

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

GENESIS MORTGAGE INVESTMENT CORPORATION

Applicant

- and -

1776411 ONTARIO LTD. AND 1333 WEBER STREET KITCHENER LP

Respondents

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**FACTUM OF THE APPLICANT
(Appointment of Receiver)**

October 10, 2023

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FACTUM OF THE APPLICANT

PART I: OVERVIEW

1. Genesis Mortgage Investment Corporation ("**GMIC**" or the "**Applicant**") seeks an order (the "**Receivership Order**") pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-33, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (as amended, the "**CJA**").
2. The proposed Receivership Order, among other things:
 - (a) appoints KSV Restructuring Inc. ("**KSV**") as receiver and manager (in such capacities, the "**Receiver**") of (i) the real property legally described in Schedule "A" to the proposed Receivership Order (the "**Real Property**"), (ii) all of the right, title and interest in the personal property arising from, pertaining to, located on, or used in the operation or maintenance of the Real Property, and all proceeds therefrom held by 1776411 Ontario Ltd. ("**177**") as general partner of 1333 Weber Street Kitchener LP (the "**Partnership**", and together with 177, the "**Debtor**") (iii) all of the Debtor's rights and interests in, to, under, and in respect of all material agreements, leases, documents, permits, approvals, licenses and instruments in respect of the Real Property and all monies or proceeds payable thereunder (collectively with (i), (ii) and (iii), the "**Property**");
 - (b) grants a first-priority charge (the "**Receiver's Charge**") over the Property in favour of the Receiver and the Receiver's counsel to secure their fees and disbursements in respect of these proceedings (the "**Receivership Proceedings**"); and
 - (c) grants a charge (the "**Receiver's Borrowings Charge**") over the Property subordinate only to the Receiver's Charge for the purpose of funding the exercise

of the powers and duties conferred upon the Receiver pursuant to the proposed Receivership Order.

3. The Debtor is the developer of a phased four-tower residential condominium development known as "Elevate Condominiums" (the "**Project**"), which is under construction on the Real Property. The Real Property is owned by 177, and consists of the lands located at 1333 Weber Street East, Kitchener, Ontario. The first phase of the four-phase Project is a 15-storey, 177-unit residential development condominium tower ("**Phase 1**"), which is approximately 80% complete.

4. GMIC is the junior secured lender in a syndicate of secured lenders (the "**Syndicate**") consisting of itself and two senior secured lenders (the "**Senior Lenders**"). CMLS Financial Ltd. ("**CMLS**"), as the administrator and servicer of the Syndicate, advanced funds to 177, on behalf of the Partnership, to be used to finance the Project. The funding was made available pursuant to a Senior Commitment Letter and a Junior Commitment Letter that respectively provided for, among other things, a Senior Secured Loan Facility and a Junior Secured Loan Facility (each as defined below). As of September 13, 2023, there was approximately \$42,055,404.91 outstanding in respect of the Senior Secured Loan Facility, and approximately \$19,598,404.91 outstanding in respect of the Junior Secured Loan Facility. In addition, \$2,698,148.29 is outstanding in respect of a letter of credit facility provided by the Senior Lenders.

5. The Loan Facilities (as defined below) are collectively secured by, among other things: (i) a first-ranking charge over the Real Property in the amount of \$82,000,000; (ii) a general security agreement over the personal property of 177 and the Partnership used in connection with or located on the Real Property; and (iii) the assignment of various related documents and rights. The Security (as defined below) is registered in favour of GMIC, as well as the title custodians on behalf of the Senior Lenders, Computershare Trust Company of Canada ("**Computershare**") and CMLS (together with GMIC, the "**Secured Parties**"). The Syndicate and CMLS are parties to an Interlender Agreement (as defined below) that, among other things, provides that the Senior

Lenders have priority to GMIC, and assigns the Senior Secured Loan Facility to the Senior Lenders, and the Junior Secured Loan Facility to GMIC.

6. The Debtor previously defaulted, and a demand and Notice of Intention to Enforce Security in accordance with the BIA were issued by counsel to the Secured Parties in March, 2023. CMLS, on behalf of the Secured Parties, ultimately agreed to forbear from enforcement pursuant to a forbearance agreement dated April 27, 2023 (the "**Forbearance Agreement**"). However, further defaults have since occurred, thus terminating the Forbearance Agreement. Construction on the Project has halted and GMIC is unaware whether the site is currently secured. It is GMIC's understanding that insurance for the project has not been paid since February 2023, and the roof is not watertight, which could lead to significant damage to the Project with winter fast approaching.

7. GMIC has the contractual right to appoint a receiver pursuant to the Security Documents (as defined below). It has terminated its servicing agreement with CMLS and is a proper party to bring this Application. The Senior Lenders do not oppose the relief sought. In furtherance of its contractual rights, GMIC has commenced these Receivership Proceedings in order to preserve the Property and ultimately facilitate a sale of the Property to maximize recoveries for the Debtor's stakeholders. The appointment of the Receiver is necessary to secure and stabilize the Property for the benefit of the Debtor's stakeholders.

