

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

FIRST SOURCE FINANCIAL MANAGEMENT INC.
and KINGSETT MORTGAGE CORPORATION

Applicants

and

IDEAL (BC) DEVELOPMENTS INC., IDEAL (BC2) DEVELOPMENTS INC.,
IDEAL DEVELOPMENTS INC., 2490564 ONTARIO INC., 2490568
ONTARIO INC. and SHAJIRAJ NADARAJALINGAM

Respondents

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 APPLICANTS

July 15, 2019

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PART I - INTRODUCTION

1. The Applicants bring this application to appoint KSV Kofman Inc. (“**KSV**”) as receiver over the real property owned by the Respondents, Ideal (BC) Developments Inc., Ideal (BC2) Developments Inc., 24905464 Ontario Inc., and 2490568 Ontario Inc. (the “**Debtors**”) under section 243 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and section 101 of the *Courts of Justice Act* (the “**CJA**”).

2. In or around February 2017, First Source Financial Management Inc. (“**First Source**”) and Home Trust Company loaned \$13 million to the Debtors pursuant to a Commitment Letter dated December 12, 2016 (the “**Loan**”). The Loan was guaranteed by Ideal Developments Inc. (“**Ideal Developments**”) and Shairaj “Shaji” Nadarajalingam (the “**Guarantors**”), whereby they agreed to jointly and severally guarantee payment of the Loan.

3. The Loan was secured by a mortgage in the same amount and registered in first priority against the Property (as defined below). Initially, First Source had a 42.31% interest and Home Trust Company had a 57.69% interest in the Loan and related security. In or around August 2017, KingSett Mortgage Corporation (“**KingSett**”) purchased Home Trust Company’s interest in the Loan and a transfer of charge was subsequently registered on title.

4. In 2018, the Debtors experienced financial difficulty causing them to default a number of times with respect to payment of principal and their monthly payments. In many instances, the Debtors made promises to First Source that the Debtors would repay the loan in full because the Debtors were working on securing alternative financing. However, none of those alternatives ever materialized.

5. In order to accommodate the Debtors, First Source and KingSett agreed to bridge the Debtors' financing and extend the terms of their security multiple times. In the most recent extension agreement, the Debtors agreed to consent to the appointment of a receiver in the event of default. Despite accommodating the Debtors, the Debtors repeatedly breached the terms of the Loan and the mortgage extension agreements.

6. The Loan matured on May 30, 2019, without payment from the Debtors. By letter sent June 3, 2019, First Source and KingSett, demanded payment of all amounts outstanding under the Loan and attached a Notice of Intention to Enforce Security pursuant to section 244 of the BIA (the "**Notice**"). This was not the first time that the lenders had to issue demands to the Debtors in relation to the Loan.

7. The Debtors have made no interest or principle payments since May 2, 2019. They remain in default. As of May 31, 2019, the outstanding Loan amount was \$13,264,958.74. Interest and costs continues to accrue.

8. At no point were the Debtors able to secure alternative financing. Although the Debtors state that they are now close to securing alternative financing, a number of the conditions have yet to be satisfied and the amount of financing is insufficient to pay the indebtedness on the Loan.

9. It is not only "just and convenient" to appoint a receiver over the mortgaged Property, but the Debtors also expressly consented to the appointment of a Receiver in the event that they breach the most recent extension agreement, which they have. Appointing a receiver to ensure that appropriate actions are taken as a result of the defaults by the Respondents is the most appropriate remedy in the circumstances.

PART II - SUMMARY OF FACTS

10. The facts of this Application are more fully set out in the affidavits of Daniel Pollack, sworn June 21 and July 9, 2019. The following is a summary of the facts of this Application.

