No. VLC-S-S-246994
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

KINGSETT MORTGAGE CORPORATION

Petitioner

and:

DISTRICT NORTHWEST LIMITED PARTNERSHIP and
105 UNIVERSITY VIEW HOMES LTD.

Respondents

RESPONSE TO PETITION

Filed by: The Respondent, District Northwest Limited Partnership (the "petition respondent(s)")

THIS IS A RESPONSE TO the petition dated October 11, 2024

The petition respondent(s) estimate(s) that the application will take 2.5 hours.

Part 1: ORDERS CONSENTED TO

The petition respondent(s) consent(s) to the granting of the orders set out in the following paragraphs of Part 1 of the petition: NONE.

Part 2: ORDERS OPPOSED

The petition respondent(s) oppose(s) the granting of the orders set out in the following paragraphs of Part 1 of the petition: NONE.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The petition respondent(s) take(s) no position on the granting of the orders set out in the following paragraphs of Part 1 of the petition: NONE.

Part 4: FACTUAL BASIS

1. The Petitioner seeks a standard-form Receivership Order over the Respondents, which includes a charge on the assets of the Respondents along with typical powers, which include the ability of the Receiver to market the assets of the Respondents immediately.

The Property/Project and the Petitioner's Security

2. The security granted to the Petitioner includes a first mortgage over the subject development property (the "**Property"**) owned by the Respondent 105 University Homes Ltd., as nominee, and beneficially owned by the Respondent, District Northwest Limited Partnership. It holds additional security in the form of a GSA and guarantees against several parties.

3. In addition, as additional security/comfort to the petitioner, Thind Properties Ltd. ("**Thind**"), a company owned by Daljit Thind, a director of the Nominee, completed an assignment of its financial interest in three other projects (Highline in Burnaby, Minoru in Richmond, and Eclipse (Tower C) in Burnaby) that the petitioner has financed. The latter project, Eclipse (Tower C), is approximately 95% complete, with an occupancy permit expected in Q1 of 2025. The proceeds of sale from the units sold at Eclipse totaling approximately $144 million (net) will be paid to the petitioner and reduce its loan exposure on the within loan.

4. The Property has gone through the rezoning and development phase to the point where the Respondents have paid approximately $26.1 million in development permits and associated municipal fees and are poised to proceed with construction of a mixed-use development project consisting of two towers with 1,023 units known as District Northwest (the "**Project**"). A stage 1 building permit was issued for excavation and shoring work on or about December 21, 2022 and was extended on October 21, 2024. A full building permit is expected to be issued before the end of 2024.

5. The respondents commenced marketing the sale of residential units on or about December 21, 2021 and to date approximately 90% of such units have been pre-sold (collectively, the "**Pre-Sold Units**") with contractual deposits in an aggregate amount of approximately $78,777,703.65, together with interest, held in trust by Richards Buell Sutton LLP ("**RBS**"), the respondents' legal counsel.

6. Despite the delay to the start of construction, the Respondents do not believe the deposits for the Pre-Sold Units are at risk as they were sold at a price that is below current market value.

Negotiations with Petitioner over Ongoing Financing for Project

7. In specific Response to paragraph 24 of Mr. Pollack's affidavit made October 9, 2024 and filed herein, the Respondents say that while there have been ongoing discussions with the Petitioner before and after the issuance of the Demand on August 30, 2024, this does not tell the whole story of the negotiations/ discussions between the parties. The innuendo left by Mr. Pollack's affidavit is that the Respondents have not latched on to opportunities to restructure their affairs in order to meet the obligations due to Kingsett. There is not a fair description of the ongoing discussions between the parties.

8. In November - December 2022, the petitioner delivered a letter of intent and subsequently a construction commitment letter to confirm its intended commitment to finance construction. On or about November 3, 2023, the petitioner's representative, Justin Walton, assured Mr. Thind that the petitioner would provide construction financing for the Project. At the time the subordinate mortgage holder, IHI Developments Ltd, Garmeco Canada Consultants Ltd., IHI Holdings Ltd., and R.A.R. Consultants Ltd., together hold the second mortgage under CA9754858, agreed to enter into priority agreements in favour of the petitioner in or around March 2022 and November 2023. Mr. Thind understood the petitioner would still be providing construction financing.

