



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-23-00696362-00CL

DATE: June 24, 2024

NO. ON LIST: 3

TITLE OF PROCEEDING: CHIEF EXECUTIVE OFFICER OF THE FINANCIAL SERVICES  
REGULATORY AUTHORITY OF ONTARIO v. FIRST SWISS MORTGAGE CORP.

BEFORE: JUSTICE STEELE

**PARTICIPANT INFORMATION**

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

Name of Person Appearing	Name of Party	Contact Info

**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
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## **ENDORSEMENT OF JUSTICE STEELE:**

- [1] This is a motion by KSV Restructuring Inc., in its capacity as Court-appointed receiver of First Swiss Mortgage Corp. The Receiver seeks an approval and vesting order approving the transaction pursuant to which Zayoun Group Inc. will buy the real property located at 8457 Highway 17, Rockland, Ontario, over which First Swiss holds a first mortgage (the “Transaction”). The property is being sold by the Receiver pursuant to power of sale proceedings pursuant to the *Mortgages Act*.
- [2] The Receiver seeks a second ancillary order approving the proposed distributions set out in the Receiver’s Third Report (“Distributions”), approving fees and disbursements, approving activities, and discharging the Receiver once the Transaction has closed and the distributions have been made.
- [3] The Receiver served the Service List on June 14, 2024.
- [4] There is no opposition to the relief sought on the motion.
- [5] The Receiver discussed the proposed relief with the Investor Advisory Committee, which is an ad hoc committee with representatives from five of First Swiss’ largest investors. Further, the Receiver’s proposed approach with respect to the Distributions was included in the Receiver’s First Report and subsequent materials filed with the Court.
- [6] On April 8, 2024, the Receiver issued letters to each Investor that indicated that the Receiver was preparing to make a distribution and provided a schedule of the balances owing to the parties. In the letter the Receiver noted that the methodology “assumes that all Investors are treated equally, regardless of whether: a) the funds advanced were actually used to fund a mortgage; and b) a mortgage was registered on title to a residential property in respect of funds advanced by an Investor as at the date of the Receivership Order.” The Receiver referred in the letter to its earlier report and position that “the Company did not manage its funds or operate on a basis that would meet the legal requirements for a trust, and that Investors should therefore be treated equally.” The Investors were provided with a form of dispute notice that was required to be returned by May 24, 2024. No disputes were issued.
- [7] For the reasons set out below, the relief requested by the Receiver is approved.

### *Approval of Sale Transaction*

- [8] The Receiver has the power under the Amended Appointment Order to sell, convey, transfer, lease or assign the Company's property with the approval of the Court in respect of any transaction exceeding \$250,000.
- [9] I am satisfied that the sale transaction should be approved. I have considered the factors set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] 46 OAC 321 at para. 16 and am satisfied that they are met for the reasons set out at para. 26 of the Receiver's factum.

### *Approval of Distributions*

- [10] The Receiver seeks authorization to make the Distributions set out in the Third Report. As noted by the Receiver, Orders granting distributions are routinely granted by Canadian Courts in insolvency proceedings, including receiverships: *Re Windsor Machine & Stamping Limited*, 2009 CanLII 39772 (ONSC) at paras 8 and 13.
- [11] The Receiver was appointed pursuant to section 37 of the *Mortgage Brokerages, Lenders and Administrators Act, 2006* and section 101 of the *Courts of Justice Act*. Under the Amended Appointment Order, the Receiver is granted broad powers, including to collect all monies owed to the debtors, to take possession of the debtors' property, to market and sell the property, and to take any steps reasonably incidental to the exercise of the broad powers or the performance of any statutory obligations. The Amended Appointment Order further contemplates that all monies received or collected by the Receiver are to be deposited into accounts opened by the Receiver and held by the Receiver to be paid in accordance with the terms of that order or any further order of the Court.
- [12] The Receiver submits that pursuant to the doctrine of jurisdiction by necessary implication, in granting the Court the statutory authority to appoint a receiver pursuant to the MBLAA and the CJA, the legislature necessarily implicitly granted the statutory authority to make orders essential to that receivership. In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, the Supreme Court of Canada explained that the "doctrine of jurisdiction by necessary implication" in para. 51:

The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication": the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be

secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). [...]

