

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**CMLS FINANCIAL LTD.**

Applicant

- and -

**ASHCROFT URBAN DEVELOPMENTS INC.**

Respondent

**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, CMLS FINANCIAL LTD.  
(returnable February 24, 2025)**

February 19, 2025

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## PART I – NATURE OF THE APPLICATION

1. The Applicant, CMLS Financial Ltd. (“**CMLS**”), makes an application for an Order (the “**Receivership Order**”), in substance, appointing KSV Restructuring Inc. (“**KSV**”) as receiver (in such capacity, the “**Receiver**”), without security, of all the assets, properties and undertakings of Ashcroft Urban Developments Inc. (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor and all proceeds thereof (collectively, the “**Property**”), including, without limitation, the real property at the address municipally known as 101 Queen Street and 110 Sparks Street, Ottawa, Ontario (the “**Real Property**”).

2. The Debtor is a real property holding company which owes CMLS more than \$51 million. CMLS holds security over the assets of the Debtor including, without limitation, a general security agreement and charge over the Real Property, which give CMLS the right to apply to court for the appointment of a receiver. In addition, the Debtor has consented to the appointment of a receiver.

3. CMLS made formal demand on the Debtor on November 15, 2023, which demand has not been honoured. Instead, the Debtor initiated an application under the *Companies’ Creditors Arrangement Act* (the “**CCAA**”) without notice to CMLS. As described herein, the CCAA proceedings were ultimately dismissed and KSV was appointed as interim receiver of the Debtor.

4. CMLS is justified in having lost confidence in the Debtor and its management, and it is respectfully submitted that it is just and convenient for the Receiver to be appointed.

## PART II – SUMMARY OF FACTS

5. The Debtor is a privately-owned Ontario corporation. David Choo is a director and officer, and Manny DiFilippo is also an officer. The Debtor is the registered owner of the Real Property.

**Affidavit of Jeff Burt sworn February 7, 2025 [Burt Affidavit] at paras. 3-5, Tab 4 of CMLS' Application Record dated February 18, 2025 [Application Record].**

6. The Debtor is indebted to CMLS in connection with the loan that CMLS advanced to the Debtor (the “**Loan**”) pursuant to and under the terms of the commitment letter dated July 8, 2021, as amended by the commitment letter amendment dated August 9, 2021 (together, the “**Credit Agreement**”).

**Burt Affidavit, *supra* at para. 6.**

7. Equitable Bank and General Bank of Canada are participants in the Loan made by CMLS to the Debtor under the Credit Agreement, and CMLS services that Loan. Additionally, the Credit Agreement names Computershare Trust Company of Canada as mortgagee (in such capacity, the “**Custodian**”), such that the Custodian holds title to the security for CMLS as the beneficial owner (and, through CMLS, the other Loan participants). Furthermore, the Custodian acts at the direction of CMLS.

**Burt Affidavit, *supra* at paras. 7-8.**

8. To secure its obligations to CMLS, the Debtor provided security to CMLS (the “**Security**”), including, without limitation:

- (a) the first charge/mortgage in the principal amount of \$65,000,000 in respect of the Real Property, which was registered on title as Instrument No. OC2385994 on August 12, 2021 (the “**Mortgage**”);

- (b) the general assignment of rents in respect of the Real Property, which was registered on title as Instrument No. OC2385999 on August 12, 2021; and
- (c) the site-specific general security agreement dated August 4, 2021 (the “**GSA**”), registration in respect of which was made under the *Personal Property Security Act* (Ontario) (the “**PPSA**”).

**Burt Affidavit, *supra* at para. 9.**

9. The Custodian is the senior secured creditor registered under the PPSA against the Debtor, holding the sole registration against all collateral categories other than consumer goods. Aside from the Custodian’s registration, the PPSA search results also show three other registrations, all of which are limited in scope to the Accounts and Other collateral categories.

**Burt Affidavit, *supra* at paras. 11-12.**

10. Likewise, the Custodian holds the first-ranking (and only) Mortgage over the Real Property.

**Burt Affidavit, *supra* at para. 13.**

11. The Loan matured on September 1, 2023 and was not repaid by the Debtor at that time, which constituted a default under the Credit Agreement and the Security (together, the “**Financing Agreements**”). In any event, the Debtor was in default of other payment and covenant conditions under the Financing Agreements including, without limitation, non-payment of taxes.

**Burt Affidavit, *supra* at para. 14.**

12. On November 15, 2023, CMLS made formal written demand on the Debtor for the payment of the amounts owed to CMLS under the Financing Agreements (the “**Demand Letter**”). A notice

of intention to enforce security (the “**BIA Notice**”) pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) accompanied the Demand Letter.