A. The Parties

11. First Source is a boutique mortgage lender providing funding for projects primarily in the Greater Toronto Area, incorporated pursuant to the laws of Ontario and headquartered in Toronto, Ontario.¹

12. KingSett is a subsidiary of KingSett Capital Inc., which is a private equity real estate investment firm headquartered in Toronto, Ontario.²

13. The Debtors are corporations pursuant to the laws of Ontario.³ Ideal Developments is also incorporated pursuant to the laws of Ontario and develops residential and commercial real estate throughout the Greater Toronto Area and internationally. It was founded by Shajiraj Nadarajalingam, who is the CEO and President of Ideal Developments and the related companies.⁴

14. The Debtors are the registered owners of real property known municipally as 8, 10, 12, 14, 16 and 18 Bostwick Crescent, and 2, 6 and 8 Bond Crescent, in the Town of Richmond Hill, Ontario (the “**Property**”).⁵ Although the Property has many addresses, with separate street names

¹ Affidavit of Daniel Pollack, sworn June 21, 2019 (“**Pollack Affidavit**”), para 3, Tab 2 of the Application Record at p 11.

² Pollack Affidavit, para 4, Tab 2 of the Application Record at p 11.

³ Pollack Affidavit, para 5, Tab 2 of the Application Record at p 11.

⁴ Pollack Affidavit, para 6, Tab 2 of the Application Record at p 11.

⁵ Ideal (BC) Developments Inc. is the registered owner of the property legally described as PINs 03196-0072(LT), 03196-0074(LT), and 03196-0075(LT). Ideal (BC2) Developments Inc. is the registered owner of the property legally described as PIN 03196-0077(LT). 2490564 Ontario Inc. is the registered owner of the property legally described as PINs 03196-0076(LT), 03196-0078(LT) and 03196-0080(LT). 2490568 Ontario Inc. is the registered owner of the property legally described as PIN 03196-0079(LT).

and PINs, the addresses in effect comprise one development property. The Property has an area of approximately 3.56 acres. Ideal Developments attempted to develop the Property into 23 stacked townhomes and 49 freehold townhomes, but it has not yet received site plan approval to do so. Currently, the Property is vacant and undeveloped.⁶

B. The Loan and the Security

15. First Source and Home Trust Company agreed to provide, among other things, \$13 million to fund the development of the Property and to refinance existing debt pursuant to a Commitment Letter executed on December 12, 2016.⁷ The Loan was guaranteed by the Guarantors, whereby they agreed to jointly and severally guarantee payment to First Source and Home Trust Company of all debts and liabilities.

16. Pursuant to the terms of the Commitment Letter, in the event that the Debtors default on the Loan, the Debtors agreed that that the lenders could obtain a judgment and enforce all remedies available, including selling the Property to satisfy the Loan. Specifically, the Debtors expressly agreed that the lenders shall be entitled to appoint a receiver to do all things necessary as an owner would be entitled to do to sell the Property:

5.02 Borrower's Acknowledgments: The Borrower acknowledges and represents that:

[...]

(v) In the event the Borrower is unable to pay monthly payments, Property taxes, fire insurance premiums or the principal amount when the Loan is due, the Lender could obtain a court judgment and enforce all remedies

⁶ Pollack Affidavit, para 7, Tab 2 of the Application Record at p 12.

⁷ Pollack Affidavit, para 8, Tab 2 of the Application Record at p 12.

available by law and income could be seized to pay the judgment or the Lender could keep the Property or sell it.⁸

[...]

Receiver: In the event due to default of the Borrower on the Property, beyond the applicable cure period, **then the Lender in addition to any other rights which it may have, shall be entitled to appoint a receiver manager or receiver**, either privately or court appointed to manage the building and to do all things necessary as an owner would be entitled to do to sell the Property, subject to the terms of the Mortgage and all applicable governmental legislation.⁹ [Emphasis added]

17. The Loan was secured by a first mortgage in the same amount and registered in first priority against the Property, whereby First Source had an undivided 42.31% tenant-in-common interest and Home Trust Company had an undivided 57.69% tenant-in-common interest. The mortgage was registered against title to the Property (the “**Mortgage**”).¹⁰ Similar provisions permitting the lenders to appoint a receiver over the collateral is present in the General Security Agreements, which were executed separately by each Respondent.¹¹

18. Subsequently, in or around August 2017, KingSett purchased Home Trust Company’s interest in the Loan.¹²

C. The Default

19. On multiple occasions, the Debtors have defaulted on the terms of the Loan and Mortgage. Since early 2018, the Debtors have failed to make payments on the principal of the Loan, make

⁸ Commitment Letter, Exhibit D to the Pollack Affidavit, Tab 2D of the Application Record at p 97.

