SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-22-00685133-00CL **DATE:** **31 May 2023**

NO. ON LIST: 1

TITLE OF PROCEEDING: **Chriscwe Holdings Inc. v. Oasis Global Inc., et al.**

BEFORE: **JUSTICE STEELE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Catherine Francis	Counsel for the Plaintiff	cfrancis@mindengross.com
Yosef Adler	Counsel for the Plaintiff	yadler@mindengross.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jeffrey Feiner	Counsel for Mark Rivers, Oasis Global Inc., and 2833713 Ontario Inc.	jfeiner@cormanfeiner.com
Ryan Chan	Counsel for Mark Rivers, Oasis Global Inc., and 2833713 Ontario Inc.	rchan@cormanfeiner.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Fred Tayar	Counsel for Zeifmans Partners Inc.	fred@fredtayar.com

ENDORSEMENT OF JUSTICE STEELE:

1. This is a motion by Chriscwe Holdings Inc. ("Chrisco") for (a) an order granting leave to amend the Statement of Claim; and (b) an order appointing Crowe Soberman Inc. ("Crowe") as receiver of the assets of Oasis Global Inc. ("Oasis"), Mark Rivers ("Mark") and 2833713 Ontario Inc. ("283") pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA"). The motion was heard May 15, 2023 via Zoom.

2. 283 was incorporated in April 2021. Mark is the sole officer and director of 283. Mark's wife, Linda, is the sole shareholder of 283.

3. Additional background is set out in my endorsement, dated February 24, 2023.

Amendment to Statement of Claim

4. Chrisco seeks leave to amend the Statement of Claim to add 283 as a defendant. Chrisco argues that 283 is a necessary and proper party to this proceeding.

5. The general principles regarding motions for leave to amend were summarized in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co*, 2017 ONCA 42 (CanLII), at para. 25:

    a) The rule requires the court to grant leave to amend unless the responding party would suffer non-compensable prejudice;
    b) The amendment may be permitted at any stage of the action;
    c) The prejudice must flow from the amendments and not from some other source;
    d) The non-compensable prejudice may be actual prejudice – evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a result of the amendment (specific details must be provided);
    e) Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial;
    f) At some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed;
    g) The onus to prove actual prejudice lies with the responding party;
    h) The onus to rebut presumed prejudice lies with the moving party; and
    i) When the delay in seeking amendment is lengthy, courts will presume prejudice to the responding party and the onus to rebut the presumed prejudice lies with the moving party.

6. Chrisco, which is a secured creditor of Oasis and Mark, is concerned with actions taken by Oasis and Mark to transfer certain of Oasis's assets and business operations to 283, the sole shareholder of which is Mark's spouse.

7. Chrisco states that under s. 25 of the *Personal Property Security Act*, R.S.O. 1990, c. P. 10, Chrisco's security extends to all assets placed in the name of 283 and Chrisco seeks to trace its security to 283. Chrisco further relies on the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, sections 2 and 4, and the

Business Corporations Act, R.S.O. 1990, c. B. 16, section 248. Chrisco states that the conduct of Mark as a director of Oasis and 283 has been oppressive to Chrisco's interests and has prevented Chrisco from realizing on its security other than through a court appointed process.

8. In the Statement of Claim in this matter, issued August 8, 2022, the plaintiff, Chrisco, seeks relief against Mark and Oasis, claiming:
    a) An order enforcing the arbitral award issued by Andrew M. Diamond, dated July 18, 2022;
    b) Judgment in the sum of $9.2 million against Oasis and Mark pursuant to the Arbitral Award;
    c) Judgment in the sum of $78,602.85 in respect of the costs of the mediation held with Diamond, pursuant to the Arbitral Award;
    d) A mandatory order requiring Oasis to issue shares to Chrisco such that Chisco holds 50% of the shares of Oasis;
    e) A mandatory order requiring Oasis to deliver two vehicles to Chrisco, pursuant to the Arbitral Award;
    f) Its costs of the arbitration before Diamond;
    g) An equitable mortgage over the Baltimore, Ontario property owned by Mark;
    h) Leave to issue a CPL in respect of the Baltimore Property;
    i) An order requiring Oasis to produce certain documents; and
    j) An order appointing a receiver of the assets of Oasis and Mark.

9. Further to a motion brought by Chrisco, by Order dated February 24, 2023, items a, b, c, d, e, f, and i (above) were addressed. The motion for the appointment of a receiver was dismissed without prejudice to Chriscwe's right to return to Court seeking the appointment of a receiver.

