related thereto, free of interruption caused by enforcement actions against the applicants and/or the properties; and

e. Continue to liaise with the secured lenders and other stakeholders in relation to the foregoing efforts, and also with the secured lender to the Promenade Retirement Residence property in relation to the proposed sale of the Promenade properties.

[61] Anticipating (and then responding to) opposition by a number of the secured creditors to restructuring proceedings under the CCAA, the applicants argue that the proposed extension of the stay of proceedings is appropriate given that:

a. Since the granting of the initial order they have acted in good faith and with due diligence to stabilise and continue the ordinary course operations of the businesses, to develop strategies, increase occupancy levels, and advance their restructuring objectives;

b. It is desirable to prevent uncoordinated and value destructive enforcement efforts by the secured lenders;

c. The CCAA process will best facilitate the maintenance of the residential communities, facilities and services comprising the projects (as compared to uncoordinated enforcement actions, such as the appointment of separate receivers to individual applicants and their projects, which will come at significant social and economic costs in the circumstances);

d. There is very significant equity in each of the properties, and therefore no risk that secured lender funds will not ultimately be recoverable;

e. The capital of the secured lenders will not be tied up for a longer period of time under the CCAA (as compared to receivership, having regard in particular to the sales and refinancing strategies already under way on behalf of the applicants);

f. The costs of up to eight separate receivers to the applicants and their respective advisors will far outweigh the costs of the continuing appointment of the Monitor and the Financial Advisor under the CCAA;

g. The stay of proceedings will preserve the *status quo* and afford the applicants "the breathing space and stability" required to continue the businesses in their ordinary course operations;

h. A stay is necessary to enable the continuations of engagement with the secured lenders and other stakeholders;

i. The revised cash flow forecast prepared by the Monitor demonstrates that the applicants, separately and together, have sufficient liquidity to fund their obligations and the costs of the CCAA proceedings; and

j. The Monitor is supportive of the proposed extension and stay of proceeding.

The Position of the Secured Lenders

[62] All but one of the secured lenders responding to the comeback motion oppose continuation of CCAA protection.

[63] ACM, CLMS Financial Ltd., Equitable Bank and IMC hold, between them, approximately $194,000,000 in secured debt, representing 68% of the total. Each of these lenders seeks the appointment of KSV Restructuring Inc. ("KSV") as interim receiver.

[64] CWB also supports the ACM motion and the appointment of KSV as interim receiver.

[65] Collectively, I will refer to ACM, CLMS Financial Ltd., Equitable Bank, IMC and CWB as the "ACM Group".

[66] Central 1, representing another approximately $38,000,000 of secured debt, supports the ACM Group, but with BDO Canada Limited as receiver and manager, as previously directed by MacLeod RSJ.

[67] The ACM Group and Central 1 together represent $232,000,000, or 84%, of the applicants' secured indebtedness.

[68] Peoples Trust, as the first priority lender on the Envie I project, does not oppose the CCAA order sought. The Envie I property is in the midst of a sale process. Peoples Trust's main concern is that whatever is determined appropriate by the court should not impede that sale. Accordingly, so long as Peoples Trust continues to receive monthly payments, it sees no reason to oppose the creditor protection that has been sought.

[69] The ACM Group argued that the test established by s. 11.02(2) has not been met. Section 11.02(2) provides that the court may extend a stay order for any period necessary, if the court is

satisfied that: (a) circumstances exist to make the order appropriate; and (b) the applicants have acted, and are acting, in good faith, and with due diligence.

[70] In respect of the first of these elements, the secured creditors say that it is unusual (although not completely unheard of) to order creditor protection under the CCAA for real property-centric entities, due to the nature of their security structures and operations. Rather, those entities and their stakeholders more commonly benefit from simpler receivership proceedings.

[71] On the second element, the secured lenders assert that the applicants proceeded to obtain a stay without notice to their major lenders, representing a marked departure from usual restructuring practices and the applicants' obligations under the CCAA to act in good faith and with diligence. These concerns were compounded by the failure of the applicants to serve their comeback hearing materials until less than 24 hours before the comeback hearing.