9. On or about March 3, 2024, Mr. Walton advised Mr. Thind that the petitioner would not provide construction financing for the Project, citing the petitioner's overall exposure to Thind. The petitioner's failure to follow through on its commitment has forced the Respondents to search for alternative joint venture partners resulting in the accrual of significant interest charges and the partial erosion of the respondents' equity in the Project.

Value in the Project – Refinancing Efforts

10. The completed construction Project will see the petitioner paid back in full along with the subordinate mortgage holders.

11. The intrinsic value of the Project is well in excess of the debt owed to the petitioner. At this critical juncture, the Respondents need additional time to secure new joint venture

partners as discussed below. The value/opportunity for the respondents will be lost with the appointment of a receiver. The Respondents stand to lose their entire investment in the Property and the Project if a Receiver is appointed at this stage to sell the Property, with the subordinate mortgage holders likely receiving no return on their investments.

12. The Respondents are currently in discussions with a third party joint venture partner (the "**JV Partner**"), the details of which the petitioner is aware of, which will either come to fruition and see a payout to the petitioner by the middle of January 2025 or will not proceed at all. Thind and the JV Partner are close to reaching agreement on a letter of intent (the "LOI") that will provide for an exclusive dealings period to January 15, 2025, during which time the JV Partner will have the opportunity to conduct due diligence and the parties the opportunity to come to terms on a definitive agreement. The petitioner is aware of and is involved in the discussions with the JV Partner and the petitioner has indicated its commitment to finance construction of the Project if an agreement is reached between the respondents and the JV Partner.

The Appointment of a Receiver with Immediate Power of Sale

13. In the first instance the Respondents submit that the appointment of a Receiver as requested by the Petitioner is not warranted at this time.

14. No redemption period is contemplated in the Petition. The Petitioner has not adduced any evidence of value as to the assets of the Respondents whatsoever. Instead, the Petitioner has baldly stated in its material that [it] *"is concerned about uncertain interest rates which could negatively affect the value of the Land*" combined with "*a lot of uncertainty in the economy and particularly, in the real estate market*".

15. The evidence lead by the Petitioner in relation to uncertainty of interest rates does not correspond with current steps taken this year by the Bank of Canada to lower interest rates, having dropped rates four consecutive times since June of this year, including a reduction of .50 % on October 23, 2024.

16. The onus in on the Petitioner to produce cogent evidence that its security is in imminent risk in order to establish a basis for the extraordinary remedy it seeks. As above, there is no evidence of value, no evidence the assets are in danger, no evidence they are wasting, no evidence of any infusion of cash required to save an ongoing business, no evidence of

corporate disarray which is impairing the assets, in short, none of the evidence required to support the Order sought.

17. The Order seems to be sought solely on the basis that the Respondents granted the Petitioner the contractual right to the appointment of a Receiver, that the Respondents are allegedly insolvent, and that the Receiver will facilitate a sale of the subject property. This is not sufficient to appoint a Receiver.

18. A sale of the assets at this stage, would improperly impact/limit the Respondents' equitable right of redemption.

19. Indeed, the entire proceeding appears designed expressly to avoid bringing a standard foreclosure proceeding, in which, typically, redemption periods are fixed, although the Petition is framed otherwise. If that is the object of the action, it is based on a fundamental misapprehension of the law surrounding the equity of redemption, the right to exercise which, in fact, is triggered by this very proceeding.

20. Regardless, the Respondents have produced relevant to the Court's consideration, as follows:

    (a) There is equity in the Property;

    (b) There is a good prospect that the Petitioner will be paid in full on or before January 21, 2025; and

    (c) The Receiver would add a layer of cost and its appointment is not being sought for any purpose linked to the operation of any business.

21. In the alternative, if this Honourable Court directs that there be a Receiver appointed, the Respondents submit that the powers of sale contained at paragraphs 2 (k), (l) and (m) of the model Receivership Order attached to the within Petition not become effective until January 21, 2025 to permit the Respondents to complete the contemplated refinancing referred to in the Affidavit of Mr. Thind. There is no evidence presented by the Petitioner that there will be a wasting of their security or risk to its recovery. If the refinancing is not complete by that time, the Respondents take no issue with the Receiver proceeding with its power of sale.

