



No. S-244083  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**KINGSETT MORTGAGE CORPORATION**

PETITIONER

AND

**3000 HENRY STREET LIMITED PARTNERSHIP**

**AND**

**0790857 B.C. LTD.**

RESPONDENTS

**REPLY**

Filed by KingSett Mortgage Corporation

In reply to: The Response filed by certain opposing unit holders of 3000 Henry Street Limited Partnership, filed July 22, 2024

**BACKGROUND**

1. Capitalized terms used, but not otherwise defined herein, shall have the meanings ascribed to them in the Petition filed by KingSett Mortgage Corporation's ("**KingSett**") on June 19, 2024 (the "**Petition**").
2. Certain unit holders of 3000 Henry Street Limited Partnership (the "**Opposing Unit Holders**") filed response materials in these proceedings on July 22, 2024 (the "**Response**"). The Opposing Unit Holders ask this Court to deny KingSett's application to appoint a receiver, in favour of enforcement progressing by foreclosure.
3. KingSett submits that, as outlined in its Petition, appointing a receiver is the most appropriate and efficient enforcement mechanism in these circumstances.

4. KingSett takes issue with two high-level items in the Opposing Unit Holders' Response:
  - (a) it does not appear that any of the unit holders of Henry Street Limited Partnership ("**Henry LP**") have standing in these proceedings; and
  - (b) the Opposing Unit Holders' opposition to the appointment of a receiver will result in unnecessary delays in KingSett's enforcement efforts and erode the value in the Property and collateral of the Respondents.

#### **THE OPPOSING UNIT HOLDERS DO NOT HAVE STANDING**

5. KingSett submits that the Opposing Unit Holders do not have standing in this matter.
6. As set out in the Petition, Henry LP and 0790857 B.C. Ltd. are the "**Borrowers**" under the Commitment Letter provided by KingSett.
7. Henry LP operates through its general partner, 1215914 B.C. Ltd. (the "**General Partner**").
8. None of the Opposing Unit Holders provided any security to KingSett in connection with the Loan, nor did they sign any of the loan documents.
9. Notably, Amin Eskooch and Navid Morawey, the principles of the General Partner, provided unlimited personal guarantees for the Loan to KingSett.
10. Pursuant to the Limited Partnership Agreement for Henry LP dated September 14, 2017 (the "**Limited Partnership Agreement**", attached as Exhibit B to the first affidavit of Hossein Ghandchi, sworn July 22, 2024):
  - (a) the purpose of Henry LP is to acquire and hold the Property, to be developed and sold, as approved by the General Partner (s. 2.2);
  - (b) the unit holders expressly agreed that "no partner, except the General Partner will ... be capable of being party to any litigation involving a claim by or against [Henry LP] other than in respect of his rights as a Limited Partnership" (s. 3.3(d)); and
  - (c) the General Partner has the power to "commence or defend any action or proceeding in connection with [Henry LP] and its business or affairs" (s. 12.1(m)).

11. Therefore, it is clear from the Limited Partnership Agreement that the Limited Partners do not have the power to be involved in these proceedings for and on behalf of Henry LP. Notably, KingSett has not named any of the Opposing Unit Holders in its Petition and is not seeking recourse against the Opposing Unit Holders at this time.
12. The General Partner is expressly empowered to commence or defend proceedings in respect of Henry LP.
13. As set out in the email from Amin Eskooch (the “**Eskooch Email**”), attached to the Second Affidavit of Samatha Tse, sworn July 24, 2024, KingSett understands that the General Partner is supportive of KingSett’s application to appoint a receiver in these circumstances.
14. Particularly, in the Eskooch Email, Mr. Eskooch emphasizes the following points in support of the receivership:
  - (a) there have been previous marketing efforts for this Property, which did not result in a sale, and yielded bids significantly below the appraised values;
  - (b) there are a number of permits obtained in connection with the Property that will be at risk of expiration if not attended to in short order, particularly:
    - (i) “**Development Permit**”: the General Partners obtained the Development Permit, but building must commence within 24 months of the issuance of the Development Permit, which requires building to commence by June 2025, otherwise this permit will expire;
    - (ii) “**Building Permit**”: the General Partner was able to submit an application for a Building Permit prior to the deadline to submit before more onerous changes to the building permit code were in force. But this application is incomplete and immediate steps are required to ensure this Building Permit will be issued in accordance with the prior rules, any delay in completing this process could jeopardize the issuance of a Building Permit;
    - (iii) “**Subdivision**”: it is a condition of the Building Permit application that the Property be subdivided. There are a number of conditions that have to be