8. In the circumstances, it is just and appropriate to appoint the Receiver, and the relief sought by GMIC is fair and reasonable. GMIC respectfully submits that the Receivership Order should therefore be granted.

PART II: FACTS

9. The facts underlying this application are more fully set out in the affidavit of Michael Yeung sworn October 2, 2023 (the "**Yeung Affidavit**").¹ All capitalized terms used but not defined herein have the meanings ascribed to them in the Yeung Affidavit.

10. All monetary amounts referred to herein are in Canadian currency unless otherwise stated.

A. Parties and the Project

11. The Applicant is incorporated pursuant to the British Columbia *Business Corporations Act*, SBC 2002, c 57, and is headquartered in Vancouver, British Columbia.² It is also extra-provincially registered in Alberta and Ontario. GMIC is managed by Gentai, a privately held company that originates, funds, syndicates and services mortgage investments in Canadian residential and commercial properties.³

12. The Partnership is a limited partnership registered under the Ontario *Limited Partnerships Act*, RSO 1990, c L.16, and its principal place of business is Kitchener, Ontario.⁴ The Partnership's general partner is 177, a privately held corporation registered under the Ontario *Business Corporations Act*, RSO 1990, c B.16. 177 (the "**OBCA**") that is also headquartered in Kitchener, Ontario.⁵

13. 177 is the registered owner of, among other things, the Real Property. The Real Property includes the lands located at the municipal address 1333 Weber Street East, Kitchener, Ontario.⁶

¹ Affidavit of Michael Yeung sworn October 2, 2023 ("the **Yeung Affidavit**"), Applicant's Application Record at Tab 2 (the "**Application Record**").

² *Ibid* at para 8, Application Record at Tab 2.

³ *Ibid* at para 8, Application Record at Tab 2.

⁴ *Ibid* at para 9, Application Record at Tab 2.

⁵ *Ibid* at para 9, Application Record at Tab 2.

⁶ *Ibid* at para 10, Application Record at Tab 2.

14. Until in or around mid-July, the Project was under construction.⁷ However, no phase of the four phase Project has been completed, although substantial progress has been made on Phase 1.⁸ As of the date hereof, all 177 dwelling units of Phase 1 and 325 dwelling units of phases 2 and 3 of the Project have been sold pursuant to agreements of purchase and sale.⁹

B. Indebtedness Owing to the Syndicate and Related Security

15. The Syndicate, through CMLS, made funds available to 177, on behalf of the Partnership, pursuant to two mortgage loan facilities (together, the "**Loan Facilities**") under separate commitment letters (together, as amended, the "**Commitment Letters**"), both dated July 22, 2021.¹⁰

16. Pursuant to the interlender agreement dated August 19, 2021 between CMLS, the Senior Lenders, and the Applicant (as amended from time to time, the "**Interlender Agreement**"):

- (a) the Senior Lenders were assigned "Mortgage Loan No. 50715", the mortgage loan facility which was made available under the first commitment letter (as amended, the "**Senior Commitment Letter**", and the mortgage loan available thereunder, the "**Senior Secured Loan Facility**"); and
- (b) the Applicant was assigned "Mortgage Loan No. 50716", the mortgage loan facility which was made available under the second commitment letter (as amended, the

⁷ *Ibid* at para 11, Application Record at Tab 2.

⁸ *Ibid* at para 11, Application Record at Tab 2.

⁹ *Ibid* at para 11, Application Record at Tab 2.

¹⁰ *Ibid* at para 12, Application Record at Tab 2.

"Junior Commitment Letter" and the mortgage loan available thereunder, the **"Junior Secured Loan Facility"**).¹¹

17. The Interlender Agreement provides that the Senior Lenders are entitled to first preference and absolute priority over the Applicant in respect of their proportionate share of the amounts owing pursuant to the Senior Secured Loan Facility.¹²

17. The Senior Commitment Letter provided for, among other things, the Senior Secured Loan Facility in the principal amount of \$52,800,000.¹³ The Senior Commitment Letter also provided that one of the Senior Lenders would provide a non-revolving facility for the issuance of one or more letters of credit to be provided to the municipality or the region to secure duplicate costs with a facility limit of \$2,700,000.¹⁴ As of September 13, 2023, the total indebtedness owing under the Senior Commitment Letter was \$42,055,404.91,¹⁵

18. The Junior Commitment Letter provided for, among other things, the Junior Secured Loan Facility in the principal amount of \$13,000,000.¹⁶ GMIC also provided a separate \$2,000,000 cost overrun facility (the **"Cost Overrun Facility"**).¹⁷ The Junior Commitment Letter was amended twice to, among other things, increase the principal to \$19,000,000 and roll the Cost Overrun Facility into the Junior Secured Loan facility.¹⁸ As of September 13, 2023 the total indebtedness owing under the Junior Commitment Letter was \$19,598,083.91.¹⁹ Advances under the Loan

¹¹ *Ibid* at para 12, Application Record at Tab 2.

