Court File No. CV-24-00730869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

TWO SHORES CAPITAL CORP.

Applicant

and

PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP, and PRODUCTIVITY MEDIA LENDING CORP. I

Respondents

AND IN THE MATTER OF AN APPLICATION UNDER section 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

BOOK OF AUTHORITIES
(Motion Adding 8397830 Canada Inc.)

April 14, 2025

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TAB 1

2024 ONSC 1983
Ontario Superior Court of Justice [Commercial List]

Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al.

2024 CarswellOnt 4779, 2024 ONSC 1983, 13 C.B.R. (7th) 202, 2024 A.C.W.S. 1263

IN THE MATTER OF AN 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

KingSett Mortgage Corp. (Applicant) and Mapleview Developments Ltd., Pace Mapleview Ltd. and 2552741 Ontario Inc. (Respondents)

Peter J. Osborne J.

Heard: March 21, 2024
Judgment: March 21, 2024
Docket: CV-24-00716511-00CL

Counsel: Sean Zweig, Aiden Nelms, for Applicant
Nicole Maragna, for Lien Claimant, Foremont Drywall Inc., Foremont Drywall Contracting, et al.
Alexander Soutter, for Aggregated Investments Inc. and Drewlo Holdings Inc.
Olivia Hy, for Con Drain Company Ltd. and Northgate Farms Ltd.
Maya Poliak, for MarshallZehr Group Inc.
Montana Licari, for Aviva Insurance Company of Canada
Andrew Wood, for Lien Claimant, Sunbelt Rentals of Canada Inc.
Patrick Martina, for Dino Sciavilla and Yvonne Sciavilla
Dave Rosenblat, for Proposed Receiver, KSV
Catherine Litinsky, for Quality Rugs of Canada o/a Quality Sterling Group
Stewart Thom, for Creditor, Rivervalley Masonry Group Ltd.

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.3 Appointment
VII.3.b Application for appointment
VII.3.b.iii Grounds
VII.3.b.iii.A Just and convenient

Headnote
Debtors and creditors --- Receivers — Appointment — Application for appointment — Grounds — Just and convenient
Debtors developed real property and entered loan facilities with creditor to finance development of project — Loan facilities matured and were not repaid — Guarantors of loan facilities were also principals of debtors and did not oppose relief sought — Demand letters and notices were issued under s. 244 of Bankruptcy and Insolvency Act — Creditor had contractual right to appointment of receiver in event of default — Proposed receiver consented to appointment — Creditor brought application for appointment of receiver of real and other property — Application granted — It was just or convenient to appoint receiver

— Presence or lack of contractual entitlement was not determinative — Proposed terms of receivership set out in draft order were appropriate — Proposed receiver was qualified.

Table of Authorities

Cases considered by *Peter J. Osborne J.*:

BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 1953, 2020 CarswellOnt 5156, 78 C.B.R. (6th) 299 (Ont. S.C.J. [Commercial List]) — referred to

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — referred to

Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited, 2618905 Ontario Limited, 2618909 Ontario Limited, Beverley Rockliffe and Chantal Bock (2022), 2022 ONSC 6186, 2022 CarswellOnt 15689 (Ont. S.C.J. [Commercial List]) — considered

Elleway Acquisitions Ltd. v. Cruise Professionals Ltd. (2013), 2013 ONSC 6866, 2013 CarswellOnt 16639 (Ont. S.C.J. [Commercial List]) — referred to

Macquarie Equipment Finance Limited v. Validus Power Corp. et al. (2023), 2023 ONSC 4772, 2023 CarswellOnt 13699 (Ont. S.C.J. [Commercial List]) — referred to

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 2009 BCSC 1527, 2009 CarswellBC 2982, 60 C.B.R. (5th) 142 (B.C. S.C. [In Chambers]) — considered