⁹ Schedule A of the Commitment Letter, Exhibit “D” to the Pollack Affidavit, Tab 2D of the Application Record at p 104.

¹⁰ Pollack Affidavit, para 10, Tab 2 of the Application Record at p 12.

¹¹ General Security Agreements, Exhibit 1 to the Cross-Examination of Shajiraj Nadarajalingham, held on July 12, 2019, Tabs 3-8.

¹² Pollack Affidavit, para 11, Tab 2 of the Application Record at p 11.

timely monthly payments, and have failed to pay associated fees associated with administering the Loan and Mortgage.

20. First Source and KingSett's (collectively, the "**Lenders**") attempted to assist the Debtors by renegotiating the terms of the Mortgage on multiple occasions:

- (a) The Debtors required refinancing as they were unable to make monthly interest payments due on February and March, 2018. First Source negotiated an amending agreement to the original Mortgage as a bridge to have the Loan refinanced, which would become payable on or before October 1, 2018. The first amending agreement was executed on June 29, 2018.¹³
- (b) The Debtors failed to make payment of the principal on October 1, 2018, and failed to communicate any intention to not make the payment until Lenders requested payment.¹⁴ In order to further assist the Debtors, the Lenders agreed to a second extension. The parties executed another agreement, which extended the Mortgage until November 30, 2018.¹⁵
- (c) Again, the Debtors breached the second extension agreement. The Debtors failed to make payment of the mortgage extension fee and interest payments for October 2018 and the principal payment before November 30, 2018. Despite the Lenders making multiple requests for payment, the Debtors failed to make payment of the Loan, causing the Lenders to issue a demand for payment of the Loan.¹⁶

¹³ Pollack Affidavit, paras 12-13, Tab 2 of the Application Record at p 13.

¹⁴ Pollack Affidavit, para 14, Tab 2 of the Application Record at p 13.

¹⁵ Pollack Affidavit, para 15, Tab 2 of the Application Record at pp 13-14.

¹⁶ Pollack Affidavit, paras 17-18, Tab 2 of the Application Record at p 14.

- (d) During the notice period, the Debtors made repeated assurances that the Debtors would satisfy the Loan and would receive a commitment letter from a third party. However, the Debtors were unable to secure refinancing to satisfy the Loan.¹⁷
- (e) The Lenders renegotiated another extension agreement, executed on February 13, 2019, requiring the Debtors to provide the Lenders with two post-dated cheques for interest payments for February and March in order to provide assurance to the Lenders that the Debtors would not continue to breach the terms of any further extension agreement.¹⁸
- (f) The February monthly payment was received without issue, but the March payment was not cashed due to prior notice from the Debtors that they had insufficient funds to satisfy the cheque. Again, the Debtors were in default of the Loan.¹⁹

21. At every instance, Shaji, on behalf of himself and the Debtors, signed and agreed to all of the terms and conditions of the mortgage extension agreements, including the associated mortgage extension fees and administrative costs.²⁰ Despite him doing so, the Respondents were very difficult to deal with and, often times, acted as if complying with the contractual terms of the Loan was an inconvenience. For example, First Source would have to follow up repeatedly with the Respondents to get an indication of when payment was to be expected. In an email dated November 14, 2018, Mr. Steven Walters of First Source expressed that a “lot of people, Kingsett

¹⁷ Pollack Affidavit, para 19, Tab 2 of the Application Record at p 14.