¹² *Ibid* at para 13, Application Record at Tab 2.

¹³ *Ibid* at para 14, Application Record at Tab 2.

¹⁴ *Ibid* at para 14, Application Record at Tab 2.

¹⁵ *Ibid* at para 20, Application Record at Tab 2.

¹⁶ *Ibid* at para 15, Application Record at Tab 2.

¹⁷ *Ibid* at paras 15 and 18, Application Record at Tab 2.

¹⁸ *Ibid* at para 19, Application Record at Tab 2.

¹⁹ *Ibid* at para 20, Application Record at Tab 2.

Facilities were provided to the Debtor on a cost-in-place and cost-to-complete basis, supported by draw requests and progress claim reports approved by Altus Group Limited ("**Altus**").²⁰

19. As general and continuing security for the payment and performance of the obligations under the Commitment Letters, the Secured Parties were granted various security by 177 and the Partnership (collectively, the "**Security**"), including:

- (a) an \$82,000,000 charge/mortgage granted by 177 in respect of the Real Property (the "**Mortgage**"), governed by, among other things, the additional provisions registered therewith (the "**Mortgage Terms**");
- (b) a Postponement of Interest receipted on August 17, 2021, in respect of a previously registered charge/mortgage over the Real Property by Westmount Guarantee Services Inc. ("**Westmount**"), the effect of which is to give the Mortgage first priority over the Real Property;
- (c) a General Security Agreement dated August 13, 2021 (the "**GSA**"), pursuant to which, among other things, the Secured Parties were granted a security interest in all right, title and interest that the Debtors have or may have in the personal property which arises from, pertains to, is located on, or is used in the operation and maintenance of, the Real Property and any proceeds therefrom. The GSA provides that the security interest in favour of the Secured Parties is subject to Westmount's security interest in deposit monies of purchasers of units in the Project; and
- (d) a General Assignment of Rents and Leases dated August 17, 2021 (the "**Assignment of Rents**"), pursuant to which, among other things, 177 assigned to

²⁰ *Ibid* at para 16, Application Record at Tab 2.

the Secured Parties its interest in and to the Leases and Rents (each as defined in the Assignment of Rents) in respect of the Real Property.²¹

20. Both the Mortgage Terms and the GSA (collectively the "**Security Documents**") expressly provide that the Secured Parties may appoint a receiver over the relevant assets if an Event of Default (as defined therein) occurs.²²

21. Pursuant to several additional agreements, the Debtor also assigned various documents for the benefit of the Secured Parties, including all: material agreements and permits; agreements of purchase and sale; rights to the interest reserve created pursuant to the Commitment Letters; condominium voting rights; construction contracts; and the Debtor's interest in insurance (collectively, the "**Additional Security**").²³

22. The Mortgage is registered in the Land Registry Office for the Land Titles Division of Waterloo (No. 58).²⁴ The security interest granted by the Debtor pursuant to the GSA is registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.10, as amended (the "**PPSA**").²⁵

C. The Debtor's Other Creditors

23. In addition to the Security granted to the Secured Parties, the Debtor has granted security interests to other creditors in both its personal property and the Real Property. These creditors include Westmount, CORFinancial Corp. ("**COR**"), construction lienholders and a leasing company.²⁶

²¹ *Ibid* at paras 22, Application Record at Tab 2.

²² *Ibid* at paras 23, Application Record at Tab 2.

²³ *Ibid* at paras 24, Application Record at Tab 2.

²⁴ *Ibid* at paras 25, Application Record at Tab 2.

²⁵ *Ibid* at paras 26, Application Record at Tab 2.

²⁶ *Ibid* at paras 27-36, Application Record at Tab 2.

Westmount

24. Westmount has been granted a mortgage against the Real Property which secures the principal amount of \$20,000,000 (which amount was amended to \$50,000,000) and security interests in certain personal property, which was registered under the PPSA (the "**Westmount Security**").²⁷ The Westmount Security secures a cash collateral requirement from the Debtor in the amount of \$750,000 (the "**Required Cash Collateral**"), and the other obligations of the Debtor in connection with the deposit trust agreements.²⁸

25. Pursuant to the agreement as most recently amended on May 8, 2023, between Westmount and the Secured Parties (the "**Westmount Priority Agreement**"):

- (a) the Security is an encumbrance and first charge upon the Property to the extent of the Senior Secured Loan Facility;
- (b) the Westmount Security, to the extent of the Required Cash Collateral, is an encumbrance and second charge upon the Property prior to the Junior Secured Loan Facility secured by the Security;
- (c) the Security in respect of the Junior Secured Loan Facility otherwise has priority over the Westmount Security.²⁹

26. The Westmount Priority Agreement otherwise provides that the Security shall at all times be postponed and rank subordinate to Westmount in respect of the monies deposited by purchasers, in respect of which the Westmount Security shall have a first charge and priority over the Security for only so long as such monies shall remain in trust pursuant to the provisions of the trust

²⁷ *Ibid* at para 27, Application Record at Tab 2.