[72] Just as the making of orders under s. 11.02 of the CCAA are discretionary, so is the appointment of a receiver. Section 101 of the *Courts of Justice Act* provides that the court may appoint a receiver where it is just or convenient to do so. While a court must have regard to all of the circumstances when determining whether it is appropriate to appoint a receiver, the applicants submit that particular regard is to be had to the nature of the property and the rights of interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 (ON SC). Accordingly, as Osborne J. observed in *Antibe Therapeutics Inc. (Re)*, unreported, 22 April 2024, at para. 59:

> [W]here…there are competing applications for a continued insolvency proceeding under the CCAA, or the appointment of a receiver, the Court must consider all of the relevant factors in the exercise of its discretion to determine the most appropriate path forward.

[73] The secured creditors focus on a number of points, which they ask the court to consider in the exercise of its discretion.

[74] First, the proposed interim receiver, KSV, is already providing financial advice to CMLS Financial Ltd. regarding its loans to Ashcroft Urban Developments Inc. and has also provided advisory services to IMC in respect of its mortgages registered on title to certain of the applicants' real properties. KSV has ongoing experience as the receiver and manager of a seniors' residence in Oshawa, Ontario, where it has worked with a specialist property manager, Brightwater Senior Living Group LLC, to stabilise the performance of the seniors' residence and improve its financial results. If appointed as interim receiver of the Ashcroft entities, KSV intends to engage Brightwater to review and oversee the operations of the retirement properties owned by the applicants. With respect to the student housing residences, KSV intends to engage Varsity Properties Inc. to oversee their operations, having previously worked with Varsity on a prior student residence receivership in Kingston, Ontario. KSV's plan envisages similarly engaging a party with expertise in the hospitality sector to review and provide recommendations on improving the performance of the hotel property owned by Ashcroft Urban (REStays).

[75] The secured creditors contrast KSV's plan with what they describe as the absence of a restructuring pathway put forward by the applicants. To the extent that there is a path forward by the applicants, it comprises what the secured creditors consider to be unrealistic marketing plans. Furthermore, the cash flow projections provided by the monitor show that after thirteen weeks, there would be almost no DIP financing left.

[76] Another concern is that the values relied upon by the applicants are based on what the secured lenders regard as obsolete appraisals, some dating as far back as 2017. For example, in relation to the Park Place property, while Mr. Choo claims that there is $24.6 million of net equity after secured debt, the secured lender, ACM's internal valuation estimates reflect that there may not be any equity in that property.

[77] Second, and closely connected to the secured lenders' misgivings about the lack of a cogent road map for the restructuring, is a mounting loss of confidence in the applicants' management.

[78] For example, Promenade Senior Suites, a relatively new senior suite facility built in 2020, has a 65% occupancy rate. Yet the appraisal relied upon by the applicants assumes a stabilised 90% occupancy rate.

[79] There have also been regulatory and reputational concerns, and associated negative publicity, with respect to the management and operation of the Ashcroft seniors' and retirement facilities.

[80] The secured creditors say that trust has also been undermined as a result of what they regard as a lack of candour and straight dealing. IMC offers two examples.

[81] IMC had asked Ashcroft to keep it apprised about material developments on Ashcroft's whole portfolio of assets. IMC expressed concern when it was informed by Ashcroft that Central 1 was proposing a forbearance agreement or a receiver on the $43,000,000 facility related to the Ravines Retirement project. Significantly, Ashcroft did not disclose to IMC that one of the conditions of the forbearance agreement proposed by Central 1 was that La Promenade was to sign as a guarantor of the outstanding $38,000,000 in debt owed by Ashcroft to Central 1. Notwithstanding IMC's known concerns, Ashcroft then entered into a forbearance agreement with Central 1, doing so without notice to or approval of IMC, and contrary to Ashcroft's loan agreement with IMC.

[82] Subsequent to that, Ashcroft caused La Promenade to be amalgamated with another Ashcroft-controlled entity, again without IMC's consent (Ashcroft did originally request IMC's consent, which it knew was contingent upon completion of due diligence, but, when told by IMC on 25 October 2024 that providing the consent by a drop-dead date of 31 October was unrealistic, Ashcroft immediately proceeded, the same day, with the amalgamation). The secured lenders' concerns were further deepened by the immediate pre-filing conduct (i.e., lack of notice) of the applicants, to which reference has already been made.

[83] There are also claims that Ashcroft has exaggerated occupancy rates of some of the subject buildings. For example, ACM claims that on 18 September 2024, Ashcroft reported that Envie I

was 80% leased but when ACM's Vice-President – Investments toured Envie I on 18 November 2024, the property manager advised that the building was only 70%-73% leased.