Pandion Mine Finance Fund LP v. Otso Gold Corp. (2022), 2022 BCSC 136, 2022 CarswellBC 176, 96 C.B.R. (6th) 273 (B.C. S.C.) — referred to

Yorkville Residences Inc., Re (March 27, 2020), Doc. CV-20-00637297-00CL (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — referred to

s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — referred to

***Peter J. Osborne J.*:**

ENDORSEMENT

1 The Applicant, KingSett, seeks the appointment of KSV Restructuring as Receiver of the Real Property and other property as set out at Schedule A to the proposed receivership order. That comprises all of the property of the Debtors with the exception of Deposit Monies representing deposits paid by homebuyers in respect of certain lots sold by the Debtors, which funds will remain in trust.

2 The Applicant also seeks a first ranking super priority charge in favour of the Receiver and its counsel and a second ranking super priority Receiver's Borrowing Charge for the purpose of funding the receivership.

3 Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated. The Applicant relies on the Affidavit of Daniel Pollock sworn March 14, 2024 together with exhibits thereto.

4 The Debtors, Mapleview Developments Ltd., Pace Mapleview Ltd., and 2552741 Ontario Inc., did not appear today, although properly served. As noted below, however, the principals of these entities are personal guarantors under the Loan Facilities, and they were represented today in that capacity.

5 Vector Financial Services Limited held until yesterday a first priority mortgage over one of the PINs comprising the property. Yesterday, that position was assigned to Aggregated Investments Inc. (AI). AI consents to the relief sought today and the proposed receivership includes that PIN.

6 There are also 10 construction liens registered against title to the property, the most significant of which is held by Con-Drain Company (1983) Limited. That company has filed a notice of appearance. All lienholders are on notice. None opposes the relief today.

7 Other creditors include Westmount Guarantee Services and the MarshallZehr Group, the latter of which is represented today. The security of both of those creditors is subordinated and postponed to that of the Applicant, and neither opposes the relief sought today.

8 The Debtors have been developing the real property at 700-780 Mapleview Drive East, Barrie, Ontario. The project is a residential real estate development being developed in phases on 50 acres of land.

9 Phase 1 includes 193 units of which 91 are freehold townhomes and 12 are stacked townhomes. 181 of those units have closed.

10 Phase 2 includes 119 units all of which are freehold townhomes. 83 of these units have closed.

11 Phase 3 comprises property where servicing is materially complete but the construction for a proposed 209 units has not yet begun.

12 Phase 4 comprises property where servicing is in progress but not yet completed. 321 stacked townhomes are proposed.

13 Phase 5 and Phase 6 include properties where neither servicing nor construction has begun but for which 210 senior homes and 81 stacked townhomes, respectively, are planned. The proposed receivership does not include phase 6.

14 The Debtors entered into various Loan Facilities with KingSett to finance development of the project, which in the aggregate have a maximum principal amount of $105,762,112.

15 The Maturity Date has already been extended on agreement several times. The Loan Facilities matured on February 1, 2024 and have not been repaid. As of February 1, 2024, the aggregate indebtedness was $47,099,842.63, with interest, fees and costs continuing to accrue.

16 Payment and performance of all obligations under the Loan Facilities has been unconditionally guaranteed by Dino Sciavilla and Yvonne Sciavilla pursuant to a Guarantee dated November 30, 2022. The Guarantors are represented in Court today and do not oppose the relief sought. They are also principals of the Debtors.

17 The Security in favour of KingSett includes first ranking mortgages, a General Security Agreement and General Assignments of the leases and material contracts together with other security as set out on motion materials.

18 Demand letters and section 244 *BIA* notices were issued on February 16, 2024. They enumerated the Listed Events of Default which include various covenant defaults in addition to the failure to repay.