²⁸ *Ibid* at para 27, Application Record at Tab 2.

²⁹ *Ibid* at para 28, Application Record at Tab 2.

agreements and in respect of which the Security shall constitute a second charge and security interest in those monies.³⁰

COR

27. Pursuant to a commitment letter dated May 8, 2023, COR made available a loan to 177 in the maximum principal amount of \$3,500,000 (the "**COR Facility**"). To secure those amounts, COR has registered a charge against the Real Property and has registered security interests under the PPSA (the "**COR Security**").³¹ Pursuant to an agreement with the Secured Parties, the COR Security and indebtedness owing to it is subordinated to the indebtedness owing pursuant to the Senior Secured Loan Facility and Junior Secured Loan Facility and the Security.³²

28. On September 28, 2023, the Applicant became aware of a Statement of Claim issued by COR against CMLS, Computershare and GMIC (the "**Statement of Claim**").³³ The Applicant denies many of the assertions in the Statement of Claim and denies any liability whatsoever thereunder.³⁴

29. As evidenced by sub-searches of title in the Land Registry Office for the Land Titles Division of Waterloo (No. 58) conducted on September 21, 2023, construction liens have been registered against the Real Property by various trade contractors.³⁵ As evidenced in search results conducted against the Debtor under the PPSA effective September 20, 2023, a leasing company has also registered a security interest against 177 in respect of a vehicle.³⁶

³⁰ *Ibid* at para 30, Application Record at Tab 2.

³¹ *Ibid* at para 31, Application Record at Tab 2.

³² *Ibid* at para 31, Application Record at Tab 2.

³³ *Ibid* at para 32, Application Record at Tab 2.

³⁴ *Ibid* at para 32, Application Record at Tab 2.

³⁵ *Ibid* at paras 25 and 32, Application Record at Tab 2.

³⁶ *Ibid* at paras 26 and 32, Application Record at Tab 2.

D. The Debtor's Defaults

30. Prior to April 2023, the following breaches under the Commitment Letters occurred, each of which constituted a default entitling CMLS, on behalf of the Secured Parties, to demand repayment in full for the Loan Facilities:

- (a) May 2022: without the knowledge and consent of CMLS, the Debtor began incurring hard costs of construction on later phases of the Project without having secured the requisite financing.³⁷
- (b) December 2022: on and after December 8, 2022, several construction liens were registered against the Real Property.³⁸
- (c) March 2023: the Debtor failed to make a required interest payment to CMLS and failed to make a municipal tax payment on March 1, 2023.³⁹

31. On March 17, 2023, Blaney McMurtry LLP, on behalf of the Secured Parties, issued a demand letter and a notice of intention to enforce security pursuant to the BIA (a "NITES") to 177 and the Partnership in connection with the defaults. Pursuant to the demand letter and the NITES, the deadline for the Debtor to repay the amounts owing was March 27, 2023.⁴⁰

32. At the instruction of the Senior Lenders and the Applicant, CMLS ultimately entered into the Forbearance Agreement.⁴¹ The Debtor and the Guarantors acknowledged, pursuant to the Forbearance Agreement, that the Debtor was in default of its obligations and that CMLS was entitled to immediately enforce all of its rights and remedies under the Loan Facilities, the Commitment Letters, and the Security Documents.⁴² In exchange for certain amendments to the

³⁷ *Ibid* at para 37, Application Record at Tab 2.

³⁸ *Ibid* at para 37, Application Record at Tab 2.

³⁹ *Ibid* at para 37, Application Record at Tab 2.

⁴⁰ *Ibid* at para 37, Application Record at Tab 2.

⁴¹ *Ibid* at para 38, Application Record at Tab 2.

⁴² *Ibid* at para 38, Application Record at Tab 2.

Commitment Letter (which, among other things, increased the principal amounts advanced under each of the Loan Facilities), CMLS agreed not to enforce its rights and remedies under the Loan Facilities, the Commitment Letters, and the Security until the earlier of March 1, 2024, or the occurrence of a further default under the Loan Facilities, the Commitment Letters, or the Security Documents.⁴³

33. In connection with the Forbearance Agreement, the principal amount of the Senior Secured Loan Facility was increased by \$2,000,000, and the principal amount of the Junior Secured Loan Facility was increased by \$3,000,000.⁴⁴ The purpose of these increases was to provide bailout funding to assist the Debtor in paying unpaid payables that were incurred, without permission, by the Debtor on later phases of the project and to pay amounts owing to the construction lien claimants.⁴⁵ To address these costs, additional financing was also provided by Westmount and COR extended the COR Facility.⁴⁶

34. Since the Forbearance Agreement was executed, several additional defaults have occurred. Altus provided a report to CMLS indicating that there were additional cost overruns that were not disclosed at the time of the Forbearance Agreement.⁴⁷ The Debtor has been unable to cover these costs, which caused construction on the Project to cease and has triggered defaults, including:

- (a) the registration of at least 18 construction liens (starting in July 2023); and
- (b) construction of the Project ceasing since in or around mid-July, 2023.⁴⁸

⁴³ *Ibid* at para 38, Application Record at Tab 2.