- [13] I am satisfied that I have the jurisdiction to approve the requested Distributions. It would not be logical for the Receiver to be empowered to sell property and hold assets without a corresponding ability to distribute the collected assets to the appropriate stakeholders.
- [14] I am also satisfied that the Distributions should be approved. The Distributions are proposed to go first to the legal costs of investors that contributed evidence to FSRA (as noted in the Amended Appointment Order), and next to all Investors and creditors on a pro rata basis.
- [15] The Receiver submits that it is appropriate to distribute the remaining funds on a pro rata basis, as opposed to applying the strict rules of trust law, because:
- a. Certain Investors had no mortgages registered on title on the investments they funded while other Investors had up to all their investments reflected as active mortgages.
  - b. The Investors who would potentially benefit from the application of trust principles were not more diligence investors, they were simply the relatively lucky ones;
  - c. Certain funds that were advanced by Investors were never advanced to a borrower. Similarly, certain funds that were repaid to the Company when a mortgage was repaid were not provided to the Investor that funded the mortgage with no apparent consistency; and
  - d. The bank accounts were not managed in a way that is consistent with there having been a trust in place.
- [16] Since the First Report the Receiver has taken the position that the appropriate distribution in this case is pro rata. There was no consistency or rationale as to why certain of the First Swiss mortgages were properly registered, while many were not. It was not a question of one investor being savvier than another. The Receiver noted in the Third Report that “the Receiver is of the view that it would be patently unfair to prefer the Investors who invested in a mortgage that was correctly placed over the many Investors whose funds were misused.” The Receiver further stated that “it is clear that the Company was not operating as a legitimate business enterprise.”
- [17] In cases of “ponzi schemes” courts have found that innocent investors should not suffer and have emphasized that these are not cases involving poorly performing investments: *Re Titan Investments Limited Partnership*, (*Judicature Act*), 2005 ABQB 637 at paras 22-23.

[18] Where investors have suffered as a result of fraud, the application of strict legal rules may be set aside for rateable sharing. In *Millard v. North George Capital Management Ltd.*, [2000] O.J. No. 1535 at para 49, the Court stated:

I note that there is some question of priority as to funds of approximately \$1 million held by Lionard's IR as a result of various PPSA registrations as more investors were revealed from a review of the records of Lionaird. Further the RRSP subclass investors did not receive secured notes, but because of the allegation of fraud, their sub class could claim *pari passu* treatment. I also am mindful of cases such as *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) at paras 76-8; *Winnipeg Mortgage Exchange Ltd. v. Mortgage Holdings Ltd.* (1982), [1983] 1 W.W.R. 213 (Man. C.A.) at pa. 218 where (a) investors were intended to rank equally; (b) fairness in the result necessitated that they have equality, so that the application of strict legal rules has been set aside by rulings that all available assets be pooled and all investors share equally and rateably in the pooled assets. In these circumstances and especially where priority disputes would delay proceedings and eat away at the available funds, it would generally appear appropriate to apply this rateable sharing concept. [...]

[19] I have considered the cases noted by the Receiver, in addition to certain of the cases cited in those cases. I am satisfied that in the appropriate circumstances assets may be pooled and distributed rateably. In *Ranjoy Sales and Leasing Ltd. v. Estates of Winnipeg Mortgage Exchange Ltd.*, [1983] 1 W.W.R., the Manitoba Court of Appeal considered an appeal where there was a bankruptcy of a mortgage investment company and the lower Court had determined that certain creditors were entitled to be paid in priority to the appellant creditors. The majority of the Manitoba Court of Appeal allowed the appeal and determined that all the investors should be treated equally; those investors who "by sheer luck" received the "good" mortgages should not be preferred. At para. 11, the Court stated:

In light of the facts emerging from that extract, it would be grossly unfair to give a preferred position to those who happened to have been allocated "good" mortgages, and a subordinate position to those who were allocated "bad" mortgages. Our disposition of the controversy should reflect two things – (1) the intention of the parties when the transactions were entered into, and (2) the necessity for fairness in the ultimate result. Concerning the first, it cannot be doubted that if, on the day before the bubble burst, the investors had all been asked whether each of them stood on the same level as the others the answer would assuredly have been in the affirmative. An answer suggesting that the investors stood on different levels would have been inconsistent with the intention both of the investors and of the companies. As for the second, to make preferred creditors out of those who by sheer luck received "good" mortgages would be to make ourselves slaves to contingency and to deny ourselves the power to do justice in

accordance with the maxim that equality is equity. I would treat all the investors equally by pooling the available assets and dividing them among the investors according to their respective claims as proved.