Part 5: LEGAL BASIS

Underlying Fundamentals

22. There is perhaps no area of the law where the contribution of equity is so complete as the law with respect to the enforcement of mortgages.

23. The equity of redemption is something that arises out of the relationship between mortgagor and mortgagee. That fundamental relationship in the law of British Columbia was, of course, confirmed in the well-known case of *North Vancouver v. Carlisle*, 1922 CanLII 726 (BC CA). In British Columbia, despite the changes to the *Land Title Act*, RSBC 1996, c. 250 in 1989, a mortgage operates as if it were a conveyance with a right of defeasance. The right of defeasance, that is, the equity of redemption, does not arise as a result of a foreclosure proceeding being commenced. In fact, foreclosure proceedings were designed to bring some finite limit to the already existing right of redemption.

> *Proceedings for redemption were invented before proceedings for foreclosure.*
>
> *CIBC Mtge. Corp. v. Burnham*, 1986 CanLII 1032, para. 11

24. The equity of redemption is a concept that equity imposed upon the parties to a mortgage, regardless and, in fact, despite, the wording of the contract between them. However, there is, today, usually a contractual right as well.

CIBC, supra, paras. 9 & 11;

25. That fundamental right is not lost by an election on the part of a mortgagee to sue on the covenant and seek an Order for Sale. It is certain, of course, that a mortgagee may decide to commence action on the covenant or to appoint a Receiver, all without commencing a foreclosure proceeding.

26. In those circumstances, however, the equity of redemption is neither side-stepped nor avoided.

> *That passage defines what is now the everyday procedure in these cases. Where the mortgage seeks a power to sell, it ordinarily should not be granted that power until after the expiration of a fixed period of redemption.*
>
> *F.B.D.B. v. F.J.H. Const. Ltd.*, 1988 CanLII 3004 (BC CA), para. 16

27. The Court also adopted a decision of Taylor, J.:

> *But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem. While the court may waive the requirement for accounting and the establishment of a redemption period, it is no more likely, I think, to do so in one case than in the other.*
>
> *F.B.D.B. v. F.J.H. Const. Ltd., supra*, para. 19

28. In other words, whether by way of action on the covenant, appointment of Receiver, or otherwise, an immediate Order of Sale can only be made if the facts and evidence justify it. Absent such evidence, before any Order for Sale is made, a mortgagor is entitled to a redemption period of some length - routinely six months.

29. The Court of Appeal undertook a very complete analysis of the right of a mortgagee to seek a sale of the property based on the mortgage contract, without commencing a foreclosure proceeding, in *South West Marine Estates Ltd. v. Bank of B.C.*, 1985 CanLII 570 (BC CA). The Court said:

> *[12] The following submission is contained in the factum of the appellant:*
>
> > *16. While a mortgagor's equity of redemption is an interest in land that equity has always guarded, it is respectfully submitted that protection of the equity of redemption by the setting of a redemption period is only appropriate, in a situation where a mortgagee seeks the aid of the Court in the enforcement of its remedy of foreclosure.*
>
> *[13] I do not agree with this submission. Even though the mortgagee had a contractual right to obtain title in the event of default, the courts of equity intervened to protect the equity of redemption by fixing a redemption period. The intervention by a court of equity to restrain the exercise of a contractual power of sale during the redemption period is a similar interference with contractual rights in order to protect the equity of redemption.*
>
> *[14] If I am wrong in concluding that the courts of equity would intervene to prevent the exercise of a contractual power of sale during the redemption period, it appears to me that this is a proper case for bringing the rules of equity into accordance with modern practice. Firstly, in order that there be certainty in commercial matters it is, in my opinion, necessary that the same principles apply*

> *to all proceedings whether by way of foreclosure or by way of exercise of a contractual power of sale. This rule is as follows:*
>
> > *Except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale until the expiry of the normal redemption period (6 months).*
>
> *Secondly, the courts should intervene to protect the equity of redemption. To distinguish between a sale in foreclosure proceedings and a sale made pursuant to a contractual power of sale as a means of permitting the mortgagee to effectively eradicate the equity of redemption is not in accordance with the basic tenets of equity. The rules of equity are not to be fashioned on semantic or technical distinctions but must be framed so as to do justice between mortgagor and mortgagee. Justice requires that, except in special circumstances, the equity of redemption will be protected by fixing a redemption period of six months.*

See also *Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899

A. APPOINTMENT OF RECEIVER

30. The grounds advanced by the Petitioner for the appointment of a Receiver are:

(a) There has been default;

(b) The mortgage, GSA contains an agreement to the appointment of a Receiver;

(c) The Petitioner has lost confidence in the Respondent's ability to satisfy their obligations and manager their business; and

(d) A Receiver can more efficiently sell the Property than the Respondents.