19 The Applicant has a contractual right to the appointment of a receiver in the event of default.

20 The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

21 In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, 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. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

22 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: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,*2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

23 The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.,*2020 ONSC 1953 at paras. 43-44.

24 As I observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2 nd ed. (Toronto, Carswell, 1999) listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25):

> a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment 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 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 a right to appointment under the loan documentation;
>
> h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
>
> i. the principle that the appointment of a receiver should be granted cautiously;
>
> j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties 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; and
>
> p. the goal of facilitating the duties of the receiver.

25 How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

26 Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

27 For all of the above reasons I am satisfied that the answer to that question is yes.

28 The Applicant has provided a form of order that is generally consistent with the Model Order of the Commercial List. While that is not determinative of the appropriateness of any terms in any particular case, it does assist the Court.

29 I am satisfied that the proposed terms of the receivership set out in the draft order are appropriate here.

30 I observe that the proposed order allows the Receiver to make certain limited critical prefiling payments with the written consent of the Applicant. That is appropriate where they are critical to the continued operation of the debtor: *Macquarie Equipment Finance Limited v. Validus Power Corp et al* (August 2, 2023), Toronto, CV-23-00703754-00CL ONSC 4772 (Order Appointing Receiver) at para 30; *33 Yorkville Residences Inc. and 33 Yorkville Residences Limited Partnership (Cresford Group)* (March 27, 2020), Toronto, CV-20-00637297-00CL (Order appointing Receiver) at para 28.

31 I am also satisfied that the proposed Borrowings Charge is appropriate. I observe that the quantum is limited; that charge is not intended and nor is it sufficient to fund construction of the completion of the project.

32 The other terms of the proposed order are appropriate.

33 KSV is qualified and is appropriate to be appointed to be the Receiver, an appointment to which it consents.

34 The Application is granted. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Application granted.

TAB 2

CITATION: KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al., 2023 ONSC 5881
COURT FILE NO.: CV-23-00707839-00CL
DATE: 20231018

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 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

RE: KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434, Applicants

AND:

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC., Respondents

BEFORE: Peter J. Osborne J.

COUNSEL: *Michael De Lellis, Jeremy Dacks and Shawn Irving*, for the Applicants

Kenneth D. Kraft, for Mizrahi Commercial (The One) LP, Mizrahi Development Group (The One) Inc. and Mizrahi Commercial (The One) GP Inc.

Nina Perfetto and David Levangie, for Coco International Inc., 12823543 Canada Ltd. and Jenny Coco

David Bish, for Coco International Inc. and 12823543 Canada Ltd.

Brendan Monahan, Counsel to CERIECO Canada Corp.

Roger Jaipargas and Scott Hutchison, for Mizrahi Inc., Sam M Inc., and Sam Mizrahi

Stuart Brotman, for NongHyup Bank in its capacity as trustee of Hana Private Real Estate Investment Trust No. 137

Brendan O'Neill, Christopher Armstrong and Jennifer Linde, Counsel to Proposed Receiver

Stephen Ferguson, Josh Nevsky and Melanie MacKenzie, Proposed Receiver

HEARD: October 18, 2023

ENDORSEMENT

Context: "The One"

1. This Application arises out of the construction of one of Canada's largest mixed-use construction projects (the "Project") marketed as "The One". It is located at a property the intersection of Bloor and Yonge Streets in downtown Toronto ("One Bloor").

2. The Project, still under construction and far from complete, contemplates an 85-storey mixed-use (residential, hotel, retail and restaurant) tower.

3. In short, the Senior Secured Lenders seek the appointment of a receiver and related relief as a result of financial and other covenant defaults by the Borrower, pursuant to section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended (the "*CJA*").

4. Defined terms have the meaning given to them in this Endorsement or in the Application materials unless stated otherwise.

5. The Applicant relies on the Affidavit of Joo Sung Yoon affirmed October 17, 2023 together with Exhibits thereto.

6. The Application has been served on the Service List which includes, among other parties, all of the secured lenders to the Project.

7. The appointment of a receiver is not opposed by any party. As further described below, however, certain responding parties made submissions about the scope of relief being sought today.

