

FORM 32 (RULE 8-1(4))

No. VLC-S-H-210439
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

PROSPERA CREDIT UNION

Petitioner

And

PORTLIVING FARMS (3624 PARKVIEW) INVESTMENTS
INC. (FORMERLY W.D.C. WHITMAR DEVELOPMENT
CORPORATION)
LIVING BEACHSIDE DEVELOPMENT LIMITED
PARTNERSHIP
PORT CAPITAL FARMS (BEACH) INC.
PORT CAPITAL GROUP INC.
PORT CAPITAL DEVELOPMENT INC.
ERLENMATTE AG
ROLAND KRUGER
ROLAND KRUGER FAMILY TRUST IN TRUST
HAGEN KRUGER
HAGEN KRUGER FAMILY TRUST IN TRUST
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA as represented by THE ATTORNEY
GENERAL OF BRITISH COLUMBIA
JOHN DOE

Respondents

NOTICE OF APPLICATION

Name of applicant: Prospera Credit Union

To: THE RESPONDENTS AND THEIR SOLICITORS

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at the Vancouver Law Courts, 800 Smithe Street, Vancouver, British Columbia, V6Z 2E1 on February 8, 2022 at 9:45 a.m., by MS Teams or as the court may otherwise direct, for the order set out in Part 1 below.

Pursuant to COVID-19 Notice No. 42 petitioner's counsel's contact information is as follows:

Email: sstephens@owenbird.com

Telephone number: (604) 691-7521

Address: Owen Bird Law Corporation, 2900-595 Burrard St., Vancouver, B.C. V7X 1J5

Part 1: ORDER SOUGHT

1. An order substantially in the form attached as Schedule "A", or as the court may otherwise order, granting the receiver, The Bowra Group Inc. (the "Receiver"), the powers to market and sell the property of Portliving Farms (3624 Parkview) Investments Inc. (formerly, W.D.C. Whitmar Development Corporation) ("Portliving Farms 3624") and Living Beachside Development Limited Partnership ("Living Beachside") (collectively, the "Property").

Part 2: FACTUAL BASIS

The Parties, the Security and Prospera's Right to Appoint Receiver with Power to Sell

1. The petitioner, Prospera Credit Union ("Prospera"), advanced a term loan in the principal sum of \$2 million to Living Beachside and Port Capital Farms (Beach) Inc. (the "Loan").
2. The Loan is secured by, *inter alia*, a mortgage and assignment of rents granted by Portliving Farms 3624 (the "Mortgage"). The Mortgage is registered in first position against lands located in Penticton that have been improved by a motel and are legally described as follows:

The Corporation of the City of Penticton

Parcel Identifier: 012-474-983

Lot 1 Block 212 District Lot 189 SDYD Plan 397 Except Plan 40551

(the "Motel").

3. Portliving Farms 3624 is the registered owner of the Motel. Living Beachside is the beneficial owner.

4. Prospera's security for the Loan also includes general security agreements granted by various parties, including Portliving Farms 3624 and Living Beachside (together, the "GSAs").
5. Under the terms of the Mortgage and the GSAs, Prospera holds the contractual right to appoint a receiver upon the occurrence of an event of default. The powers of the receiver, whether appointed by instrument or the court, were specifically agreed to include the power to carry on the debtors' business and to sell the Motel and/or the debtors' personal property.

Other Interested Parties

6. The respondent, Erlenmatte AG, holds a mortgage registered against the Motel in second position.
7. The respondents, Roland Kruger, Roland Kruger Family Trust in Trust, Hagen Kruger and Hagan Kruger Family Trust hold a mortgage registered in third position.
8. The respondent, Her Majesty the Queen in Right of the Province of British Columbia (the "Province") as represented by the Attorney General of British Columbia, holds a Provincial Sales Tax Act Lien registered against title to the Motel.
9. The Province also made two Personal Property Registry registrations against Portliving Farms 3624 for unremitted Provincial Sales Tax, one registered on October 15, 2020 under base registration number 531932M and the other on December 1, 2020 under base registration number 629310M.
10. The remaining respondents are related to Portliving Farms 3624 and Living Beachside and are liable to repay the indebtedness under the Loan.