¹⁸ Pollack Affidavit, para 20-21, Tab 2 of the Application Record at p 15.

¹⁹ Pollack Affidavit, para 22, Tab 2 of the Application Record at p 15.

²⁰ Cross-Examination of Shajiraj Nadarajalingham, held on July 12, 2019.

included; are not very happy as to your lack of communication with me. The fee is due and payable [*sic*].”²¹

22. The Respondents would respond cavalierly to First Source’s attempts to confirm whether payment would be made. For instance, in response to First Source confirming whether payment would be made in December 2018, Prasana Balachandran of Ideal Developments responded “You and I will both know by tomorrow. Stop being a pest. I can’t wait until you guys are discharged.”²²

23. Without notice to the Lenders, who rank in first priority pursuant to the charge registered over the Property, the Debtors secured additional secured financing from a third party, Feature Corp., who was granted security by way of a second mortgage registered on title. The Debtors agreed to register Feature Corp.’s interest on title **without notice** to the Lenders twice in 2018.²³ Pursuant to the terms of the Commitment Letter and the Mortgage, in the event that a subsequent mortgage is placed on the Property without the Lenders’ written consent, the Lenders would have the right to immediately declare all unpaid principal and interest due and payable.²⁴

24. Once again, in or around early 2019, the Debtors required an additional \$2 million refinancing from Feature Corp., which required an additional charge to be registered on the Property, requiring the Lenders’ consent.

25. In order to accommodate the Debtors difficult financial situation and to address the lack of payment and transparency by the Debtors, the Lenders again negotiated a further extension of the

²¹ Emails to/from First Source and Ideal Developments, Exhibit I to the Pollack Affidavit, Tab 1I of the Application Record at p 125.

²² Emails to/from First Source and Ideal Developments, Exhibit I to the Pollack Affidavit, Tab 2I of the Application Record at p 127.

²³ Pollack Affidavit, para 23, Tab 2 of the Application Record at p 15.

²⁴ Section 9, Schedule A of the Commitment Letter, Exhibit D to the Pollack Affidavit, Tab 2D of the Application Record at p 103.

Mortgage (the “**Extension Agreement**”). The Lenders offered to forebear on enforcing the Mortgage until May 30, 2019, if the parties, including Feature Corp., agreed to a Subordination and Standstill Agreement, whereby Feature Corp. would not be permitted to enforce on its security until July 1, 2019.²⁵ The Subordination and Standstill Agreement was made as of March 25, 2019.

26. In addition, the parties agreed to, among other things, the following terms²⁶:

- (a) The Debtors must pay the outstanding interest, legal fees, and mortgage extension fees that were in arrears by March 30, 2019;
- (b) The security given by the Debtors to the Lenders pursuant to the Commitment Letter and the Mortgage, and all subsequent amendments, will remain in full force and effect for the entire term of the charge; and
- (c) The Debtors must pay interest fees and a mortgage extension fee on April 1, 2019 and May 1, 2019.

27. Notably, the Debtors explicitly agreed that if the full indebtedness under the Loan is not repaid by May 30, 2019, the Debtors will consent to the appointment of a receiver.²⁷

28. Again, the Debtors were unable to satisfy the terms of the Extension Agreement; the Debtors failed to make timely payment of the May 1, 2019 interest payment and ultimately, the Lenders did not receive payment of the Loan on May 30, 2019.

²⁵ Pollack Affidavit, para 24, Tab 2 of the Application Record at p 16.

²⁶ Letter of Andrew Winton, dated March 15, 2019, Exhibit M to the Pollack Affidavit, Tab 2M of the Application Record at pp 140-141.

²⁷ *Ibid*, at p 141; Letter of William Friedman, dated March 19, 2019, Exhibit N to the Pollack Affidavit, Tab 2N of the Application Record at pp 144-145.