The Parties, the Application, the Credit Facilities and the Status of the Project

8. The Applicant, KEB Hana Bank, as trustee of IGIS Global Private Placement Real Estate Fund No. 301, (the "Term Lender") and as trustee of IGIS Global Private Placement Real Estate Fund No. 434 (the "Standby Lender") (and together, the "Senior Secured Lenders"), seeks an order as set out in the Notice of Application at paragraph one granting the following relief, in particular:

    a. appointing Alvarez & Marsal Canada Inc. ("A&M") as Receiver over the assets and property of the Respondents, Mizrahi Commercial (The One) LP, (the "Beneficial Owner"), Mizrahi Development Group (The One) Inc. (the "Nominee") (and together, the "Borrower"), and Mizrahi Commercial (The One) GP Inc. ("GP Inc.") in connection with the Project and the project itself, including all proceeds thereof (the "Property");

    b. granting the Receiver a charge over all of the Property as security for Receivership Costs, with priority other than Aviva's security interest in the Condo Deposits and subject to the relevant provisions of the BIA (the "Receiver's Charge");

    c. approving the Receivership Funding Credit Agreement;

d. granting KEB Hana Bank, but this time in its capacity as trustee of IGIS Global Private Placement Real Estate Fund No. 530 (the "Receivership Lender"), a charge over the Property as security under the Receivership Funding Credit Agreement with priority other than the Receiver's Charge and Aviva's security interest in the Condo Deposits; and

e. a stay of proceedings in respect of the Borrower, GP Inc. and the Property.

9. The Beneficial Owner is an Ontario-based limited partnership formed to undertake the Project. Ms. Jenny Coco (and/or her family, directly or indirectly) and Mr. Sam Mizrahi (and related parties) each have a 50% ultimate indirect voting interest in the Beneficial Owner through its two limited partners owned by each of them respectively. The sole general partner is GP Inc., the common shares of which are owned by each of the limited partners as to 50%.

10. The Nominee, an Ontario corporation wholly-owned by GP Inc., is the registered owner of One Bloor as nominee for and on behalf of the Beneficial Owner.

11. Mizrahi Inc. is the developer and general contractor of the Project (the "Developer").

12. To finance the development of the Project, the Borrower, the Senior Secured Lenders (and others) entered into a credit agreement dated August 30, 2019, as amended on April 30, 2020, October 30, 2020, February 4, 2021, September 9, 2021 and August 30, 2022 (as amended, the "Credit Agreement").

13. The Credit Agreement made available to the Borrower a Term Credit Facility and a Standby Credit Facility (together, the "Credit Facilities"). As at September 29, 2023, the total amount outstanding under the Credit Facilities was approximately $1.235 billion, inclusive of principal, interest, fees and expenses.

14. The Senior Secured Lenders were granted various security for all of the obligations owing, including:

a. a general security agreement with the Borrower dated August 30, 2019 registered under the *Personal Property Security Act*;

b. a demand debenture from the Nominee in the maximum principal amount of $957 million, a charge in respect of which was registered against title to One Bloor;

c. a general assignment of rents and leases, also registered against title;

d. two pledge agreements from GP Inc. granting first priority interests in certain of its bank accounts and investment assets, including its common shares in the Nominee; and

e. guarantees from Ms. Coco and Mr. Mizrahi, each in their personal capacity, and from GP Inc.

15. The Term Credit Facility matured on August 30, 2023 and the Standby Credit Facility matured on September 29, 2023. Neither has been repaid.