[84] A third generalised cause for concern is that proceeding without sensitivity to the legal and practical separation between each of the eight projects, and their isolated contractual relations with the lenders, will prejudice the secured creditors.

[85] Although the applicants assert that each of the projects is managed separately, with segregated operations, including bank accounts, books and records, and assets, and with intercompany transactions effected at arm's length, the merger of the properties into what the secured creditors call an "asset melting pot" under the CCAA order, would force lenders to rescue properties to which they had no contractual relation.

[86] Despite the involvement, since August, of Hawco Peters, the investment advisors' efforts have not, to date, contributed to meeting the applicants' obligations to their secured lenders. Furthermore, the engagement of Hawco Peters relates to projects both outside and within the CCAA application.

[87] While the applicants' draft proposed ARIO has been amended to respond to the secured creditors' concerns about the lack of ringfencing on a project by project basis (a provision has been added which would prevent the applicants from making payments or other transfer of assets to any affiliated entities or related parties), as well as to limit the engagement of Hawco Peters to the applicants only, the secured creditors remain concerned that their interests will be prejudiced as a result of effected *de facto* extensions of their loan or forbearance agreements, coupled with a concomitant loss of ability to control the process and the possibility that their loans may not be fully covered by the projects they are secured against.

[88] Fourth, factors which might otherwise favour a CCAA process are, at best, neutral in the present case. There is no clear threat to the employees of the applicants. There are no duelling receiverships. The suggestion by Mr. Choo that tenants need to be protected from forced entries and disruptive conduct which might be taken by or on behalf of aggressive lenders is strongly refuted by the secured creditors.

[89] Finally, the secured creditors do not share Mr. Choo's belief that the prospects of successful refinancing, sale and restructuring efforts will be enhanced by providing CCAA protection. Some of the creditors are sanguine about the state of distress in the current commercial real estate market in general, and the Ottawa area market in particular.

[90] Ishbel Buchan, the Executive Vice President – Investments at ACM deposes that:

> ACM, and many other lenders I have spoken to, are dealing with multiple distressed assets. These lenders have in many instances, elected to make efforts to negotiate out-of-court arrangements with their commercial mortgage borrowers, similar to how ACM has unsuccessfully attempted to resolve matters with the Ashcroft.

She continues:

> Not surprisingly, the challenging macro-economic factors and market conditions described above have had a snowball effect where the relatively high number of distressed real assets has further led to depressed valuations and sales volumes. For example, Bobby Kofman of KSV, the proposed interim receiver, has advised me that in KSV's experience as the court-officer of dozens of real property projects across Canada, real property valuations are currently impaired, and transactions are limited, except at distressed pricing, including for industrial, development, residential, multi-family and hospitality properties.
>
> Ms. Buchan concludes by stating that ACM is concerned that its secured indebtedness in relation to the Ashcroft projects will similarly be affected by the current state of the commercial real estate market in terms of property values and related sales velocity, such that the properties may sell for "significantly below estimated values and/or take much longer to sell than anticipated".

[91] Ultimately, the secured creditors regard the applicants as having sought CCAA protection in order to buy time to continue their hitherto ineffective attempt to raise meaningful amounts of new funding.

Discussion

[92] As D. M. Brown J. observed in *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781, at para. 61, both an order appointing a receiver and an initial order under the CCAA are highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders. The specific factors taken into account by the court will, as a consequence, vary from case to case.

[93] Further, and as noted by Justice Osborne in *Antibe Therapeutics*, at para. 55:

> In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

No Presumption in Favour of Receivership

[94] Although, as commentators have observed, there is a presumption among insolvency practitioners that, when it comes to real property, in a contest between a receivership and the CCAA, the receivership is bound to emerge victorious (see Jeremy Opolsky, Jacob Babad and Mike Noel, *Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis* (2020), 18 Annual Review of Insolvency Law 199, 2020 CanLIIDocs 3602), there is no hard and fast rule to that effect. The nature of the security and the secured creditor's views are not fully determinative of whether a CCAA proceeding will be preferred: *BCIMC Construction Fund Corporation v. The Clover on Yonge Inc.*, 2020 ONSC 1953, per Koehnen J. at para. 104.

