



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-23-00700694-00CL DATE: 20 July 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: FIERA FP REAL ESTATE FINANCING FUND LP v. CHANCERY (OSHAWA)  
THE BARTLETT LTD PARTNERSHIP

BEFORE JUSTICE: KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
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Name of Person Appearing	Name of Party	Contact Info

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**ENDORSEMENT OF JUSTICE KIMMEL:**

1. Fiera FP Real Estate Financing Fund, L.P. ("Fiera" or the "Applicant") seeks orders, inter alia:
  - a. an Order (the "Receivership Order") appointing KSV Restructuring Inc. ("KSV") as receiver (in such capacity, the "Receiver") of: (i) all of the assets, undertakings and properties of Chancery (Oshawa) The Bartlett Limited Partnership and Chancery (Oshawa) the Bartlett GP Inc. (collectively, the "Debtors"); and (ii) the real property known municipally as 550 Bond Street West, Oshawa, Ontario and legally described in PINs 16301-0236 (LT), 16301- 0464 (LT) and 16301-0462 (LT) (the "Land" and with (i), the "Property");
  - b. approval the sale process for the Property proposed by KSV ("Sale Process") in its report dated July 13, 2023 (the "Proposed Receiver's Report"); and
  - c. an Order (the "Rectification Order" and with the Receivership Order, the "Orders") declaring that certain minor errors in certain of the Security (as defined below) entered into mutually by the Applicant and the Chancery Group (as defined below) are rectified.
2. This motion has proceeded on an unopposed basis. At the outset, the court disclosed a conflict that would prevent an adjudication today on any issues of controversy dependent upon the affidavit of Stephen Suske affirmed July 19, 2023 that was primarily directed to one aspect of the proposed Receiver's Sale Process (the time that had been allotted for the phase 2 marketing). The other issue that had been raised in that affidavit, about the inclusion of another prospective listing agent in the pool of potential agents to be considered by the proposed Receiver, was agreeable to the applicants and the Receiver.
3. After a brief recess the parties reached a compromise on the disputed marketing period, with the result that the final form of order was not opposed by any party, upon the inclusion in this endorsement of the following modification with respect to the approval of the Sale Process:

Pursuant to Paragraph 29 of the receivership order dated July 20, 2023 (the "**Receivership Order**") (terms as defined therein), the Sale Process is hereby approved subject to a modification that Phase 2 - Marketing under column "Timeline" at section 4.2 of the Proposed Receiver's Report be changed from "Day 29 to Day 63/68" to "Day 29 to Day 79".

4. Fiera has the right under its various security and loan documents to appoint the Receiver. The Receiver has consented to act as a court-appointed officer. Furthermore, it is just and convenient to appoint the Receiver for the ultimate purpose of effecting a timely sales process to monetize the Land and preserve the Property for the benefit of all stakeholders.
5. The Land is marketed for lease to seniors online as "The Bartlett", which is a fully constructed 129-unit apartment building with approximately 11,000 square feet of retail space and which functions as a

seniors' apartment building (the "Project"). The Project was financed by Fiera through credit facilities (collectively, the "Credit Facilities"), all as set out in a commitment letter dated November 25, 2020, as amended. Fiera holds certain security for the Credit Facilities made available pursuant to the Commitment Letter (collectively, the "Security"). Fiera is owed the principal sum of \$53,250,000 (which includes an interest reserve in the amount of \$3,185,000) (the "Loan"). The maturity date on the Loan was March 31, 2023, which has not been extended. Interest, fees and costs continue to accrue.