D. The Demand

29. As of May 31, 2019, the outstanding Loan amount was \$13,264,958.74.²⁸

30. On June 3, 2019, the Lender issued a written demand for payment of the full amount outstanding under the Mortgage and gave notice of its intention to enforce security by delivering a Notice pursuant to section 244 of the BIA.²⁹

31. The Debtors have not paid the amounts outstanding under the Mortgage and the time period provided in the Notice has expired. The Respondents remain in default under the Loan and the Mortgage. Furthermore, it has been approximately **ten weeks** since the Lenders have received **any** interest payments on the outstanding indebtedness.

32. Since issuing the Notice of Application, the Debtors have, once again, suggested that they will be able to obtain replacement financing from another lender, Romspen Investment Corporation (“**Romspen**”), and attached a “commitment letter” from Romspen to their Responding Record.³⁰

33. However, the Respondents admit that they have not satisfied the conditions required for Romspen to advance the funds to the Respondents, including signing back the commitment letter and paying half of the standby fee of \$60,000.³¹ More significantly, the financing from Romspen

²⁸ Pollack Affidavit, para 33, Tab 2 of the Application Record at p 18.

²⁹ Pollack Affidavit, para 32, Tab 2 of the Application Record at p. 18.

³⁰ Affidavit of Shajiraj Nadarajalingham, sworn July 3, 2019 (“**Shaji Affidavit**”), para 28, Tab 1 of the Responding Record at p 6; Romspen Commitment Letter, Exhibit G to the Shaji Affidavit, Tab 1G of the Responding Record at p 6.

³¹ Cross-Examination of Shajiraj Nadarajalingham, held on July 12, 2019.

is insufficient to satisfy the Debtors' indebtedness.³² The Romspen commitment letter, even if it comes to fruition, is **not** a solution to the Debtors' indebtedness to the Lenders.

E. The Value of the Property

34. In responding to the Lenders' contractual right to appoint a receiver over the Property, the Respondents allege that the loan to Property ratio is 50%.³³ The Respondents' ratio is misleading, as it relies on a valuation that was prepared on December 20, 2017 (based on an inspection conducted on December 28, 2016)³⁴ and makes a number of assumptions that have not materialized as of yet. The appraisal that the Respondents rely upon was speculative, at best, as it assumed that all approvals required for the development would be granted, which is not the case.

35. The Respondents' appraisal is flawed in many additional respects, as noted below. The Applicants retained John Galluzzo of Altus Group Limited, who reviewed the appraisal and found it was "quite misleading given that municipal development approvals had not been granted prior to the effective valuation date".³⁵

36. In addition, Mr. Galluzzo noted that the Property was "recently assembled between October 2014 and November 2015 for a total consideration of \$8,860,000" and that the

³² The amount of the Romspen financing is \$13 million, less transaction fees and related costs of at least \$400,000, which is subtracted from the amount of the Romspen advance. As of May 31, 2019, the outstanding Loan amount was \$13,264,958.74.

³³ Shaji Affidavit, para 4, Tab 1 of the Responding Application Record at p 2.

³⁴ "Narrative Appraisal of Real Property", Exhibit "A" of the Shaji Affidavit, Tab 1A of the Responding Application Record, p 15.

³⁵ "Northwest Corner of Bond Crescent and Bostwick Crescent Richmond Hill – 'Cushman & Wakefield Ltd.' Summary Review", Exhibit A to the Reply Affidavit of Daniel Pollack, sworn July 9, 2019 ("**Reply Affidavit**"), Tab 1A of the Reply Application Record at p 9.