⁴⁴ *Ibid* at para 39, Application Record at Tab 2.

⁴⁵ *Ibid* at para 39, Application Record at Tab 2.

⁴⁶ *Ibid* at para 39, Application Record at Tab 2.

⁴⁷ *Ibid* at para 40, Application Record at Tab 2.

⁴⁸ *Ibid* at para 40, Application Record at Tab 2.

35. These defaults each constitute a "Forbearance Default", as defined in the Forbearance Agreement, the consequence of which is that the Forbearance Agreement and the forbearance provided for therein have terminated.⁴⁹

36. Since the occurrence of the Forbearance Defaults, the Applicant has terminated its servicing agreement with CMLS.⁵⁰ It is therefore bringing this Application solely on its own behalf as a Secured Party.⁵¹

E. Present status

37. Presently, the Project is stalled.⁵² The trade contractors have left the site.⁵³ It is currently unclear to GMIC if the site is secured.⁵⁴ While Phase 1 is approximately 80% complete, the roof is not watertight, which could lead to significant damage to the Project with winter fast approaching.⁵⁵ Insurance for the Project continues to be in place but has not been paid since February 2023.⁵⁶ As such, it is critical that a Receiver be appointed forthwith.

PART III: ISSUES

38. The issues to be considered on this application are whether:

- (a) this Court has jurisdiction to appoint the Receiver;
- (b) it is just and convenient to appoint the Receiver; and
- (c) the terms of the proposed Receivership Order are appropriate in the circumstances.

⁴⁹ *Ibid* at para 40, Application Record at Tab 2.

⁵⁰ *Ibid* at para 41, Application Record at Tab 2.

⁵¹ *Ibid* at para 41, Application Record at Tab 2.

⁵² *Ibid* at para 45, Application Record at Tab 2

⁵³ *Ibid* at para 45, Application Record at Tab 2

⁵⁴ *Ibid* at para 45, Application Record at Tab 2.

⁵⁵ *Ibid* at para 45, Application Record at Tab 2.

⁵⁶ *Ibid* at para 45, Application Record at Tab 2.

PART IV: LAW AND ARGUMENT

A. This Court has the Jurisdiction to Appoint the Receiver

39. Subsection 243(1) of the BIA and section 101 of the CJA vest this Court with jurisdiction to appoint a receiver where it is "just or convenient to do so".⁵⁷ In the case of the BIA, subsections 243(1)-(1.1) provides as follows:

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a 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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.⁵⁸

⁵⁷ [Bankruptcy and Insolvency Act, RSC 1985, c. B-3 s 243\(1\)](#) [BIA]; [Courts of Justice Act, RSO 1990, c. C. 43 s 101](#) [CJA]; [Meridian v Okje Cho & Family Enterprise Ltd, 2021 ONSC 3755](#) at para 19 [Meridian], [Elleway Acquisitions Ltd v Cruise Professionals Ltd, 2013 ONSC 6866](#) at paras 24-25 [Elleway];, [Bank of Montreal v Sherco Properties Inc, 2013 ONSC 7023](#) at paras 39-40, [Sherco]; [Bank of Montreal v Carnival National Leasing Ltd, 2011 ONSC 1007](#) at para 23 [Carnival],.

⁵⁸ [BIA](#), *ibid* s 243(1), s 243(1.1). See also, [CJA](#), *ibid* s 101(1), which provides that "[i]n the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

40. As indicated above, the Applicant is a secured creditor of the Debtor with a perfected security interest pursuant to its real property registrations and PPSA registration.⁵⁹ As such, it is permitted to bring the attached application to appoint the Receiver under subsection 243(1) of the BIA. Such appointment is not precluded by subsection 243(1.1) of the BIA as former counsel to the Secured Parties delivered the NITES in accordance with section 244 of the BIA, the ten-day notice period prescribed thereunder has long since expired, and, with the termination of the Forbearance Agreement, the Applicant is entitled to enforce on its Security.⁶⁰

41. As set out immediately below, each of the remaining technical requirements enumerated under the BIA for the appointment of the Receiver are satisfied.

1. The Locality of the Debtor is Ontario

42. Where an application is brought for the appointment of a receiver under subsection 243(1) of the BIA, subsection 243(5) requires that it be filed in "a court having jurisdiction in the judicial district in the locality of the debtor".⁶¹ Section 2 of the BIA defines the "locality of a debtor" as the principal place:

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.⁶²

⁵⁹ Yeung Affidavit at para 26, Application Record at Tab 2.

⁶⁰ [BIA](#), *supra* note 17 s 244.

⁶¹ [Ibid](#) s 243(5).

⁶² [Ibid](#) s 2, "locality of a debtor".