completed within 12 months of submitting the Building Permit with respect to the subdivision. Currently, the General Partner has only six months to meet these conditions or else risks the expiry of the Building Permit application;

- (c) interest is continuing to accrue on the Loan and any further delays in the enforcement process will continue to erode any equity Henry LP holds as interest accrues;
  - (d) KingSett has already provided six months of marketing time to the Borrowers which has not yielded any results. It is the view of the General Partner that the sooner the Property is marketed, the more likely a buyer can be found with sufficient time to completed due diligence and ensure the permit and subdivision timelines do not expire.
15. KingSett submits the position of the General Partner should be given significant weight over the Opposing Unit Holders in these circumstances, given that:
- (a) the Limited Partnership Agreement expressly provides the General Partner with the power to defend actions on behalf of Henry LP;
  - (b) the principles of the General Partner have provided personal guarantees to KingSett in connection with the Loan and therefore have a clear interest in ensuring the most value is obtained for the Property in these circumstances; and
  - (c) it is the job of the General Partner to develop this Property, it has the understanding of the details and the value of the Property and it is of the view that any undue delay will decrease the value of the Property.
16. Therefore, KingSett submits that the Response should not hold significant weight with this Court and the views of the General Parter ought to be considered.

## **APPOINTMENT OF THE RECEIVER IS APPROPRIATE**

17. Notwithstanding the issue of standing, the Opposing Unit Holders argue that a receiver should not be appointed by the Court, as foreclosure proceedings are more equitable in these circumstances, particularly if the foreclosure proceedings come with a six month redemption period.

18. In the Response, the Opposing Unit Holders submit that the following points factor against appointing a receiver in this case:

(a) the Property is bare land that does not require maintenance;

*Response, Part 1, para. 24.*

(b) the appraisal evidence shows that KingSett is well secured;

*Response, Part 1, para. 25.*

(c) a receivership is costly; and

*Response, Part 1, para. 27.*

(d) a receivership would defeat the equitable right of redemption.

*Response, Part 2, para. 4*

19. With respect to these factors, KingSett submits that:

(a) bare land: while property is bare land, a receiver is still extremely valuable. As indicated, there are permits that need to be maintained and a subdivision process to complete, which the receiver will attend to, in the view of preserving the value of the Property and its development potential;

(b) appraisal: the appraisal evidence led by the Opposing Limited Partners is outdated and KingSett submits is not reflective of the current real estate market. More useful to this Court's analysis is the previous marketing efforts for this Property which,

have yielded offers significantly below the appraised value, and none of which resulted in a sale;

- (c) cost of the receivership: while receiverships do cost money, there are certain permits that risk expiration if the enforcement proceeds under the timelines of a foreclosure. This would significantly decrease the value of the Property and likely reduce recoveries under foreclosure proceedings, potentially making that process more costly than a receivership. Further, interest continues to accrue on the KingSett Loan and a lengthy foreclosure process will result in additional interest being due and owing, eroding any equity held by Henry Street LP in the Property; and
- (d) redemption: the appointment of a receiver does not negate the right to redeem the Property. The parties have the right to redeem the Property until this Court grants an order approving a sale of the Property. The receivership itself does not negate the right to redeem. It is the intention of KingSett, if a receiver is appointed, to bring an application to this Court to approve a sales process in short order. At which time, the Court can assess the timelines proposed by KingSett with respect to a sales process and in consideration of the right on the parties to redeem the Property and the timelines with respect to the permits.