The Foreclosure Proceeding

11. By November 10, 2020 the debtors had committed various events of default under the terms of the Loan. Prospera sent letters to the debtors dated November 10, 2020 and

January 5, 2021 requiring that the defaults be remedied and demanding that certain information be provided. The debtors did not respond to either letter.

12. As of March 10, 2021 the debtors continued to be in default of their obligations to Prospera on account of, *inter alia*, failure to make mortgage payments when due and the granting of the second and third mortgages without Prospera's consent.
13. Prospera demanded repayment of the indebtedness by letters dated March 10, 2021. The debtors failed to satisfy the demand. This foreclosure proceeding was subsequently commenced on April 15, 2021.
14. Order nisi was granted herein on July 8, 2021. Under the terms of the order nisi the redemption period was set to expire on January 8, 2022.

The Receivership

15. Leading up to and following pronouncement of the order nisi, Prospera harbored concerns regarding the Motel and the debtors' management thereof. Those concerns included that the Motel was not financially viable, evidenced by the debtors' failure to meet liabilities as they came due, and was not being properly maintained/was being allowed to waste. Prospera's concerns were heightened by the debtors' failure to provide required financial and other information despite demand and court order.
16. As a result of the foregoing, Prospera applied to appoint a receiver over the Property of Portliving Farms 3624 and Living Beachside. Apart from the debtors themselves, none of the other respondents opposed the appointment of a receiver.
17. Madam Justice Horsman gave oral reasons for judgment on November 29, 2021 granting the receivership order on the terms sought by Prospera, with the exception of the Receiver's power to market and sell the Property. Prospera was given leave to apply for that relief after the expiry of the redemption period on January 8, 2022.

Prospera Credit Union v. Portliving Farms (3624 Parkview) Investments Inc., 2021 BCSC 2449 (the "Reasons") at para 40

18. The terms omitted from the receivership order were the usual terms set out in the model order that empower a receiver to market and sell assets. Those terms read as follows:

The Receiver is empowered and authorized...:

- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate;
 - (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
 - (i) without the approval of this Court in respect of a single transaction for consideration up to \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$150,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,
- and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;
- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances;

(the "Powers to Market and Sell").

19. In her Reasons, Madam Justice Horsman adjourned the Powers to Market and Sell, with leave to reapply, in order to alleviate a concern that the Receiver could effect a sale during the redemption period and thus potentially truncate the debtors' redemption period.

Reasons at para 34

Part 3: LEGAL BASIS

1. It would be just or convenient for the court to grant an order empowering the Receiver to market and sell the Property for reasons including:

- a) Under the terms of the Mortgage and GSAs the debtors expressly agreed Prospera has the right to appoint a receiver with the power to sell assets.
- b) The Powers to Market and Sell are standard terms in a receivership order and are contained in the British Columbia model form receivership order;
- c) The redemption period has now expired and thus there remains no basis to except the Powers to Market and Sell from the Receiver's powers;
- d) Despite the expiration of the redemption period the Loan has not been redeemed and Prospera is thus entitled obtain an order for conduct of sale in any event (i.e. the debtors have lost any right at law to control the sale process and, particularly in circumstances where the Receiver is already in possession of and managing the Property, it would make eminent sense for the Receiver to now be granted the power to market and sell the Property); and
- e) The Receiver has significant experience selling assets of this nature and granting it the Powers to Market and Sell will be an efficient means to realize the Property's value to the benefit of all stakeholders.

2. Indeed, the primary role of a receiver is to liquidate assets and distribute proceeds for the benefit of all stakeholders:

“...a court-appointed receiver is a court officer and fiduciary to all stakeholders. In *Edmonton (City) v. Alvarez & Marsal Canada Inc.* the court reiterated the purpose of a court-appointed receivership:

The policy behind receiverships is that the collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONCS 368 (Ont. S.C.J.) at para 26:

The whole point of a court-appointed receivership is that one person...is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.”

Bennett on Receiverships, 4th Ed., Frank Bennett [*Bennett on Receiverships*] at page 8, citing *Edmonton (City) v. Alvarez & Marsal Canada Inc.*, 2019 ABCA 109.