The Secured Creditors' Opposition

[95] As is the case in many real estate driven CCAA proceedings, the secured creditors see little incentive for surrendering control over the process of enforcing their security. Circumstances similar to those in the present case pertained in *Octagon Properties Group Ltd. (Re)*, [2009] A.J. No. 936 (Q.B.), where, at para. 17, Kent J. observed:

> This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted *CCAA* relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for *CCAA* relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[96] It is noteworthy that in the present case, fully 84% of the secured creditors not only oppose the CCAA relief sought, but have combined to put forward the nomination of a common receiver to assist with the enforcement of their security. This arrangement significantly dilutes the force of the argument advanced by the applicants that the costs of up to eight separate receivers and their respective advisors will far outweigh the costs of continuing with the appointment of the Monitor and the Financial Advisor under the CCAA. It also renders as far less likely the prospect of "uncoordinated and stress sales or forced liquidations of the subject properties and projects".

Is There a Clear Plan?

[97] In their article *Receivership versus CCAA in Real Property Development: Constructing a Framework for Analysis*, Opolsky *et al*. express the following observation, based on a review of real-estate driven CCAA cases:

> An important consideration for the courts in granting a CCAA is the feasibility of a resolution under that CCAA proceeding. If the chances of a successful proposal are low, then a court may decide to order a receivership rather than spend time on a failed CCAA.

[98] The evidence and submissions put forward on behalf of the applicants have a distinctly aspirational quality. Their message is one of hope, despite the failures of the past eighteen months. The appointment of the Monitor to steady the ship, and bring order to the process of holding the

secured creditors at bay will, they hope, allow for a coordinated process, that maximises value and best serves the interests of all concerned parties.

[99] While there is a superficial attraction to the proposition that the applicants, with the assistance and guidance of the Monitor and the Financial Advisor, will succeed in the coming months, the applicants' plans, such as they are, appear to largely rest on a more benign interest rate environment, a more active property market, and improving occupancy rates. Despite changes in the interest environment in the year to date and well publicised public concerns about a lack of affordable housing, the applicants' malaises continue.

[100] I find myself more inclined to the view that the applicants are simply buying time ("[i]t is envisaged that this strategy will allow sufficient time to allow for the continued sell down of assets which will further deleverage the Ashcroft Homes Group, including the Applicants") and not much more.

[101] Specifically, I see nothing markedly better in the plans put forward by the applicants than those articulated by the secured creditors. Indeed, if anything, the plan put forward by KSV, the proposed interim receiver, has more substance, including the engagement of specialist property managers operating in the retirement residence and student residence markets in Ontario.

Confidence in Management

[102] The refrain that secured creditors have "lost confidence in management" of debtor companies is a familiar one in CCAA proceedings. This matter is clearly no exception.

[103] For at least eighteen months or more, the applicants have been engaged in an ongoing juggling act with their secured creditors, culminating in their current insolvent positions.

[104] Furthermore, a number of the secured creditors have raised concerns about the some of the cross-default and cross-collateralisation arrangements that have been made, as well as about the applicants' honesty and forthrightness in their dealings with the secured creditors. These concerns were compounded by what the secured creditors regard as a failure of the applicants to give any notice of their intention to seek an initial order (followed by extremely short service of the materials supporting their motion for an ARIO).

[105] The experience of Central 1 is perhaps indicative. Central 1 commenced receivership proceedings. There was a contested application heard by MacLeod RSJ. He found that it was apparent that the debtor – 2139770 Ontario Inc. – had not been able to comply with all of the terms of the forbearance agreement it had entered into, and that the defaults were not trivial. The debtor had failed to deliver "important information by the deadline it agreed to". He granted a postponement of the receivership order on strict terms, failing which the receivership order "will be made". Despite this, Central 1 complains that there have been numerous further breaches of the terms ordered by MacLeod RSJ. They say that the debtor failed to execute collateral security documents, and refused to pay the professional fees incurred under the forbearance agreement. On 2 December 2024, Central 1's lawyers requested an urgent return of the receivership application. The apparent response to that was the commencement of this proceeding, with the resultant affect

of securing a stay of Central 1's receivership proceeding, a stay that it seems highly unlikely could have been obtained in the receivership proceeding itself.

[106] While I would not subscribe to the view that the applicants have acted in bad faith, the secured creditors' expressed lack of confidence in management is understandable.