16. The Borrower also has secured indebtedness owing to other creditors:

    a. Aviva Insurance Company of Canada ("Aviva") in respect of its surety to Tarion Warranty Corporation on behalf of the Nominee in the amount of $8,320,000 and excess condominium deposit insurance to the Nominee with a coverage limit of $201,680,000;

    b. Coco International Inc. (the "Coco Lender"), in respect of a credit agreement with the Beneficial Owner pursuant to which a $75 million credit facility was provided;

    c. CERIECO Canada Corp. and its agent 10216267 Canada Corp. in respect of several agreements pursuant to which a contractor's loan in the amount of $213 million was agreed to be advanced to fund the first stage of construction of the Project; and

    d. NongHyup Bank, in its capacity as trustee of Hana Private Real Estate Investment Trust No. 137 (the "Hana Lender") in respect of a credit agreement pursuant to which the funds in the amount of $55 million were agreed to be advanced under a term loan facility.

17. The total secured indebtedness of the Borrower is therefore approximately $1.662 billion.

18. The Senior Secured Lenders have first priority over One Bloor and the other assets of the Borrower (other than the Condo Deposits) pursuant to several priority, subordination and standstill agreements. The relative priorities are set out in the motion materials and are not in issue today.

19. The Application materials show that the Borrower has committed several defaults since the closing of the Credit Agreement in 2019. In particular, it failed to repay the obligations under the Credit Facilities at maturity. Each such failure represents a separate and independent Event of Default.

20. On October 4, 2023, the Senior Secured Lenders delivered a formal Demand letter demanding repayment of all indebtedness under the Credit Facilities and enclosing a Notice of Intention to Enforce Security pursuant to section 244 of the *BIA*. The statutory cure period has long expired. The Demand and the Notice have not been satisfied, with the result that the Repayment Events of Default continue today.

21. To say that the Project has been delayed and faced challenges would be an understatement. The original anticipated completion date of December 31, 2022 was obviously not met.

22. The original construction budget has already been materially exceeded. The most recent budgets, based on the Borrower's latest construction schedule and commitments and cost data to May 31, 2023, reflect anticipated gross Project expenditures in excess of $2 billion, an amount that exceeds the costs projected in 2019 by more than $600 million.

23. As stated above, the Project is far from complete. In fact, as of October 4, 2023, concrete columns and walls had been poured only up to the 40th floor and completion is now projected by the Borrower for March, 2025. 70 condominium units remain unsold as of August 31, 2023.

24. In addition, the Borrower has not been able to complete a sale or mortgage of the Commercial Component nor has it completed a severance of the Commercial Component lands. The Project recently lost its anchor retail tenant and has yet to find a replacement.

25. The relationship between Ms. Coco and Mr. Mizrahi, together with their respective related parties, is acrimonious. Those parties have had, and continue to have, significant and material disputes about their respective obligations and their involvement in the Project generally.

26. While responsibility for all of those disputes has neither been determined, nor is such a determination necessary to dispose of this motion, the fact of those disputes and the difficult relationship between those two principal parties has affected both the completion of the Project and, among many other things, the relationship with the Senior Secured Lenders.

27. It is the position of the Senior Secured Lenders on this Application that the information they have received (or not received) has been insufficient for them and their cost consultant to form an accurate view of the ultimate expected costs to complete the Project, or to accurately estimate a completion date.

28. At the same time, the Borrowers cannot continue construction of the Project without further advances under the Credit Agreement or alternative financing.

29. The result of all of this is that the Senior Secured Lenders have lost confidence in the Borrower with the further result that the Applicant seeks the appointment of a receiver today, to bring stability to the situation and bring oversight to the Project in an effort to maximize recovery for the benefit of all stakeholders.

30. As further discussed below, whether, when and on what terms the Project is to be sold prior to completion, is for another day. The immediate objective is to bring stability and provide for the continuation of work on the Project as an overarching strategy is developed.

31. That will require the engagement of a project manager to work with trades and sub-trades as well as other advisors to assist with and oversee the administration and construction of the Project.