Respondents' appraisal should have included a detailed discussion "to explain why the prior sale price was well below the market value estimate of \$26,400,000."³⁶

37. Mr. Galluzzo concludes that the "value conclusion was inflated well above actual market value and therefore should not be relied upon without further analysis completed"³⁷ and identifies the following issues, among others, for the basis of his conclusion:

- (a) The inspection date, December 28, 2016, was approximately twelve months prior to the effective valuation date, December 20, 2017. Mr. Galluzzo states that the appraiser "should have re-inspected the Subject properties given the extended period between dates to ensure no major changes to the immediate area or Subject."³⁸
- (b) The appraisal report "failed to indicate the negative impacts to the housing market partly brought on by the Liberal provincial government in April 2017"³⁹; and
- (c) The appraisal report includes a direct comparison approach only, where the majority of the comparable land sales relied upon are not relevant. The majority of the land sales used are either smaller than the Property and/or are located in more favourable locations. The comparable lands relied upon cannot be relied upon.⁴⁰

38. It is unlikely that the Property is worth \$26,400,000, or anywhere near that amount; otherwise, the Debtors would have been able to find replacement financing by now.

³⁶ *Ibid.*

³⁷ *Ibid.*, Tab 1A of the Reply Application Record at p 11.

³⁸ *Ibid.*, Tab 1A of the Reply Application Record at p 9.

³⁹ *Ibid.*, Tab 1A of the Reply Application Record at p 9.

⁴⁰ *Ibid.*, Tab 1A of the Reply Application Record at p 10.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

39. The issue on this Application is whether the Court should make an order pursuant to section 243 of the BIA and/or section 101 of the CJA appointing KSV as the Receiver over the Property.

40. Section 243(1) of BIA and section 101 of the CJA authorize a court to appoint a receiver where such appointment is just or convenient to do so, and on such terms as it considers just.⁴¹

41. In addition, subsection 243(1) provides that on application by the secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court considers advisable over the property.

42. In determining whether it is just and convenient to appoint a receiver under both statutes, a court must have regard to all of the circumstances of the case, particularly the nature of the property and rights and interests of all parties in relation to the property. There is no requirement that the applicant secured creditor establish that it will suffer irreparable harm if a receiver is not appointed.⁴²

43. Where the enumerated rights of the secured creditor under the credit agreement include the right to seek the appointment of a receiver, the burden on the applicant seeking the relief is relaxed.⁴³

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. **This is because the**

⁴¹ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 243(1); *Courts of Justice Act*, R.S.O.1990, c. C.43, s. 101(1).

⁴² *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851 [*Sandy Cove Marine*], citing *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088 (Gen. Div. [Comm List]) at para 21, Tab 1 of the Applicants' Brief of Authorities ["BOA"].

⁴³ *Ibid*, para 12; Also see: *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] OJ No 330 at para 4 (Gen. Div.), Tab 2 of the BOA.

applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.⁴⁴

44. In cases where the parties have stipulated in their contracts that the lenders would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default, the relief sought by the applicant is not extraordinary.⁴⁵

45. In this case, the Respondents agreed that the Lenders could appoint a receiver upon default, both in the original Commitment Letter and Mortgage and later in March 2019. The appointment of a receiver is not an extraordinary remedy in this case.

46. The fact that the Applicants have a contractual right to the appointment of a receiver is not dispositive of the matter, but is a factor that should be taken into account.⁴⁶ In any event, the court will have regard to all of the circumstances of the case, including the interests of all parties in relation to the property.⁴⁷

47. In this case, it is just and convenient to appoint KSV as the Receiver in the circumstances:

- (a) The Loan is in default;
- (b) The indebtedness is not in dispute;
- (c) There has been a loss in confidence of the Debtors to secure alternative financing;

⁴⁴ *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013] O.J. No. 5399 [*Elleway*] at para 27, Tab 3 of the BOA.

⁴⁵ *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965 [*Business Development Bank*], citing *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 at para 17, Tab 4 of the BOA.

⁴⁶ *GE Canada Equipment Financing G.P. v. Barber Group Rentals Inc.*, 2011 CarswellOnt 5878 [*Barber Group Rentals*], para 5, Tab 5 of the BOA.

⁴⁷ *Sandy Cove Marine*, *supra* note, para 21, Tab 1 of the BOA; *Elleway*, *supra* note, para 26, Tab 3 of the BOA.