10. Chrisco seeks to amend its statement of claim to include the following additional claims:

    - A declaration that the Oasis Security Agreement extends to assets held by 2833713 Ontario Inc. ("283"), including but not limited to a distribution agreement with Segway Technology Co. Ltd., operating as Segway Powersports ("Segway"), dealer agreements with respect to Segway products and accounts receivable generated by the sale of Segway products (collectively, the "Segway Opportunity");
    - Further, or in the alternative, a declaration that 283 holds the Segway Opportunity in trust for Oasis;
    - Further, or in the alternative, a declaration that Oasis has fraudulently conveyed assets to 283, including diversion of the Segway Opportunity to 283;
    - An order setting aside the transfer of assets to 283, including the transfer of the Segway Opportunity to 283;
    - Further, or in the alternative, a declaration that the acts and omissions of Oasis and its affiliate 283, and the acts and omissions of Mark as sole director of Oasis and 283 are, have been and are threatened to effect a result, to be carried out or conducted and/or exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of Chrisco as a creditor and shareholder of Oasis;
    - An order appointing a receiver, without security, of the assets, undertakings and properties of Oasis, Mark and 283.

11. In Mark's affidavit, dated November 8, 2022, he stated:

> 14) Wary of Mr. Kauffman's increasingly aggressive stance, I structured the Segway Opportunity so that Oasis would benefit from it. 2833713 Ontario Inc. ("283") was incorporated to be the signing party for the distribution agreement of Segway vehicles under the Segway Opportunity. Oasis was granted a non-exclusive license to represent the Segway Powersports brand and to sell and service Segway Powersports vehicles in Canada.
>
> 14) This corporate structure has not caused any dissipation or divesting of Oasis' assets.
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> 15) Oasis has and continues to receive all of the profits under the Segway Opportunity as 283's sales agent for the Segway Opportunity.

12. Mark has repeatedly stated that the Segway Opportunity has been structured to benefit Oasis and Chrisco. It is important to note that the Segway Opportunity, which has been developed through Mark's hard work, is currently the key business opportunity for Oasis and Mark. As noted in Mark and Oasis's January 30, 2023 factum, Oasis's product agreements – including in particular the Segway Opportunity – constituted "most if not all of Oasis' value."

13. 283 argues that Chrisco is seeking to amend its statement of claim to add a new defendant after a judgment has already been rendered. As a result, 283 argues that the onus shifts to 283 to rebut the presumed prejudice.

14. 283 submits that Chrisco has not discharged its onus demonstrating that 283 will not suffer prejudice being added as a party at this late stage. 283 states that this deficiency is emphasized by the relief sought: a receivership over 283 in the same omnibus motion. 283 states that this would cause non-compensable prejudice to 283 by changing the litigation landscape of this action, preventing 283 from contesting facts or raising any defences, and irreparably harming its operations. 283 has not even been granted to opportunity to defend itself.

15. These concerns raised by 283 can be addressed by providing 283 with, among other things, the opportunity to defend itself.

16. Oasis and Mark state that the relationship with 283 was well known to the parties for quite some time. They argue that there was not a corporate restructuring done to evade a judgment. 283 was incorporated in April 2021 before the issues between the parties came in dispute. However, Chrisco was not aware of 283's existence until 2022 when it was referenced in certain materials from TD.

17. 283 argues that the Court does not have jurisdiction to bind 283 to an arbitral award it did not consent to be bound by. However, Chrisco is seeking different relief against 283, as noted above. It is not seeking to bind 283 to the arbitral award. 283 should be given the opportunity to defend the new allegations made against the company.

18. There are concerns that Mark has been diverting Oasis's business to 283. For example, while the Court's decision on the January 30, 2023 motion was under reserve, Mark provided a Segway Tech Distribution Agreement Addendum to the interim receiver. It was signed by Mark as CEO of 283 and Segway on February 11, 2023. New dealer agreements were also entered into between 283 and other

companies, which were provided to the interim receiver on or about February 23, 2023. The fact that the dealer agreements were being entered into with 283 instead of Oasis was of particular concern to Chrisco given Mark's prior representations.

19. Although 283 existed prior to the issues between the parties, it appears that Mark and Oasis may have taken additional steps to divert business and assets to 283.

20. 283 suggests that Chrisco ought to bring a new action. This is not efficient, given that the proposed claims against 283 relate to Oasis's and Mark's alleged attempts to divert assets to thwart Chrisco's realization on its security.

21. I am satisfied that it is appropriate to permit Chrisco to amend the statement of claim. The parties shall coordinate to work out a schedule for 283's statement of defence and next steps.