[20] In the instant case, the Receiver was appointed further to complaints made to FSRA by certain investor including allegations that, among other things, the Company discharged mortgages investors had funded, without their knowledge, and without such funds being paid to them, and the Company did not make registrations on title in connection with certain funds investors advanced for specific mortgages. At para. 8 of the Receiver's Third Report, the Receiver stated:

Regardless of whether the strict rules of trust exist, the Receiver is of the view that it would be patently unfair to prefer the Investors who invested in a mortgage that was correctly placed over the many Investors whose funds were misused. Given the misconduct described above and in the Receiver's prior reports, it is clear that the Company was not operating as a legitimate business enterprise. This is not a situation where some Investors stand to suffer because their legitimate investment performed poorly – instead, most Investors would suffer significant losses through no fault of their own because the mortgage that they believed to have invested in never existed, was discharged, or was allocated to multiple Investors.

[21] The Receiver further submits that recommendations of the court officer and views of the participants are relevant factors in determining whether to distribute from pooled funds: *Taylor Ventures Ltd.*, 2007 BCSC 654 at para 55.

[22] I have determined that it is appropriate in the circumstances to accept the Receiver's recommendation on the Distributions. Among other things, the Receiver has been consistent since the outset that it is of the view that Investors should share equally on a distribution. Further, after the Receiver sent out its claim letters setting out its proposed approach, the Receiver did not receive any notices of dispute or opposition of any kind to the proposed distribution approach.

#### *Approval of the Third Report and the Receiver's Activities*

[23] As is commonly done, the Receiver seeks Court approval of the Third Report and the activities set out therein. This has become common practice: *Target Canada Co. (Re)*, 2015 ONSC 7574 at para 2; *Triple-I Capital Partners Limited v. 12411300 Canada Inc.*, 2023 ONSC 3400 at paras 65-66.

[24] I am satisfied that the activities of the Receiver set out in the Third Report were necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Amended Appointment Order.

### *Approval of Fees and Disbursements of the Receiver and its Counsel*

- [25] The Receiver seeks the Court's approval of the professional fees and the Fee Accrual. Fee affidavits have been filed in respect of the fees and disbursements.
- [26] The Court of Appeal in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at para 33 set out the factors the Court will take into account when determining whether to approve the accounts of a Court-appointed receiver and its counsel, in addition to the consideration of the overall value contributed:
- a. The nature, extent and value of the assets,
  - b. The complications encountered,
  - c. The degree of assistance provided by the debtor,
  - d. The time spent,
  - e. The receiver's knowledge, experience and skill,
  - f. The diligence and thoroughness displayed,
  - g. The responsibilities assumed,
  - h. The results of the receiver's efforts, and
  - i. The cost of comparable services when performed in a prudent and economical manner.

- [27] I am satisfied that the fees and disbursements incurred are fair and reasonable in the circumstances. In addition, I agree with the Receiver that the proposed Fee Accrual will avoid the need for a separate fee approval motion in the future and minimize further professional fees.

### *Discharge of the Receiver*

- [28] Once the Transaction is completed and the Distributions made, the Receiver's duties under the receivership order will have been materially completed. Accordingly, the Receiver requests that the Court discharge the Receiver upon the filing of the Discharge Certificate.

- [29] The Receiver further submits that it is appropriate to grant a limited release in favour of the Receiver. The Receiver points to *Pinnacle v. Kraus*, 2012 ONSC 6376 at para 47 where the Court granted an order discharging and releasing a court appointed receiver.
- [30] The proposed release would not apply in respect of any liability arising from the gross negligence or willful misconduct on the Receiver's part.
- [31] I am satisfied that the requested release is reasonable in the circumstances.
- [32] Orders attached, which are effective immediately without the need for issuing and entering.

A handwritten signature in blue ink, appearing to be "J. P. [unclear]", is located in the lower right quadrant of the page.