43. The Real Property is located in Kitchener, Ontario and the Debtor is an Ontario limited partnership with a general partner registered under the OBCA.⁶³ The Superior Court of Justice in Ontario has jurisdiction across the entire province in any judicial district of the province.⁶⁴ Thus, the locality of the Debtor is Ontario and this application is properly before the Ontario Superior Court of Justice (Commercial List). As a receivership application under the BIA, this is a matter eligible for the Commercial List.

44. Given the urgency in this Application, the significant value of the debt outstanding, and the potential complexities of the case (including the potential disclaimer of more than 500 unit purchase agreements), the Applicant is of the view that it is appropriate for this matter to be heard by the Commercial List.

2. The Receiver is a Trustee under the BIA

45. Pursuant to subsection 243(4), only a "trustee" may be appointed as a receiver under the BIA.⁶⁵ KSV is a trustee under the BIA, has provided its consent to act as the Receiver if so appointed and is qualified to act as such.⁶⁶

B. The Receiver's Appointment is Just and Convenient

46. In determining whether it is just and convenient to appoint the proposed Receiver under subsection 243(1) of the BIA and section 101 of the CJA, this Court must have regard to "all of the circumstances but in particular the nature of the property and the rights and interests of all

⁶³ Yeung Affidavit at paras 3 and 9, Application Record at Tab 2.

⁶⁴ [*Foremost Financial Corporation et al v. Alai Developments Inc. et al*](#), CV-23-00702528-00CL [endorsement] at para 21; [*Kucera \(Re\)*](#), 2014 BCSC 394 at para 24.

⁶⁵ [*BIA*](#), *supra* note 17 s 243(4).

⁶⁶ Yeung Affidavit at para 46, Application Record at Tab 2.

parties in relation thereto".⁶⁷ There is no requirement for the Applicant to establish that it will suffer irreparable harm if the proposed Receiver is not appointed.⁶⁸

47. Although the appointment of a receiver has traditionally been considered an extraordinary remedy, it is now well established that "its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements."⁶⁹ In such circumstances, the burden on the applicant secured creditor is relaxed as the applicant is simply seeking to enforce a term of an agreement assented to by the parties.⁷⁰ The appointment of a receiver "becomes even less extraordinary when dealing with a default under a mortgage".⁷¹

48. Where, as here, an applicant is seeking to enforce a term of an agreement assented to by the parties, the inquiry as to whether it is just and convenient to appoint a receiver "requires the court to determine whether it is in the interests of all concerned to have the receiver appointed".⁷² In making this determination courts have been informed by, among others, the following factors:

- (a) the likelihood of preserving and maximizing the return on the subject property;
- (b) the relationship between the debtor and its creditors;
- (c) the risk of the lender's security deteriorating;
- (d) loss of confidence in the debtor's management;

⁶⁷ *Bank of Nova Scotia v Freure Village on Clair Creek*, [1996] OJ No. 5088 at para 11 [*Freure*]; *Carnival*, *supra* note 17 at para 24; *Elleway*, *supra* note 17 at para 26; *Meridian*, *supra* note 17 at para 20; *Sherco*, *supra* note 17 at para 41.

⁶⁸ *Carnival*, *ibid* at paras 24, 28; *Freure*, *ibid*.

⁶⁹ *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953 at para 43 [*BCIMC*], *Freure*, *ibid* at para 13; *Meridian*, *supra* note 17 at para 2; *Elleway*, *supra* note 17 at para 27; *Carnival*, *ibid* at paras 24-25, 27; *Sherco*, *supra* note 17 at para 42.

⁷⁰ *Sherco*, *ibid*; *Elleway*, *ibid*.

⁷¹ *BCIMC*, *supra* note 28; at para 44. See also, *Confederation Life Insurance Co v Double Y Holdings Inc*, [1991] OJ No. 2613 at para 20.

⁷² *Freure*, *supra* note 26 at para 13; *Elleway*, *supra* note 17 at para 28.

- (e) the potential costs of the receiver; and
- (f) the best way of facilitating the work and duties of the receiver.⁷³

49. Having regard to the foregoing considerations, it is just and convenient for the proposed Receiver to be appointed given that:

- (a) The Debtor breached the Commitment Letters on at least three separate instances prior to the issuance of the demand letter and NITES.⁷⁴ Since the entering into of the Forbearance Agreement the Debtor has committed several Forbearance Defaults.⁷⁵
- (b) As at September 13, 2022, the Debtor was indebted \$42,055,404.91 under the Senior Secured Loan Facility and \$19,598,404.91 under the Junior Secured Loan Facility (which amounts continue to accrue).⁷⁶ After receipt of the Demand Letter, the NITES and the expiration of the applicable notice period, the Debtor has failed to pay the indebtedness. The forbearance that was provided pursuant to the Forbearance Agreement has since been terminated as a result of the Forbearance Defaults.
- (c) The Security Documents provide the Applicant with a contractual right to the appointment of a receiver over the Property upon a default and/or event of default, as applicable.⁷⁷ In the circumstances, there is no reason to deprive the Applicant of the contractual rights for which it bargained.