32. Clearly, such an undertaking will require significant funds, and the Borrower obviously has limited cash resources. Accordingly, the Applicant seeks approval today of a Receivership Funding Credit Agreement (the "RFCA") pursuant to which, and in connection with a receivership if (and only if) granted, the Receivership Lender has agreed to make available to the Receiver a non-revolving term credit facility in the maximum principal amount of $315 million on a super priority basis, to fund Project Costs and Receivership Costs.

33. That RFCA contemplates an initial advance of $80 million followed by possible monthly advances beginning in November 2023 of up to $30 million (to a maximum of $235 million) to fund approved costs based on actual expenditures incurred in the preceding month, subject to the conditions of the proposed facility.

34. The issue is therefore whether the relief sought today should be granted.

The Test for the Appointment of a Receiver

35. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

36. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, 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. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

37. 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: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

38. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment 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 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 a right to appointment under the loan documentation;

    h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

    i. the principle that the appointment of a receiver should be granted cautiously;

    j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties 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; and

p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

39. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

Analysis

40. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

41. In my view, it is not only just or convenient to appoint a receiver in the particular circumstances of this case, but it is both just *and* convenient.

42. I am reinforced in this conclusion by the fact that the appointment of a receiver is not opposed by any party today. While not determinative of the issue, the lack of opposition from the key stakeholders, which include for greater certainty the Coco Parties, the Mizrahi parties, and all of the other secured lenders, underscores the need for a Court-supervised receivership for the Project.

43. The Senior Secured Lenders have the contractual right to the appointment of a receiver in the event of default such has clearly occurred here. That is contemplated in each of the Credit Agreement, the General Security Agreement and in the Demand Debenture. They have lost confidence in the Borrower and its management.

44. More substantively, the Repayment Events of Default are continuing. The Credit Facilities have matured, all of the Obligations are due and payable, and remain unpaid. They remain unpaid notwithstanding not only the numerous demands, delivery of the section 244 Notice and the expiry of the cure period, the other Pre-Existing Events of Default as set out in the motion materials, and the Milestone Defaults, but also notwithstanding extensive discussions between and among the key stakeholders and various extensions and other accommodations offered or provided by the Senior Secured Lenders.

45. Notwithstanding the significant and material disagreements between and among some of the key stakeholders on various issues, which are for another day, all agree that the appointment of a receiver today is appropriate.

46. I share that view. I am more than satisfied on the basis of the evidence in the Record that the situation cries out for the stability, transparency and orderly process that must be the hallmarks of a Court-appointed receivership for the Project. This will operate to the benefit of all stakeholders and will, I am satisfied, provide the necessary environment for the maximization of proceeds and outcomes generally for all stakeholders.

47. The Project is a significant one in scale, complexity and regrettably, in challenges it has encountered already. The appointment of a receiver today easily meets the test as being just or convenient.

48. The proposed Receiver, A&M, is experienced in such matters and I am satisfied is an appropriate candidate to fulfil the role of a Court-appointed officer here. Together with its counsel, the Receiver will have a significant task ahead. This will include liaising and communicating with key stakeholders as well as others in order that all affected parties can have confidence in the process that lies ahead, and therefore the outcome that it generates, whatever that may be.

49. A&M is appointed Receiver on the terms set out in the proposed draft order.

50. For the same reasons, the stay of proceedings, in the form and according to the terms sought, is also appropriate. What is required is a period of calm, in order that the Receiver can assess the situation and make a reasonable and informed recommendation as to the path forward.

51. The Applicant also seeks approval of the RFCA. Its principal terms are summarized above and set out in detail in the motion materials, but it would provide additional and immediate funding up to a maximum of $315 million.

52. I am also satisfied that it should be approved. All parties are in agreement that significant additional and immediate funding is required. The RFCA itself is part of the Record.

53. The jurisdiction of this Court to authorize such borrowing is found in section 31(1) of the *BIA*. That statutory provision also permits a receiver to give security on the property of a debtor in any amount, and on any terms that may be authorized by the court. Advances obtained must be repaid out of the property of the debtor in priority to creditors' claims.