Appointment of Receiver

22. Under section 243(1) of the BIA, on application by a secured creditor, the Court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
    a) Take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
    b) Exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
    c) Take any other action that the court considers advisable.

23. Under s. 101 of the CJA, a receiver may be appointed by an interlocutory order, where it appears just or convenient to do so.

24. Chrisco seeks an order appointing Crowe as receiver of the assets of Oasis, Mark and 283. The February 24, 2023 endorsement stated that I was not prepared at that time to place Oasis into receivership "in order to give Oasis the opportunity to put forward a reasonable plan regarding repayment of the debt owing to Chrisco and/or obtain financing."

25. Since that time, Oasis and Mark have not put forward a plan to repay the indebtedness owing to Chrisco that has been accepted by Chrisco.

26. As noted in my February 24, 2023 endorsement:

    a) The GSAs contemplate that upon default, Chrisco may appoint a receiver.
    b) Oasis and Mark have defaulted under the loans.

27. In order for the Court to order the appointment of a receiver, Chrisco must demonstrate that it is just and convenient in light of the interests of all the affected parties. This requires the Court to consider all of the circumstances, the nature of the property, and the rights and interests of all parties, including the rights of the secured creditor under its security: *2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSCC 5509, at para. 12. In *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII

8258 (ONSC), at paras. 10 -13, the Court set out the considerations that have been determined to be relevant in this assessment.

28. Kimmel J. noted the following regarding the application of the just and convenient test in *Hands-on Capital v. DMCC*, 2023 ONSC 2417, at paras. 64 and 65:

> 64. In assessing whether it is just and convenient to appoint a receiver, the question is "whether it is more in the interests of all concerned to have the receiver appointed by the Court or not": See *Freure Village*, at para. 12.
>
> 65. There is a lengthy list of factors that the court has considered in deciding whether it is just and convenient to appoint a receiver in a given case. See *Bennett on Receivership* ... Keeping in mind that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly, some factors that are relevant to this case include:
>
> *a.* The nature of the property;
> *b.* The rights and interests of all parties in relation to the property;
> *c.* The conduct of the parties;
> *d.* The length of time that a receiver may be in place and ways in which the role can be facilitated;
> *e.* The balance of convenience to the parties;
> *f.* The effect of the order on the parties; and
> *g.* The cost of the receivership to the parties.

29. As set out in *Central 1 Credit Union v. UM Financial*, 2011 ONSC 5612, at para. 22, issues for the Court to determine on an application for the appointment of a receiver include:

> (i)The existence of a debt and default; (ii) the quality of the creditor's security; and (iii) the need for the appointment of a receiver in view of alternate remedies available to the creditor, the nature of the property, the likelihood of maximizing the return to the parties, the costs associated with the appointment, and any need to preserve the property pending realization. Those issues normally require an adjudication of private rights as between the applicant secured creditor and the debtor respondent with, some consideration of the potential effect of the order sought on other creditors, whether secured or otherwise, and other stakeholders of the debtor corporation who might be affected by a receivership order.

30. Chrisco, which maintains first ranking security over Oasis's and Mark's assets, has the right under the GSA to appoint a receiver, which is one factor. As noted in the February 24, 2023 Endorsement, where the rights of the secured creditor include, under the terms of the security, the right to seek the appointment of a receiver, the burden on the applicant seeking the appointment is relaxed.

31. Chrisco also has concerns that Oasis and Mark are continuing to divert business and operations away from Oasis in favour of 283, as discussed above. Further, as noted above, Oasis and Mark were provided with an opportunity to put forward a reasonable plan regarding repayment of the debt owing to Chrisco and/or to obtain financing. Oasis and Mark have proposed a plan, but Chrisco has not accepted the proposal.

32. Oasis and Mark argue that it is not appropriate at this time to appoint a receiver for the following reasons:

    a) Oasis has prepared a proposed financing and repayment plan that it states represents Chrisco's best chance of being repaid;
    b) Oasis states that Crisco has unclean hands and has caused or contributed to the defaults it now seeks a receiver to address;
    c) There has been no dissipation of assets;
    d) It would not be value-maximizing to Oasis' stakeholders, as it would destroy Oasis and render Oasis' efforts to satisfy the Order in vain.

33. Oasis and Mark argue that the best chance for Chrisco to be repaid is for Oasis to be given the opportunity to re-finance. Oasis and Mark state that if the Court needs to supervise this process, that is fine. They have been working to put financing in place with TD Bank but need more time. They state that the re-financing would be approx. 2 months. Oasis and Mark state that given the nature of the business and the lack of other assets, the more just and convenient option is for the business to continue operating.