⁷³ *Elleway, ibid, BCIMC, supra* note 28 at para 45.

⁷⁴ Yeung Affidavit at para 37, Application Record at Tab 2.

⁷⁵ *Ibid* at para 40, Application Record at Tab 2.

⁷⁶ *Ibid* at para 20, Application Record at Tab 2.

⁷⁷ *Ibid* at paras 7, 23 and 43, Application Record at Tab 2.

- (d) The Applicant has lost all confidence in the Debtor's management to continue to satisfy the Debtor's obligations, obtain refinancing and/or manage the Property.⁷⁸
- (e) The Receiver's appointment will provide the stability and supervision required to preserve the value of the Property.⁷⁹ The appointment of a Receiver is urgently needed given, among other things, the lack of security at the construction site, the unpaid insurance, and the fact that Phase 1 is not water-tight with winter approaching.
- (f) The proposed Court-supervised Receivership Proceedings will provide the most effective and appropriate means to secure and effect the sale of the Property, including, if applicable, the dwelling units, with a view to maximizing recoveries for the Debtor's stakeholders.⁸⁰
- (g) The Receiver will have the flexibility to consider options that are currently unavailable to the Debtor that may assist in the sale of the Property, including the disclaimer of some or all of the agreements of purchase and sale for the dwelling units in the Project.⁸¹
- (h) As previously noted, the Applicant is not the only secured creditor of the Debtor.⁸² The proposed Receiver will be able to equitably deal with the interests of all of the Debtor's creditors, including with respect to the distribution of funds realized from any Court-authorized sale of the Property. This is particularly salient given the current possibility of disparate proceedings.

⁷⁸ *Ibid* at para 43, Application Record at Tab 2.

⁷⁹ *Ibid* at para 45, Application Record at Tab 2.

⁸⁰ *Ibid* at para 45, Application Record at Tab 2.

⁸¹ *Ibid* at para 45, Application Record at Tab 2.

⁸² *Ibid* at paras 28-35, Application Record at Tab 2.

C. The Terms of the Proposed Receivership Order are Appropriate

50. The proposed Receivership Order is tailored to the scope of the Applicant's Security, is substantially similar to the terms of the Ontario Superior Court of Justice Commercial List's model receivership order (the "**Model Order**") and is appropriate in the circumstances.

1. The Statement of Claim

51. The Proposed Receivership Order seeks to explicitly stay the Statement of Claim for greater certainty. While the Debtors are not named as defendants in the Statement of Claim, the Applicant submits that the Model Order stay language would stay the Statement of Claim given that is in respect of the Debtor and/or the Property.⁸³ The Statement of Claim is purportedly derived from the Forbearance Agreement to which the Debtor is a party, and relates to various construction claims at the Property.

52. Claims against former officers and directors of debtor companies have been stayed due to their impact on debtor property where they inherently involve the affairs and business of the debtor.⁸⁴ The Statement of Claim would necessitate the involvement of the Debtor's personnel and records, and it is reasonably foreseeable that one or more of the parties would seek to third party the Debtor. The Statement of Claim inherently involves the affairs and business of the Debtor and ought to be stayed.

2. Critical Payments

53. The Proposed Receivership Order allows the Receiver to make certain limited critical pre-filing payments. Critical payments to pre-filing creditors have been permitted where they are

⁸³ Yeung Affidavit at Exhibit "P", Application Record at Tab 2.

⁸⁴ [*Sutherland v. Reeves*](#), 2014 BCCA 222 at para 36.

critical to the continued operation of the debtor.⁸⁵ In this case they are necessary to preserve the value of the Property which could face damage if not secured expeditiously, and will be limited to \$250,000 in the aggregate.

3. The Receiver's Charge and Receiver's Borrowings Charge

54. As contemplated by the Model Order, the proposed Receivership Order grants the following charges:

- (a) the Receiver's Charge to secure the fees and disbursements of the Receiver and its counsel; and
- (b) the Receiver's Borrowings Charge for the purpose of funding the exercise of the powers and duties conferred upon the Receiver pursuant to the proposed Receivership Order.⁸⁶

55. Priority charges sought by a receiver under the BIA, such as the Receiver's Charge and the Receiver's Borrowings Charge, provide the certainty required to ensure the integrity, fairness and predictability of insolvency proceedings.⁸⁷ In accordance with subsection 243(6) of the BIA, the Applicant has provided reasonable notice to the parties likely to be affected by such charges of the proposed Receivership Order.⁸⁸

56. The Applicant submits that the proposed Receiver's Charge and the Receiver's Borrowings Charge are appropriate in the circumstances and commensurate with the administrative and borrowings charges granted by this Court in similar receivership proceedings.⁸⁹

⁸⁵ *Validus Power Corp et al.* (Order appointing receiver) at para 30 and *33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership (Cresford Group)* (Order appointing receiver) at para 28.

