

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

**IN THE MATTER OF SECTION 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**

B E T W E E N:

NHE CAPITAL CORP.

Applicant

- and -

111 SHERWOOD INVESTMENTS INC.

Respondent

FRESH AS AMENDED FACTUM OF THE APPLICANT
(Application returnable on April 19, 2024 at 10:00 a.m. by Zoom)

April 17, 2024

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TO: SERVICE LIST

PART I - OVERVIEW

1. The Applicant applies for the appointment of KSV Restructuring Inc. (“KSV”) as receiver and manager of the assets, undertakings and property of the Respondent 111 Sherwood Investments Inc. (the “Debtor”), including, without limitation, the property municipally known as 111 Sherwood Drive, in Brantford, Ontario (the “Real Property”).
2. The Debtor is indebted to the Applicant in connection with a loan in the principal amount of \$12,000,000 (the “Loan”). The Loan matured on April 1, 2023. Notices under section 244 of the *Bankruptcy and Insolvency Act* (the “BIA”) have been issued under the Loan, but the indebtedness remains unpaid.
3. This application was originally returnable on July 4, 2023. On June 30, 2023, the Applicant agreed to forbear from exercising its security subject to certain terms and conditions, including that the Debtor would be required to make monthly payments of interest under the Applicant’s mortgage and the Debtor consented to an order appointing KSV as receiver and manager upon the earlier of an event of default or April 1, 2024.
4. The Debtor defaulted on the forbearance agreement by failing to pay interest on February 1, 2024. Moreover, April 1, 2024 has come and gone and the Loan remains unpaid. As of April 12, 2024, \$12,351,773.92 was owing under the Loan. *Per diem* interest in the amount of \$4,356.16 is accruing under the Loan.
5. The Real Property is an income producing property which the Applicant is not qualified to manage. A Court-appointed receiver is ideally suited to manage and maintain the Real Property and to implement a fair and transparent process to market and sell the Real Property, with regard to the interests of all of the Debtor’s stakeholders.

6. In the circumstances, it is just and convenient to appoint a receiver.

PART II – SUMMARY OF FACTS

The Loan and Security

7. The Applicant holds, as security for the Loan, among other things, a first charge against the Real Property registered on March 24, 2022 (the “**First Charge**”), a general assignment of leases and rents and a general, first priority, site-specific security agreement against the present and after acquired personal property of the Debtor (but not its tenants) relating solely to the Real Property (the “**GSA**”). Notice of the Applicant’s security interest under the GSA is registered under the *Personal Property Security Act* (Ontario).¹

8. The First Charge secures payment of the principal sum of \$14,400,000, together with interest at the rate of the greater of (i) 8.50% per annum and (ii) the floating annual rate of interest established by Canadian Imperial Bank of Commerce on similar loans plus 6.05%, calculated and payable monthly, interest only.²

9. The First Charge and the GSA respectively contain contractual rights to appoint a receiver over the Real Property and personal property collateral upon default.³

10. The Real Property is a 10.31 acre multi-tenant site referred to as the “Brantford Cordage District” in the southwestern portion of the City of Brantford. There are a number of industrial

¹ Exhibits C, D, and E, Affidavit of Ely Rechtsman sworn on May 19, 2023 [“First Rechtsman Affidavit”], Tab 2, Application Record [“App. Rec.”], pp. 72, 87 and 98.

² Exhibit C, First Rechtsman Affidavit, Tab 2, App. Rec., p. 72.

³ Exhibit C at s. 23, First Rechtsman Affidavit, Tab 2, App. Rec., p. 80; Exhibit E at s. 9(a), First Rechtsman Affidavit, Tab 2, App. Rec., p. 103.

buildings on the Real Property. Except for one building which has a second storey office, the buildings are single storey buildings. Collectively, the buildings comprise approximately 197,914 square feet of leasable space, and have a variety of acceptable uses, including retail, office, flex and industrial.⁴

Loan Maturity and Failure to Comply With Renewal Terms

11. In March, 2023, before the Loan was set to mature on April 1, 2023, the Debtor requested and the Applicant agreed in principle to renew the Loan for an additional term of six months.⁵

12. The Applicant's agreement in principle to renew was subject to, among other things, the Debtor paying a lender's fee of \$120,000, the Debtor paying the Applicant's legal fees in connection with the renewal and the Debtor agreeing to an increased rate of interest under the Loan.⁶

13. On March 23, 2023, the Applicant learned that contrary to a term of the Applicant's security prohibiting subordinate encumbering of the Real Property, a charge in favour of Olympia Trust Company ("**Olympia**") in the principal amount of \$7,965,000 had been registered on October 19, 2022.⁷ Additionally, a construction lien in the amount of \$180,132 had been registered by Lubek Electric Inc. (the "**Lubek Lien**") on March 16, 2023.⁸

14. Notwithstanding that Olympia's charge had been registered without the Applicant's consent, the Applicant was nonetheless agreeable to proceeding with the renewal provided that the

⁴ First Rechtsman Affidavit at para. 4, Tab 2, App. Rec. p. 30.