31. That is not enough. Whether or not to appoint a Receiver calls for a "holistic" review of all the circumstances, "and a robust review" of them, to determine whether it is just and convenient to appoint a Receiver.

Bank of Montreal v. Gian's Business Centre Inc., 2016 BCSC 2348, paras. 23 & 24
Bank of Montreal v. Haro-Thurlow Street Limited Partnership., 2024 BCSC No. 47, para. 74

32. As noted by Madam Justice Fitzpatrick in the *Haro-Thurlow Street* decision, supra (para. 98):

> *"…a secured creditor also bears the onus of establishing the appropriateness of the appointment, again recognizing that it is "extraordinary relief which should be granted cautiously and sparingly". If appointment is appropriate, the Court will then proceed to consider what powers should be granted to the receiver, including whether there should be a power of sale and, if so, when any sale powers should be effective" (emphasis)*

33. In reaching her decision in *Haro-Thurlow Street*, Justice Fitzpatrick cited with approval the case of *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, where Mr. Justice Masuhara set out a list of some matters to consider:

> *[25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:*
>
> *a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;*
>
> *b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;*
>
> *c) the nature of the property;*
>
> *d) the apprehended or actual waste of the debtor's assets;*
>
> *e) the preservation and protection of the property pending judicial resolution;*
>
> *f) the balance of convenience to the parties;*
>
> *g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;*
>
> *h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;*
>
> *i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;*

> *j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;*
>
> *k) the effect of the order upon the parties;*
>
> *l) the conduct of the parties;*
>
> *m) the length of time that a receiver may be in place;*
>
> *n) the cost to the parties;*
>
> *o) the likelihood of maximizing return to the parties;*
>
> *p) the goal of facilitating the duties of the receiver.*

34. The onus is on the Petitioner to introduce cogent evidence that it is just and convenient to appoint a Receiver addressing those factors, even post-judgment.

Textron Financial Canada Limited v. Chetwynd Motels Ltd., 2010 BCSC 477, paras. 54 & 55

35. Appointing a Receiver can only be justified following a consideration and analysis of the position of both parties.

Textron, supra, para. 53

36. In doing so, the detrimental effect on the mortgagee must be considered.

> *[38] The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:*
>
> > *I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.*

Textron, supra, para. 55

37. While a written agreement in the contract between the parties, to agree to the appointment of a Receiver is a factor of some weight, the Court does not start with the presumption of an entitlement to the appointment on that basis. Nor does that affect consideration of all the factors, on a holistic basis.

> *[53] The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In BG International, at para. 17, the Court held:*
>
> > *[T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating effects. The respondent referred us to the statement in Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49(0nt. Gen. Div. [Commercial List]) at para. 31:*
> >
> > > *... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.*
> >
> > *This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.*
>
> *…*
>
> *[55] In light of these authorities, I conclude that the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made. Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in Maple Trade Finance. That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor*

> *has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in Cal Glass when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.*
>
> *Textron, supra*

38. No presumption of entitlement to a court appointment arise from the fact that the Credit Agreement allows for such an appointment.

Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership 2024 BCSC 47, para. 116

39. Of the factors listed by Mr. Justice Masuhara in the Maple Trade decision, the Respondent submits there is a paucity, if not a total absence of evidence from the Petitioner:

    (a) There is no irreparable harm which might be caused;

    (b) There is no risk to the security holder, considering the equity situation;

    (c) There is no waste;

    (d) There is no need for protection of the assets;

    (e) The balance of convenience favours the Defendants considering the impacts arising from the appointment of a Receiver;

    (f) The Petitioner does have a contractual right to the appointment;

    (g) There will be no difficulty in enforcing rights under the mortgage.

40. Unlike *Haro-Thurlow*, there is no concern with the management of the Respondents to carry out their business based on specific examples (only generic loss of confidence).