⁸⁶ *Ibid* at para 2, Application Record at Tab 2.

⁸⁷ *CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd, 2012 ONSC 1750* at paras 21-23.

⁸⁸ *BIA*, *supra* note 17 s 243(6);

⁸⁹ *In the Matter of the Receivership Proceedings of Sunrise Acquisitions (Hwy 7) Inc. (June 9, 2021), Toronto, CV*

PART V: RELIEF REQUESTED

57. Based on the foregoing, the Applicant submits that it is just and convenient to appoint KSV as Receiver over the Property, and respectfully requests that this Court grant the proposed form of Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF OCTOBER, 2023

Sean Zweig

Bennett Jones LLP
Lawyers for the Applicant

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. [*Bank of Montreal v Carnival National Leasing Ltd*, 2011 ONSC 1007](#)
2. [*Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 7023](#)
3. [*Bank of Nova Scotia v Freure Village on Clair Creek*, \[1996\] OJ No. 5088](#)
4. [*BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc*, 2020 ONSC 1953](#)
5. [*CCM Master Qualified Fund Ltd v blutip Power Technologies Ltd*, 2012 ONSC 1750](#)
6. [*Confederation Life Insurance Co v Double Y Holdings Inc*, \[1991\] OJ No. 2613](#)
7. [*Elleway Acquisitions Ltd v Cruise Professionals Ltd*, 2013 ONSC 6866](#)
8. [*Foremost Financial Corporation et al c. Alai Developments Inc. et al*](#) (Endorsement of Justice Kimmel)
9. [*In the Matter of the Receivership Proceedings of Sunrise Acquisitions \(Hwy 7\) Inc. \(June 9, 2021\)*](#), Toronto, CV-21-00663051-00CL (Order Appointing Receiver)
10. [*In the Matter of the Receivership of 2738283 Ontario Inc., 2738284 Ontario Inc. and 2738285 Ontario Inc. \(November 9, 2021\)*](#), Toronto, CV-21-00670723-00CL (Order Appointing Receiver)
11. [*Kucera \(Re\)*, 2014 BCSC 394](#)
12. [*Meridian v Okje Cho & Family Enterprise Ltd*, 2021 ONSC 3755](#)
13. [*Sutherland v. Reeves*](#), 2014 BCCA 222
14. [*Validus Power Corp et al.*](#) (Order appointing receiver)
15. [*33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership \(Cresford Group\)*](#) (Order appointing receiver)

SCHEDULE B – STATUTES RELIED ON

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Section 2

locality of a debtor means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.

Section 243

Court may appoint receiver

(1) Subject to subsection (1.1), on application by a secured creditor, a 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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Section 244

Advance Notice

(1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Courts of Justice Act, R.S.O. 1990, c. C.43

Section 101

Injunctions and receivers

(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

SCHEDULE C – ABBREVIATED AUTHORITIES

1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991

Heard: August 29, 1991

Heard: August 30, 1991

Docket: 91-CQ-72

Counsel: None given.

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.3 Appointment

VII.3.b Application for appointment

VII.3.b.iii Grounds

VII.3.b.iii.D Irreparable harm

Headnote

Receivers --- Appointment — Application for appointment — Grounds

Plaintiffs mortgaged construction project of defendants — With permission of plaintiffs, defendants used rent proceeds to finance continued construction — Total claims against project amounted to \$250 million and efforts of defendants to sell project were unsuccessful — Major tenant of project disputed obligations under lease — Defendants sued tenant and proceeds of litigation were assigned to plaintiff — Plaintiffs held veto over settlement and were to be kept informed — Defendants did not inform plaintiffs of several settlement meetings — Mortgages matured and plaintiffs demanded payment made — Months later, defendants made no principal payment — Plaintiffs brought motion for appointment of receiver — Motion allowed — Plaintiffs extended great latitude to defendants and were under no obligation to continue doing so — In context of matured loan and continued failure to complete project, receiver should be appointed — Defendants failed to show irreparable harm that was not compensable in damages — Plaintiffs would suffer prejudice if project continued in limbo — Receiver restricted to dealing only with project.

MOTION by plaintiffs for appointment of receiver.

Farley J.:

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about \$114 million. CL is owed about \$100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about \$2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some \$3.6 million in arrears. Liens (\$3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some \$250 million (including the plaintiffs' mortgages, claim by ANZ Bank \$15 million, Church \$1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for \$56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another \$20 million of which over \$18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present \$950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about \$5 million of modifications will be required. In addition, it is estimated that \$10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a \$20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is

in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.

Appointment to Enforce Rights

In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note: *These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**GENESIS MORTGAGE
INVESTMENT CORP.**

and

**1776411 ONTARIO LTD. AND 1333
WEBER STREET KITCHENER LP**

Applicant

Respondents

Court File No.: CV-23-00706813-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**
Proceedings commenced in Toronto

**FACTUM OF THE APPLICANT
(Appointment of Receiver)**

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