3. Prospera will rely on Rules 1-3, 10-2, 13-5, 14-1 and 16-1, the law of contract and the *Law and Equity Act*, R.S.B.C. 1996, c. 253 including s. 39.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of B. Sharma, made April 13, 2021.
2. Affidavit #1 of G. Potts, made April 14, 2021.
3. Affidavit of A. Chen #1, made August 31, 2021.
4. Affidavit of B. Sharma #2, made August 31, 2021.
5. Affidavit of B. Sharma #3, made November 10, 2021.
6. Affidavit of C. Carmichael, made January 13, 2022.
7. Petition filed 15/APR/2021.
8. Order nisi entered 09/JUL/2021.
9. Order made after application entered 28/SEP/2021.
10. Amended notice of application filed November 10, 2021.
11. Receivership order entered 03/DEC/2021.
12. The Reasons.

The applicant estimates that the application will take 10 minutes.

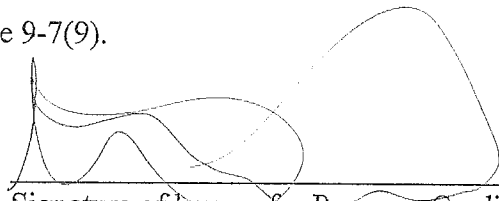
- This matter is within the jurisdiction of a master.
 This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- a) file an application response in Form 33,
- b) file the original of every affidavit, and of every other document, that
 - i) you intend to refer to at the hearing of this application, and

- ii) has not already been filed in the proceedings, and
- c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - i) a copy of the filed application response;
 - ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: January 13, 2021



 Signature of lawyer for Prospera Credit Union,
 Scott H. Stephens

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery

- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts.
- none of the above

SCHEDULE "A"

No. VLC-S-H-210439
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HAGEN KRUGER FAMILY TRUST IN TRUST
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA as represented by THE ATTORNEY
GENERAL OF BRITISH COLUMBIA

JOHN DOE

Respondents

ORDER MADE AFTER APPLICATION

BEFORE THE HONOURABLE
JUSTICE

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8/FEB/2022

ON THE APPLICATION of Prospera Credit Union for an Order pursuant to Section 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended, coming on for hearing, by MS Teams, this day at Vancouver, British Columbia.

AND ON READING the notice of application and materials filed herein, including the receivership order pronounced herein on 29/NOV/2022 pursuant to which The Bowra Group Inc. was appointed Receiver and Manager (in that capacity, the "Receiver"), without security, of all of the assets, undertakings and property of Portliving Farms (3624 Parkview) Investments Inc. (formerly W.D.C. Whitmar Development Corporation) and Living Beachside Development Limited Partnership (together, the "Debtors") including all proceeds (collectively, the "Property"); AND ON HEARING Scott H. Stephens, counsel for Prospera Credit Union, and Ritchie Clark, Q.C., counsel for Portliving Farms (3624 Parkview) Investments Inc., Living Beachside Development Limited Partnership, Port Capital Farms (Beach) Inc., Port Capital Group Inc., Port Capital Development Inc. and Macario Teodoro Reyes, and no one else appearing, although duly served.

THIS COURT ORDERS AND DECLARES that:

1. The Receiver is empowered and authorized, but not obligated, to do any of the following where the Receiver considers it necessary or desirable:
 - (i) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate;
 - (ii) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
 - (a) without the approval of this Court in respect of a single transaction for consideration up to \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$150,000; and
 - (b) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (a) above,and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required; and
 - (iii) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers, free and clear of any liens or encumbrances.
2. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
3. Endorsement of this Order by counsel appearing on this application other than the Petitioner is dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

Signature of lawyer for Prospera Credit Union,
Scott H. Stephens

By the Court.

Registrar

No. VLC-S-H-210439
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BRITISH COLUMBIA as represented by THE ATTORNEY GENERAL
OF BRITISH COLUMBIA
JOHN DOE

Respondents

SUPPLEMENTAL RECEIVERSHIP ORDER

OWEN BIRD LAW CORPORATION
P.O. Box 49130
Three Bentall Centre
2900 - 595 Burrard Street
Vancouver, BC V7X 1J5
Attention: Scott H. Stephens
File No. 23772-0215

No. VLC-S-H-210439
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