41. Unlike *Haro-Thurlow*, the Petitioner did not offer the Respondents a forbearance agreement.

42. Unlike *Textron*, the Respondents has been actively involved in refinancing efforts.

43. Unlike *Gian's Business Centre Inc.*, the Respondents has actively communicated with the Petitioner and made adequate disclosure of refinancing plans. Indeed, the evidence of

Mr. Thind is that the Petitioner is aware of refinancing discussions with a JV Partner and in fact has been involved in the same.

44. The evidence of the Petitioner before the Court in the *Haro-Thurlow Street case*, supra, is markedly different from that provided by Mr. Pollack. In that case, the evidence set out (at para. 125):

> a) the market had changed considerably since August 2023, likely resulting in a lower value for the property than even a prior offer;
>
> b) higher interest rates;
>
> c) weaker sales data;
>
> d) increased tightening of credit;
>
> e) increased rates of foreclosure reducing overall valuations;
>
> f) limited number of potential purchasers able to purchase the property due to its size;
>
> g) price and development requirements; and
>
> h) increased construction costs

45. This is in contrast to the evidence presented in the present case about "*uncertain interest rates negatively affecting value of the Lands*" (in the face of consecutive interest rate cuts from the Bank of Canada) and "*a lot of uncertainty in the economy and in particular, the real estate market***"** (Affidavit of Daniel Pollack, para. 24)

46. Finally, if it worth emphasizing that cost and necessity militate against the appointment. Above all, there is "*a principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly*".

Maple Trade, supra, para. 25(i)

B. APPOINTMENT OF RECEIVER - POWER OF SALE

47. This Petition is brought prior to judgment. That is of significance. Receivers should only be appointed prior to judgment in special circumstances when it is necessary to do so to preserve the assets from some deterioration or jeopardy.

Toronto Dominion Bank v. First Canadian Land Corp. (1989), 77 C.B.R. (N.S.), para. 8

48. An immediate power of sale should only be granted in exceptional circumstances.

49. As noted in *Haro-Street*, supra (para. 94 and 101), even though a borrower's right to redeem is not lost if a Receiver is appointed with a power of sale (with the redemption only being extinguished on a sale), the power of sale does granted to a Receiver does affect the Borrower's equity of redemption in terms of shortening the time allowed to the debtor to refinance of sell. The Court therefore should consider the debtor's equity of redemption in terms of whether a receiver will be appointed and, if so, whether that receiver will be granted the power of sale and when.

50. The Respondents submit that such a consideration is clearly relevant to the question as to whether any such appointment and power is "*just or convenient*". Further a consideration of any equity of redemption also comes with the Maple Trade factors – factor (k) – in relation to the "*effect of the order on the parties*".

Bank of Montreal v. Haro-Thurlow Street, supra, para. 101

C. Alternatives to Immediate Power of Sale on Appointment of Receiver

51. If the Court determines that an appointment of a Receiver is warranted in the circumstances, it is not a given that the immediate power of sale must follow, even though sought in the model order attached to the Petition.

52. In the *Gian* decision, Justice Fitzpatrick granted the Petitioner a Receiver but delayed the power of sale even though there was only a "*suggestion*" (not evidence) of efforts by Gian to refinance in a fact pattern where the borrower refused to give the Bank's instrument appointed receiver access to one of the buildings subject to the Bank's mortgage security and where a guarantor/principal of the debtor had left the country (at paras 42-43).

53. This also occurred in the Haro-Thurlow decision in which the appointment of the Receiver was made effective as of January 12, 2024, but not empowered to undertake any sales efforts until after February 23, 2024 and with no ability to file any application for approval of sale until after April 26, 2024.

54. If a Receiver is appointed in this case, the Respondents seek a term of the Order that the ability to market the property and the power of sale (paras. 2 (k) (l) and (m) not become

effective until January 21, 2025. The Respondents concede that if the refinancing does not take place by that time that a power of sale is appropriate.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 Daljit Thind, November 7, 2024.

Date: 7 November, 2024

Signature of **Daniel D. Nugent**, lawyer for petition respondent(s)

Petition respondent's(s') address for service: c/o 700 - 401 West Georgia Street, Vancouver, BC, V6B 5A1

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Name of the petition respondent's(s') lawyer, if any: Daniel D. Nugent, Richards Buell Sutton LLP