**Burt Affidavit, *supra* at para. 15.**

*Bankruptcy and Insolvency Act* (Canada) [BIA], s. 244(1).

13. As particularized in more detail in the Demand Letter, as of November 9, 2023, \$58,920,629.31 was owing by the Debtor to CMLS for principal, interest and costs, plus accruing interest and costs (collectively, the “**Demanded Indebtedness**”).

**Burt Affidavit, *supra* at para. 16.**

14. The Demand Letter led to the execution of a forbearance agreement dated February 23, 2024 among CMLS, the Debtor, and Mr. Choo as guarantor (the “**Forbearance Agreement**”). The essential terms of the Forbearance Agreement were that (i) the Debtor acknowledged the existing defaults; (ii) the Debtor was to provide (and did provide) additional security by way of a \$10 million collateral mortgage over a property at 256 Rideau St., Ottawa, Ontario; (iii) the Debtor was to refinance the Real Property on or before May 31, 2024; and (iv) the Debtor provided a consent to receiver (the “**Consent to Receiver**”), to be used in the event of the termination or expiration of the forbearance period.

**Burt Affidavit, *supra* at para. 17.**

15. As the Debtor was unable to repay the Demanded Indebtedness by the end of the initial forbearance period, an extension was granted to September 30, 2024 (the “**First Forbearance Extension Agreement**”) to allow the Debtor to complete a sale of the real property at 256 Rideau Street and apply the proceeds of such sale to pay down the Loan by the amount of the \$10 million

collateral mortgage provided under the Forbearance Agreement. This sale and partial paydown of the Loan were completed.

**Burt Affidavit, *supra* at para. 18.**

16. The extended forbearance period expired without repayment on September 30, 2024, and the parties entered into a second forbearance extension agreement which would have provided a further extension through to March 31, 2025 (the “**Second Forbearance Extension Agreement**”). However, the conditions precedent were not met and the Second Forbearance Extension Agreement did not take effect. Consequently, full repayment of the matured Loan is due and CMLS is in a position to enforce the Debtor’s obligations under the Financing Agreements, and to exercise its rights under the Consent to Receiver.

**Burt Affidavit, *supra* at para. 20.**

17. As of February 6, 2025, the indebtedness is approximately \$51,380,062.16 inclusive of principal, interest and costs, plus accruing interest and costs. More than 15 months after the maturity of the Loan and Mortgage, this indebtedness has still not been repaid in full.

**Burt Affidavit, *supra* at para. 21.**

18. In the past, and as reflected in the Forbearance Agreement, when the Debtor has been unable to meet its obligations to CMLS, it has also fallen delinquent in payment of priority payables. As such, and given the Debtor’s ongoing financial struggles, CMLS is concerned that the Debtor will not be able to keep its taxes current on a go-forward basis, thereby compromising CMLS’ security position.

**Burt Affidavit, *supra* at para. 22.**

19. On December 5, 2024, the Debtor and certain affiliated entities (together, the “**Ashcroft Entities**”) obtained an initial order under the CCAA without any prior notice to CMLS in proceedings bearing Court File No. CV-24-00098058-0000.

**Burt Affidavit, *supra* at paras. 25-26.**

20. At the comeback hearing on December 12, 2024, Equitable Bank opposed the CCAA proceedings on behalf of CMLS and instead supported the appointment of an interim receiver.

**Burt Affidavit, *supra* at para. 26.**

21. Within the CCAA proceedings, the Ashcroft Entities filed a cash flow projection which did not keep secured creditors current and reflected that proceeds from certain projects were being used to fund shortfalls in other projects. It is concerning to CMLS that funds may have flowed out of the Debtor to other of the Ashcroft Entities while CMLS was not receiving the payments it was and remains owed. The Receiver will need to consider these transfers as reviewable transactions.

**Burt Affidavit, *supra* at para. 27.**

**Burt Affidavit, *supra* at Exhibit “N”.**

22. On December 20, 2024, The Honourable Justice Mew granted an Order (the “**IR Order**”) appointing KSV as interim receiver over certain of the Ashcroft Entities, including the Debtor. The IR Order provides for a transition from the interim receivership to a receivership including, without limitation, provision with respect to the Property-specific costs incurred during the course of the interim receivership. Specifically, paragraph 19 of the IR Order states that a mortgagee may seek the appointment of a receiver upon payment of such Property-specific costs. Accordingly, CMLS proposes a form of Order in these proceedings which would port the Property-specific costs of the interim receivership into the new receivership proceedings.