6. Upon maturity of the Loan, various demands were made and notices were given under the BIA.

#### Appointment of Receiver

7. Section 101 of the *Courts of Justice Act*, as amended provides for the appointment of a receiver by this Court where it is "just or convenient". Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just or convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.
8. The Applicant is a secured creditor with a perfected security interest pursuant to its real property registrations and PPSA registration. It delivered the requisite notices pursuant to s. 244 of the BIA and the ten-day notice period has expired. The other technical requirements under the BIA for the appointment of the Receiver have been satisfied.
9. In order for the Court to order the appointment of a receiver, the Applicant must demonstrate that it is just and convenient in light of the interests of all the affected parties. This requires the court to consider all of the circumstances, the nature of the property, and the rights and interests of all parties, including the rights of the secured creditor under its security. See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258 (ONSC), at paras. 10 -13; See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, in which Morawetz J., as he then was, stated:  
... 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. [ ... ]
10. There has been a default, there is evidence that the Security may be deteriorating and there is a contractual right to appoint a receiver. I consider it to be just and convenient to do so in the circumstances of this case and for the reasons outlined in more detail in the material filed in support of this application.
11. I am also satisfied that the terms of the appointment order in this case are appropriate. This is reinforced by the fact that no party opposes them and they are substantially in line with the terms of the Commercial List Model Order.

#### Approval of the Sale Process

12. In *CCM Master Qualified Fund Ltd y blutip Power Technologies Ltd.*, 2012 ONSC 1750 at para 6, the court held that the criteria identified in *Royal Bank of Canada v. Soundair Corp.*, [1991] 83 DLR (4th) 76, 4 OR (3d) 1, at para 16, also inform the determination of whether to approve a court-appointed receiver's proposed sale process, as a court must assess the commercial efficacy of the process, the fairness of the process, and whether the process will optimize the chances of securing the best price for the assets.
13. In this case,
  - a. The Sale Process will be conducted by KSV as Receiver, and will include a process to determine a listing agent considered appropriate by the receiver to list the Real Property for sale;

- b. The Sale Process will contemplate a broad public marketing process for the Real Property, including the preparation of relevant marketing materials. This comprehensive marketing process will provide extensive exposure for maximization of value of the assets;
  - c. KSV, as Receiver, will evaluate offers as and when received on key objective criteria, including, but not limited to, consideration offered, closing conditions (if any), time required to close and other relevant factors;
  - d. The Sale Process (as now modified by the agreed upon qualification noted earlier in this endorsement) is commercially reasonable and consistent with other processes approved by this Honourable Court.
14. The Sale Process also preserves a credit bid option for Fiera, which is a recognized feature of some commercial real estate processes in insolvency proceedings. *See Kingsett Mortgage Corp. and Dorr Capital Corp v. Stateview Homes (Minu Towns) Inc. et al.* (June 5, 2023) SCJ [Commercial List] CV-23-00698576-00CL (Endorsement).
15. The parties having sorted through the objection to KSV's proposed Sale Process such that it is now unopposed, and having regard to the relevant *Soundair* principles, I am satisfied that the Sale Process should be approved.

#### Rectification of Security

16. The Applicant has identified a minor administrative typographical error in certain of the Security (including in certain guarantees) due to a mutual mistake. In particular, while the legal description of each parcel making up the Land is stated correctly in the Documentation, the third PIN listed in the Documentation states "PIN 16301-0236 (LT)", when it should instead state "PIN 16301-0462 (LT)" in order to match the corresponding legal description.
17. The financing statements registered under the *Personal Property Security Act*, RSO 1990, c P.10 ("PPSA") are not invalidated by virtue of this type of administrative or typographical mistake. See PPSA s. 46(4) and *Re Lambert*, [1994] 119 DLR (4th) 93, 20 OR (3d) 108; see also *Fairbanx Corp. v. Royal Bank of Canada*, 2010 ONCA 385.
18. Rectification is an equitable remedy that is available in situations such as this, to correct a contract in order to reflect the common intention of the contracting parties. See *Royal Bank of Canada v El-Bris Ltd.*, 2008 ONCA 601 at para 13.
19. This Honourable Court has previously rectified mutual mistake errors in insolvency matters using the doctrine of rectification where typographical errors are improperly recorded, if it is "beyond any serious dispute that both parties intended from the outset that [the error] was the result of a simple clerical mistake". See *Bridging Finance Inc. v 1033803 Ontario Inc.*, 2023 ONSC 1721, at para 45.
20. I am satisfied that these factors are met in this case and that the rectification order requested (and not opposed) should be granted.

#### Orders

21. The two amended orders now signed by me (Order Appointing the Receiver/Approving the Sale Process and Rectification Order) may now issue.



KIMMEL J.