34. Oasis and Mark further argue that it is important to consider the circumstances that gave rise to this obligation to Chrisco. This was not simply a repayment of a debt. The underlying arbitration had two components: repayment of a debt to Chrisco of approx. $2 million and the balance was a repurchase of any equity interest that Chrisco had in Oasis. Oasis and Mark argue that it is just and convenient for the debt component, $800,000 of which has been repaid, to be repaid quickly. Oasis requests the opportunity to come back before the Court and evidence a firm re-financing proposal in place.

35. Oasis and Mark argue that it is not appropriate to appoint a receiver given the nature of the property. Here, there is no pool of cash or property. Instead, the real value in Oasis's business is in its ability to execute the Segway Opportunity. Oasis and Mark state that similar to *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661, because Oasis is in its early development stage and there would be little chance of maximizing the value of the company without Mark and his relationship with Segway, it would not be just and convenient to appoint a receiver. Of great concern is that a receivership will trigger cancellation clauses in Oasis's product agreements, including the Segway opportunity. Oasis and Mark state that placing Oasis into receivership would drastically compromise all stakeholders' interests by destroying Oasis. Mark's evidence is that "at this stage, a full repayment [of the debt to Chrisco] will only be achieved by the continued growth of the business of which I am an integral part, as suggested by the Interim Receiver in its Report."

36. The First Report to the Court of the Interim Receiver (which has since been discharged) indicated that since the relationship with Segway started, Oasis' revenues have been growing and the company has been more profitable. Prior to 2021 Oasis had suffered operating losses. As noted in para. 15 of the First Report: "The Segway business commenced in or about May of 2021. Business has been robust and growing."

37. Chrisco argues that the Court should grant the appointment of the receiver for the following reasons:

a) The Zeifman Report raised numerous serious issues regarding, among other things, Oasis's assets and operations, Oasis's solvency and Mark's management ability, none of which have been answered since the date of the hearing on January 30, 2023;
b) Oasis and Mark are in breach of the February 24, 2023 Order;
c) Chrisco states that Oasis and Mark have not provided any form of payment plan, as contemplated by the February 24, 2023 Order and there is no reason to believe that they have any intention of doing so;
d) There is no reason to believe that providing further time will accomplish anything;
e) Chrisco states that the business (and Chrisco's security position) are in serious jeopardy.

38. This is a circumstance where there is a relatively new business opportunity that has been expanding. The Segway business relationship has been built primarily through Mark's efforts. The loss of that relationship would be very harmful to Oasis, Mark and any other creditors. Oasis has provided evidence that it is working with an advisor to secure financing with TD and expects to have that in place soon.

39. In my view, an interim non-possessory receiver for Mark and Oasis would be appropriate in the circumstances. The non-possessory receiver could have investigatory and oversight powers, and could monitor Oasis's operations, but would not be in a position at this time to take possession of and sell Oasis's and Mark's assets. The powers would be similar to those granted to the interim receiver in the December 1, 2022 Order. This would permit Mark, as the party with the relationship with Segway, to continue to operate Oasis as a going concern and provide Oasis the opportunity to finalize the financing with TD and start repaying the debt to Chrisco.

40. The non-possessory receiver could return to Court if it was of the view that it would be just and convenient to expand the breadth of the receiver's powers and/or to expand the receiver's powers to cover 283 as well.

41. Further, as suggested by Mark and Oasis, the Court must continue to be apprised of the status of the financing for Oasis.

Order and Disposition

42. Chrisco has leave to amend its statement of claim.

43. The parties shall coordinate the schedule for 283's statement of defence and next steps in the proceeding.

44. Oasis shall provide Chrisco with its 2022 financial information forthwith, including the financial statements that are being prepared to provide to TD bank.

45. The parties shall book a case conference at a time in July, 2023 that is convenient for the parties before the end of July, 2023 to apprise the Court of the status of the TD financing. This does not preclude the interim non-possessory receiver, or any other party, seeking an earlier Court appointment if required. If the TD financing is not secured by the return date in July 2023, the Court may see fit to expand the receiver's powers.

46. The parties shall coordinate, and, to the extent agreement can be reached, file a proposed draft order, including the terms upon which the non-possessory receiver for Mark and Oasis is appointed, by June 7, 2023. If the parties are unable to agree on the provisions in the proposed draft order, they shall book a 30-minute conference with me to determine the terms of the order. A word version should be provided via email to my judicial assistant.

47. I am not seized of this matter.