**Burt Affidavit, *supra* at paras. 28-29.**

### **PART III – ISSUE**

23. The sole issue to be determined on this application is whether it is just and convenient for this Court to appoint KSV as Receiver over the Property.

### **PART IV – LAW AND ARGUMENT**

#### *The Test for Appointing a Receiver*

24. CMLS seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act* (Ontario) (the “CJA”). Both statutes enable the Court to appoint a receiver and manager where such appointment is “*just or convenient.*”

**BIA, *supra* s. 243(1).**

***Courts of Justice Act* (Ontario) [CJA], [s. 101](#).**

25. In determining whether it is “*just or convenient*” to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of The Honourable Mr. Justice Blair in *Freure Village*. In that case, His Honour confirmed that, in deciding whether the appointment of a receiver is just or convenient, the court “*must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto,*” which includes the rights of the secured creditor under its security.

***Bank of Nova Scotia v. Freure Village of Clair Creek*, [40 C.B.R. \(3d\) 274, \[1996\] O.J. No. 5088 at para. 10](#) (Gen. Div. [Comm. List]) [*Freure Village*].**

26. When the rights of the secured creditor under its security include a specific right to the appointment of a receiver (as in the present case), the burden on the applicant seeking the relief is relaxed. Indeed, The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that:



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

*Elleway Acquisitions Limited v. The Cruise Professionals Limited*, [2013 ONSC 6866](#) at [para. 27](#) [*Elleway Acquisitions*].

27. More recently, The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed in *iSpan Systems* by The Honourable Mr. Justice Osborne:

Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].

*iSpan Systems LP*, [2023 ONSC 6212](#) at [para. 31](#) [*iSpan Systems*].

28. The appointment of a receiver becomes less extraordinary still when dealing with a default under a mortgage, as in the present case.

*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [paras. 43-44](#).

29. Furthermore, when a debtor executes a consent to receivership (as the Debtor did in this case), courts have very recently held that commercial certainty expects a court to honour such negotiated agreements and consents. As was held by The Honourable Justice M.A. Marion:

Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order...

*ATB Financial v. Mayfield Investments Ltd.*, [2024 ABKB 635](#) at [para 40](#).

*It is Just and Convenient to Appoint the Receiver*

30. CMLS submits that the test for the appointment of a receiver is met. CMLS is contractually entitled, via the Security held by the Custodian and the Consent to Receiver, to have a receiver appointed over the Debtor. Default has occurred under the Financing Agreements and the appointment of KSV as Receiver is not an extraordinary remedy; it is simply the result of enforcing a contractual term that was mutually assented to by the Debtor and CMLS.

**Burt Affidavit, *supra* at Exhibit “E”, Additional Provisions to CMLS Loan No. 50728, s. 60.**

**Burt Affidavit, *supra* at Exhibit “G”, GSA, s. 6.1(a).**

**Burt Affidavit, *supra* at Exhibit “N”, Forbearance Agreement, Schedule “B” Consent to Receiver.**

31. CMLS wishes to take any and all steps necessary to enforce its Security and realize on same, and the appointment of KSV as Receiver is necessary for the protection of the Debtor’s estate and the interests of CMLS as a secured creditor.

**Burt Affidavit, *supra* at para. 24.**

32. KSV is a licensed insolvency trustee. As stated above, KSV was appointed as interim receiver over the Debtor on December 20, 2024 and is therefore familiar with the circumstances of the Debtor. KSV has consented to act as the Receiver should the Court so appoint it.

**Burt Affidavit, *supra* at para. 32.**

**PART V – RELIEF REQUESTED**

33. In light of the foregoing, it is respectfully submitted that this Court should grant the Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of February, 2025.



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**SCHEDULE “A”  
AUTHORITIES CITED**

Jurisprudence

1. *ATB Financial v. Mayfield Investments Ltd.*, [2024 ABKB 635](#).
2. *Bank of Nova Scotia v. Freure Village of Clair Creek*, [40 C.B.R. \(3d\) 274](#),  
[\[1996\] O.J. No. 5088](#) (Gen. Div. [Comm. List]).
3. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#).
4. *Elleway Acquisitions Limited. v. The Cruise Professionals Limited*, [2013 ONSC 6866](#).
5. *iSpan Systems LP*, [2023 ONSC 6212](#).

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

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, s. 243**

**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.

**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.

### **Advance notice**

**244** (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.

### **Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, s. 101**

### **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.

**CMLS FINANCIAL LTD.**

- and -

**ASHCROFT URBAN DEVELOPMENTS INC.**

Applicant

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Court File No. CV-25-00098804-0000

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