Outdated Appraisals

[107] The appraisals supporting Mr. Choo's stated valuation of the respective properties vary in their antiquity. The most dated appraisal is from 2017. None of them are from 2024. According to Ms. Buchan of ACM, once an appraisal is aged more than a few months, it is typically no longer relevant given various factors, including macro-economics and market conditions. This is particularly pertinent given the current level of distress in the commercial real estate market.

[108] The applicants concede that some of the appraisals are dated, but nevertheless maintain that they are reliable evidence of the value of the various properties and that, even allowing for some diminution of value due to the state of the current commercial property market, all of the properties have more than adequate net equity and, thus, that the CCAA proceeding poses little risk that the secured creditors will not fully realise their security.

[109] If the concerns about the true value of the properties were the only major objection of the secured creditors, it would probably not be enough to carry the day in favour of the receivership applications. However, viewed alongside other considerations, the concerns about valuation are yet another weight pulling on the receivership side of the scale.

Conclusion

[110] All of the parties agree that there is a need to stabilise the applicants' businesses. The question is whether that is best achieved through a receivership or a CCAA proceeding.

[111] The secured creditors have lost patience with the management of the applicants. Despite having brought on board investment advice from Hawco Peters, progress has been modest. Expectations that term sheets will shortly be presented for refinancing have yet to be realised. Unpaid taxes have mounted. Unsecured creditors have gone unpaid. Occupancy rates have remained sub-optimal. Regulators have even become involved due to concerns about the way in which one of the retirement residences is being run, with attendant poor publicity and reputational damage.

[112] Secured creditors representing 84% of the secured debt oppose the CCAA application. With the exception of Central 1, they all propose to use the same receiver. Their collaborative approach largely neutralises the usual concerns that an applicant for CCAA protection raises concerning uncoordinated and stress sales or forced liquidation. Nor is there any convincing evidence that the remedy proposed by the secured creditors will damage the interests of employees or tenants.

[113] The receivership remedy gives effect to the bargain made between the secured lenders and the applicants, and transfers control of the process from debtors in whom confidence has been lost

to creditors who should be entitled to make good on their security while there are still good prospects of them being made whole.

[114] Mr. Choo candidly acknowledges that the applicants have found themselves in a "difficult position to address their current liquidity obligations". Yet, to use the terminology of C. Campbell J. in *Dondeb Inc. (Re)*, 2012 ONSC 6087, at para. 25, to some extent the applicants have, by the manner in which they have (sometimes chaotically) played insolvent projects and their secured creditors off against each other and eroded the confidence of the creditors, been the authors of their own misfortune.

[115] It could, potentially, have been otherwise. Counsel for Peoples Trust submitted that one option that could have been considered would be to impose a shorter stay of proceedings to see if the other parties' concerns about the applicants' proposal could be resolved by the monitor, perhaps with a "super monitor order" to allay concerns about the applicants' management continuing to have control of the restructuring. And in *Dondeb Inc.*, Campbell J. observed, at para. 26, that had there been full and timely communication both the creditors and the court may have concluded that an acceptable CCAA plan could be developed. Because of the way this application has unfolded, that has not occurred. With the benefit of hindsight, that might be seen by the applicants as a missed opportunity.

Decision

[116] For the foregoing reasons, the motion to extend the stay of proceedings granted by the initial order is dismissed. The motion made by ACM Advisors Ltd., and supported by CMLS Financial Ltd., Equitable Bank, Institutional Mortgage Capital Canada Inc. and Canadian Western Bank for the appointment of a receiver and associated relief is granted.

[117] The receivership order and transition order requested by Central 1, in accordance with the order of MacLeod RSJ in Court File No. CV-24-00097134-0000 is granted.

[118] If the parties are unable to agree on any of the terms of the orders resulting from this decision, I may be spoken to.

Graeme Mew J.

Mew J.

Released: 20 December 2024

CITATION: Ashcroft Urban Developments Inc. (Re), 2024 ONSC 7192
COURT FILE NO.: CV-24-98508
(Ottawa)
DATE: 20241220

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF ASHCROFT URBAN DEVELOPMENTS INC., 2067166 ONTARIO INC., 2139770 ONTARIO INC., 2265132 ONTARIO INC., ASHCROFT HOMES – LA PROMENADE INC., 2195186 ONTARIO INC., ASHCROFT HOMES – CAPITAL HALL INC. and 1019883 ONTARIO INC.

Applicants

REASONS FOR DECISION

Mew J.

Released: 20 December 2024