- (d) Given the value of the Property alleged by the Respondents (over \$26 million), it is concerning that there have been multiple unsuccessful attempts at securing alternative financing in order to repay the Loan and discharge the Mortgage;
- (e) The assets in question are vacant lands without income generating potential in order to make continuing interest payments;
- (f) A receivership will ensure that an independent court officer will control the sale process;
- (g) The court-appointed receiver can address issues of competing offers, to the extent there are any, in a fair manner;
- (h) Appointing a receiver is not inconsistent with granting the Debtors a short period of time to discharge the Mortgage, should they actually be able to obtain replacement financing;
- (i) Cost concerns are not material in the context of an approximate \$13.5 million indebtedness; and
- (j) In exercising its business judgment, a court-appointed receiver can balance the competing interests of the stakeholders.

48. The argument that there is no basis for the appointment of a receiver because there may be other ordinary legal remedies available to the Applicants should be of no moment. The Respondents explicitly agreed that they would consent to the appointment of a receiver in the event of default. This is the remedy that is most appropriate in the circumstances.

49. In *Business Development Bank*, the debtors also attempted to argue that there is no basis for the appointment of a receiver, despite the credit agreement permitting the lender to appoint a receiver. Justice Morawetz (as he then was) found that the appointment of a receiver was justified:

There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment.⁴⁸

50. Similarly, in *GE Canada Equipment Financing G.P. v. Barber Group Rentals Inc.*, the debtors conceded that the lender was entitled to a remedy as a result of the default, but the parties were unable to agree on the appropriate remedy. Although the debtors seem to have preferred to effect a sale privately, the court ultimately appointed a receiver.⁴⁹

51. The court in *Barber Group Rentals* found that even if the debtors were in a position to effect a sale of the property that would be sufficient to pay out the lender in full, such proposal would not necessarily be foreclosed as a result of the appointment of a court-appointed receiver.⁵⁰ To the extent to the debtor has concerns, they can be addressed at the time the sale approval is sought.⁵¹

52. In coming to this decision, Justice Morawetz held that “[t]he Debtors are no longer in a position to control the process.”⁵² Likewise, by their default, which is one of a long line of defaults, the Respondents in this Application are no longer in a position to control the process.

⁴⁸ *Business Development Bank supra* note, para 21, Tab 4 of the BOA.

⁴⁹ *Barber Group Rentals, supra* note, Tab 5 of the BOA.

⁵⁰ *Ibid*, para 3.

⁵¹ *Ibid*, para 7.

⁵² *Ibid*, para 3.

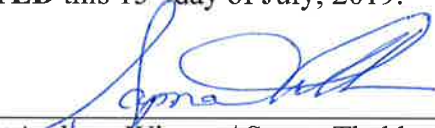
53. The Lenders have chosen to enforce their contractual right to seek the appointment of a receiver following the Debtors' default and respectfully, the court should not interfere with the rights derived by a private contract.

54. In any event, it is just and convenient to appoint KSV as the Receiver over the Property in the circumstances of this case.

PART IV - ORDER REQUESTED

55. For the reasons set forth herein, the Applicants respectfully request an Order appointing KSV as receiver of the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of July, 2019.



Andrew Winton / Sapna Thakker

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SCHEDULE “A”

LIST OF AUTHORITIES

- 1 *GE Commercial Distribution Finance Canada v. Sandy Cove Marine Co.*, 2011 ONSC 3851
- 2 *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] OJ No 330 (Gen. Div.)
- 3 *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013] O.J. No. 5399
- 4 *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965
- 5 *GE Canada Equipment Financing G.P. v. Barber Group Rentals Inc.*, 2011 CarswellOnt 5878

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

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.

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

Injunctions and receivers

101 (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.

KINGSETT MORTGAGE CORPORATION et al.
Applicants

-and-

IDEAL (BC) DEVELOPMENTS INC. et al.
Respondents

Court File No. CV-19-00622054-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANTS

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