⁵ First Rechtsman Affidavit at para. 17, Tab 2, App. Rec., p. 34.

⁶ First Rechtsman Affidavit at para. 18, Tab 2, App. Rec., p. 34.

⁷ Exhibit K, First Rechtsman Affidavit, Tab 2, App. Rec., p. 140.

⁸ Exhibit L, First Rechtsman Affidavit, Tab 2, App. Rec., p. 143.

Lien was discharged and Olympia was prepared to execute a subordination and standstill agreement on terms acceptable to the Applicant.⁹

15. The Debtor failed to discharge the Lubek Lien, failed to pay the lender's fee of \$120,000, and failed to pay the Applicant's legal fees in connection with the renewal.¹⁰

Demand and BIA Notice

16. As a result of the maturity of the Loan and the Debtor's failure to comply with the renewal terms, on April 19, 2023, the Applicant made written demand on the Debtor for payment of the indebtedness owing under the Loan, being \$12,115,693.83, and issued a notice of intention to security pursuant to section 244 of the BIA (the "**BIA Notice**").¹¹

The Within Application to Appoint a Receiver

17. The Applicant commenced this application to appoint a receiver on May 23, 2023, following which, the Debtor paid off the Lubek Lien, but a new lien in favour of Harbour Hills Construction Management Inc. (the "**Harbour Lien**") had been registered on title to the Real Property.¹² The Harbour Lien was in the amount of \$160,323, but has since been removed from title to the Real Property.

18. Prior to the return of the application on the merits on July 4, 2023, the Applicant, the Debtor and the guarantors of the Loan entered into a forbearance agreement on June 30, 2023 (the "**FA**")

⁹ First Rechtsman Affidavit at para. 20, Tab 2, App. Rec., p. 35.

¹⁰ First Rechtsman Affidavit at para. 21, Tab 2, App. Rec., p. 35.

¹¹ Exhibit P, First Rechtsman Affidavit, Tab 2, App. Rec., p. 163.

¹² Exhibit A, Affidavit of Paul Muchnik sworn on June 29, 2023 at paras. 3 and 4 ["Muchnik Affidavit"], Tab 1, Supplementary Application Record ["Sup. Rec."], pp. 5 and 9.

As a result, the within application was adjourned *sine die* by endorsement of Justice Osborne dated July 4, 2023.¹³

The FA

19. The material terms of the FA include the following:
- (a) The Debtor covenanted to continue making monthly payments of interest under the Loan, the failure of which constituted an event of default under the FA;¹⁴
 - (b) The Applicant agreed to forbear from exercising its security until the earlier of an event of default under the FA or October 1, 2023 (the “**Forbearance Expiry Period**”);¹⁵
 - (c) The Debtor acknowledged that the indebtedness under the Loan as at July 1, 2023, exclusive of legal fees was \$12,282,490.64;¹⁶
 - (d) The Debtor agreed that the Applicant would not be required to issue any further section 244 BIA notices in connection with the Applicant exercising its security upon the Forbearance Expiry Period;¹⁷ and
 - (e) The Debtor consented to a form of order appointing KSV as receiver and manager of the Debtor, including the Real Property.¹⁸
20. By amendment dated October 3, 2023, the Forbearance Expiry Period was extended to mean the earlier of an event of default or April 1, 2024.

¹³ Affidavit of Ely Rechtsman sworn April 15, 2024 [“Second Rechtsman Affidavit”] at para 4, Supplementary Record dated April 15, 2024 [“2024 Supp. Rec.”], p. 2.

¹⁴ Exhibit D at s. 4.1(a), Second Rechtsman Affidavit, 2024 Supp. Record, p. 25.

¹⁵ Exhibit D at s. 3.1, Second Rechtsman Affidavit, 2024 Supp. Record, p. 24.

¹⁶ Exhibit D at s. 2.1(c), Second Rechtsman Affidavit, 2024 Supp. Record, p. 23.

¹⁷ Exhibit D at s. 3.3, Second Rechtsman Affidavit, 2024 Supp. Record, p. 25.

¹⁸ Exhibit D at s. 3.1(v), Second Rechtsman Affidavit, 2024 Supp. Record, p. 24; Exhibit E, Second Rechtsman Affidavit, 2024 Supp. Record, p. 38.

Default Under the FA

21. The Debtor defaulted on the FA by failing to pay monthly interest on February 1, 2024. The Loan remains unpaid.¹⁹ The forbearance period has therefore expired.

22. As of April 12, 2024, \$12,351,773.92 remains owing under the Loan. *Per diem* interest in the amount of \$4,356.16 continues to accrue under the Loan.²⁰

PART III – LAW AND ARGUMENT

The Just or Convenient Test

23. Section 243(1) of the *BIA* and Section 101 of the *Courts of Justice Act* provide that the Court may appoint a receiver where it is “just or convenient” to do so.

24. Where a debtor has *expressly* agreed to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.²¹

25. The significance of a contractual right to privately appoint a receiver was discussed by Justice Blair in *Bank of Nova Scotia v. Freure Village on Clair Creek*:²²

It is conceded, in effect, that if the loans are in default... - which they are the Bank is entitled to move under its security and appoint a receiver-manager privately.