## **CASE LAW REGARDING RECEIVERSHIP AND FORECLOSURE**

- 20. Justice Fitzpatrick recently considered whether a receiver should be appointed to sell certain real property or if enforcement should proceed by foreclosure in *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership* (“**Haro-Thurlow**”).

***Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership, 2024, BCSC 47***  
**[“Haro-Thurlow”]**

- 21. In *Haro-Thurlow*, the loan parties argued for foreclosure proceedings over a receivership.

***Haro-Thurrow, at paras. 77.***

22. Justice Fitzpatrick agreed that, as KingSett set out in the Petition, the *Maple Trade* factors are the appropriate considerations for the appointment of a receiver, but Justice Fitzpatrick emphasized that the *Maple Trade* should be considered holistically.

***Haro-Thurow, at para. 74.***

23. In considering the *Maple Trade* factors, Justice Fitzpatrick recognized that “where a secured party is entitled to appoint a receiver, the "extraordinary nature of the remedy is less central to the inquiry".”

***Haro-Thurow, at para. 144.***

24. Justice Fitzpatrick recognized in *Haro-Thurow*, the issue was not whether or not foreclosure would be a more appropriate process, but rather, foreclosure made it more likely that the debtors would have an additional six months to redeem the property. Justice Fitzpatrick noted: “recognizing that an equity of redemption exists, even in a receivership, the true issue in that event is what amount of time should be afforded to the Borrowers and/or Forseed to redeem BMO's mortgage”.

***Haro-Thurow, at para. 103.***

25. After reviewing the law of receiverships and foreclosures in British Columbia, Justice Fitzpatrick emphasized that “a redemption can take place at any time prior to a sale being approved by the Court on application by any receiver”.

***Haro-Thurow, at para. 93..***

26. In determining that a receiver was appropriate in *Haro-Thurow*, Justice Fitzpatrick reasoned that:

95. The issue could be considered through the lens of either foreclosure or receivership, as both are paths that a secured creditor, such as BMO may follow. As many cases illustrate, even within a foreclosure, receivership appointments may be sought. A secured creditor is entitled to elect the means by which the security

will be enforced, as provided in the Credit Agreement, subject of course to the Court granting any relief sought from it.

***Haro-Thurow, at para. 95.***

27. In *Haro-Thurow*, Justice Fitzpatrick concluded a receiver was more appropriate, as the borrowers had been given significant time to redeem the land prior to the application to appoint a receiver, the receiver intended to run a sales process which would allow the borrowers more time to redeem the property during the receivership, and the land was commercial land, not residential, that could benefit from a receivership.

***Haro-Thurow, at paras. 107, 108, 146, 158, 163.***

28. In this case, KingSett submits that as set out in the Petition, the appointment of a receiver is appropriate. Like in *Haro-Thurow*, KingSett has provided time to the Borrowers to redeem or sell the property (six months has past since the original default), the lands are commercial lands that will benefit from a receiver, specifically with respect to permitting, and the lands are not a simple residential property.
29. Further, the General Partner is supportive of the appointment of a receiver and does not see value in any further delays in the enforcement process.
30. Finally, KingSett is not seeking the approval of a sale at this time. If a receiver is appointed, KingSett will seek this Court's approval of a sales process, at which time the Court may consider if the timelines are appropriate in the circumstances, considering the right to redeem the property, but also permitting issues and marketing timelines.
31. KingSett submits that, looking at the *Maple Trade* factors holistically and recognizing that KingSett is entitled to appoint a receiver under its Security documents, it is appropriate to appoint a receiver in these circumstances.

Dated: July 24, 2024

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Signature of Lawyer for the Plaintiff(s)

Emma Newbery

Rule 7-1 (1) of the *Supreme Court Civil Rules* states:



(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
  - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
  - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.