...

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

¹⁹ Second Rechtsman Affidavit at para 8, 2024 Supp. Record, p. 3.

²⁰ Second Rechtsman Affidavit at para 10, 2024 Supp. Record, p. 3.

²¹ [United Savings Credit Union v. F & R Brokers Inc., 2003 BCSC 640 at para. 16.](#)

²² [Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CanLII 8258 \(ON SC\) at paras. 9 and 12.](#)

26. This principle has been extended in instances where a secured creditor applies to court for the appointment of a receiver notwithstanding that its security instrument provides only for the appointment of a private receiver.²³

27. The Applicant submits that there is nothing in the facts at bar that should cause the Court to interfere with the parties' private contractual ordering or to consider the appointment of a receiver, which was explicitly contemplated by that contractual ordering, as an extraordinary remedy. More importantly, there is no dispute that the forbearance period has expired and the Debtor has expressly consented to an order appointing KSV as receiver and manager substantially on the terms of the order in the Applicant's supplementary application record.

The Appointment of a Receiver is the Optimal Remedy

28. It is well established that a court-appointed receiver is an officer of the court, acting in a fiduciary capacity to all parties having an interest in the subject matter of the receivership:²⁴

A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable

29. A secured creditor need not demonstrate that other remedies are ineffective before applying for the appointment of a court-appointed receiver.²⁵

30. A court-appointed receivership is the most effective and fair remedy and will allow for the utmost flexibility in responding to various contingencies because it facilitates the orderly and efficient realization of assets, judicial determination of creditor claims and priorities, and the fair

²³ [*Romspen Investment Corp. v. 1514904 Ontario Ltd.*, 2010 ONSC 1339 at paras. 23 to 26.](#)

²⁴ [*Regal Constellation Hotel Ltd., Re.*, 2004 CanLII 206 \(ON CA\) at para. 26.](#)

²⁵ [*Bank of Nova Scotia v. D.G. Jewelry Inc.*, 2002 CanLII 12477 \(ON SC\) at para. 3.](#)

distribution of proceeds to creditors by reference to their legal rights. Furthermore, a stay of proceedings will prevent any precipitous creditor action that may undermine the realization process.²⁶

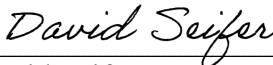
31. Having regard to the foregoing considerations, in the case at bar it is just and convenient that KSV be appointed as receiver and manager given that:²⁷

- (a) the FA is at an end and monthly interest is no longer being paid;
- (b) notwithstanding the issuance of demands and BIA Notices, the Debtor has failed to repay the Loan;
- (c) the statutory ten day notice period under the BIA has long expired; The First Charge and GSA contain contractual entitlements to appoint a receiver upon default;
- (d) pursuant to the FA, the Debtor has consented to an order appointing KSV as receiver and manager;
- (e) the Real Property is an income-producing property which the Applicant is not qualified to manage and maintain; and
- (f) a Court-appointment receiver is ideally suited to manage and maintain the Real Property and to implement and the appointment of a receiver by the court will maximize recoveries by facilitating an orderly sale of the assets, by an experienced receiver, in a transparent and court-supervised process, having regard for the interests of all of the Debtor's stakeholders.

PART IV – ORDER REQUESTED

32. For the reasons set out above, the Applicant respectfully requests an order appointing KSV as receiver and manager of the Debtor, including the Real Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 17th day of April, 2024.



David Seifer
Lawyers for the Applicant

²⁶ [Pope & Talbot Ltd., Re. 2009 BCSC 1552 at para. 131](#); [Canada \(Attorney General\) v. Reliance Insurance Co., 2007 CanLII 41899 \(ON SC\) at para. 26](#).

²⁷ Rechtsman Affidavit, Exhibit C, p.72 and para. 24, p. 32 of App. Rec.; Second Rechtsman Affidavit at para 11, 2024 Supp. Record, p. 3.

SCHEDULE “A”
LIST OF AUTHORITIES

1. [*United Savings Credit Union v. F & R Brokers Inc.*](#), 2003 BCSC 640
2. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), 1996 CanLII 8258 (ON SC)
3. [*Romspen Investment Corp. v. 1514904 Ontario Ltd.*](#), 2010 ONSC 1339
4. [*Regal Constellation Hotel Ltd., Re*](#), 2004 CanLII 206 (ON CA)
5. [*Bank of Nova Scotia v. D.G. Jewelry Inc.*](#), 2002 CanLII 12477 (ON SC)
6. [*Pope & Talbot Ltd., Re*](#), 2009 BCSC 1552
7. [*Canada \(Attorney General\) v. Reliance Insurance Co.*](#), 2007 CanLII 41899 (ON SC)

SCHEDULE “B”
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2)

33. .

NHE CAPITAL CORP.
Applicant

-and- **111 SHERWOOD INVESTMENTS INC.**
Respondent

Court File No. CV-23-00699908-00CL

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