54. In my view, residual or additional jurisdiction is found in both section 243(1)(c) of the *BIA* which authorizes the Court to take any other action that the Court considers advisable, as well as section 101(2) of the *CJA* which gives the Court jurisdiction to appoint a receiver on such terms as are considered just.

55. I draw additional comfort from the observation of the Supreme Court of Canada that the very expansive wording of section 243(1)(c) of the *BIA* has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court ordered receiverships: see *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 148, citing *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation, 2021 ABCA 226* at para. 20; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508 at para. 57; and *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*, 1994 CanLII 7468, 114 D.L.R. (4th) 176 (Ont. Ct. J. (G.D.)) at p. 185.

56. I am satisfied that the terms of the RFCA are fair and reasonable and indeed are appropriate in the circumstances. The Receiver has prepared a comparative analysis of the economic terms with those of credit facilities approved in other Court-supervised insolvency proceedings, and particularly those in real estate and construction-based insolvencies. I am satisfied that the terms of the RFCA, including but not limited to the interest rate and fees, is appropriate in the circumstances.

57. In approving the RFCA, I am recognizing not only the urgent and immediate need for funding, and the fact that the proposed RFCA is the only commitment for funding put forward today by any party, but also the fact that this process is obviously in its earliest days. In approving the RFCA, I am authorizing the funding required to underlie the necessary stability referred to above.

58. I make no determination, and nor is one sought by the Applicant today, as to whether, when and on what terms a sales process might be sought to be approved. To allay the concerns expressed today on behalf of the Coco Parties, no determination was sought and none is made with respect to whether construction of the Project under the auspices of the Receiver should continue for two years, or indeed for any fixed period of time. All of that is for another day.

59. What the timelines and milestones set out in the RFCA do is satisfy the Court, and demonstrate to stakeholders (including possible purchasers, lenders, investors and others) that there is a substantive commitment for financing in place to backstop the receivership.

60. Indeed, one of the key, if not *the* key, tasks of the Receiver and its advisors will be to determine and make appropriate recommendations concerning whether the Project should be sold, and if so when and on what terms. To do that, and to do it properly, the Receiver needs an opportunity to gather all necessary information, complete an analysis, and make recommendations on an informed basis. The Receiver will seek advice, directions and/or approvals, as required. The proposed order contains the usual comeback clause, permitting any party to seek the assistance of this Court on seven days' notice if necessary.

61. I am also satisfied that the Receiver's Borrowings Charge is appropriate and should be approved for all of the above reasons. It is to have priority over all other charges and security interests other than the Receiver's Charge, Aviva's security interest in the Condo Deposits, and is subject to subsections 14.06(7), 81.4(4) and 81.6(2) of the *BIA*.

62. Finally, the draft receivership order contemplates certain protections being extended to the Developer as set out in the motion materials. These include, for example, a limited stay, and an order that any supplier be restrained from discontinuing goods or services during the receivership provided that, with respect to post-filing supplied, the Developer continues to pay for those goods or services.

63. I am satisfied that jurisdiction to make such an order is found in section 243(1)(c) of the *BIA* and section 101 of the *CJA* and that such an order is advisable in the circumstances of this case.

64. This relief is required here to ensure that the ability of the Developer to continue with the Project is not undermined by disruption of current contractual relationships or potential

litigation, all of which is consistent with the imperative of ensuring that the Receiver has a reasonable opportunity to determine how to maximize value for stakeholders here.

65. The terms of the draft order are appropriate. They are largely consistent, with necessary modifications as are justified by the Record here, with the Model Order of the Commercial List. While not determinative of whether the order is appropriate in any case, this is of considerable assistance.

Disposition

66. The Application is granted, the Receiver is appointed and the other relief set out in the Notice of Application is approved.

67. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

68. In closing, I am grateful to the parties, their counsel and other professional advisors for working together cooperatively and collaboratively such that the appointment of a receiver today was unopposed by any key stakeholder. I recognize the complexities of the Project and the fact that there are various and material differences in perspective and disputes between and among the same parties that will have to be resolved or determined. I urge the parties in the strongest possible terms to focus on the overarching objective of maximizing the value for all stakeholders in the Project.

Osborne, J.

TAB 3

CITATION: Royal Bank of Canada v. 2668144 Ontario Inc. et al., 2024 ONSC 1680
COURT FILE NO.: CV-23-00702043-00CL
DATE: 20240320

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

RE: Royal Bank of Canada, Plaintiff

AND:

2668144 Ontario Inc. et al., Asminur Rahaman and Shakive Rahaman, Defendants

BEFORE: Peter J. Osborne J.

COUNSEL: *Melinda Vine*, for the Receiver, msi Spergel Inc.

HEARD: March 20, 2024

ENDORSEMENT

[1] Msi Spergel Inc., in its capacity as Receiver, seeks an order:

a. approving the First Report of the Receiver dated February 26, 2024 and the activities of the Receiver described therein;

b. increasing the Receiver's Borrowings Charge from $200,000 to $500,000;

c. approving the sales and marketing process in respect of the Property at 989 Ward Street, Bridgenorth Ontario (the "SISP") as fully described in the First Report;

d. releasing and discharging the Receiver from any and all liability arising out of the proposed Environmental Remedial Work proposed to be completed at the Property, save for gross negligence or wilful misconduct;

e. approving the Statement of Receipts and Disbursements; and

f. approving of the fees of the Receiver and its counsel.

[2] Defined terms in this Endorsement have the meaning given to them in my earlier Endorsements made in this proceeding or in the motion materials including the First Report, unless otherwise stated.

[3] RBC is the senior secured creditor. The Debtor is indebted to the bank in the approximate amount of $1,536,844.49 advanced under several credit facilities.

[4] The relief sought today is unopposed, and is strongly supported by RBC.

Borrowings Charge

[5] The proposed increase in the Borrowings Charge results from the anticipated additional funds required to deal with the estate, including in significant part the completion of the proposed Environmental Remedial Work. RBC supports the proposed increase.

[6] I have reviewed the First Report and the Appendices thereto and in particular the proposed Environmental Remedial Work as reflected in the Phase II Environmental Report dated October 23, 2023, the Delineation Report dated January 9, 2024 and the Remediation Proposal dated January 16, 2024.

[7] I am satisfied that the proposed increase in the Borrowings Charge is appropriate given the anticipated remedial work to be done which is supported as to both scope and estimated price by the Receiver and RBC as senior secured creditor.

SISP

[8] The proposed SISP contemplates the commissioning of appraisals, sales and marketing proposals, and listing the Property for sale on MLS, together with related matters, all leading to a sale proposed to occur after completion of the proposed Environmental Remedial Work.

[9] This Court has held that when considering a sales solicitation process, including the use of a stalking horse bid, the court should assess the following factors (See: *CCM Master Qualified Fund v. Bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):

a. the fairness, transparency and integrity of the proposed process;

b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[10] These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

[11] In *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169, 2009 CanLII 39492 (ONSC), Morawetz, J. (now Chief Justice Morawetz) described several factors to be considered in a determination of whether to approve a proposed sales process, including the following. While that was a CCAA proceeding, the same factors apply to a sale in the context of a receivership:

a. is a sale transaction warranted at this time?

b. will it benefit the whole economic community?

c. do any of the debtor's creditors have a *bona fide* reason to object to a sale? and

d. is there a better viable alternative?

[12] For the reasons set out in the First Report, I am satisfied that the proposed SISP is appropriate here since the above factors have been satisfied, and the SISP should be approved.

Environmental Remediation Work and Release and Discharge of the Receiver

[13] The proposed Environmental Remediation Work is set out in the environmental consultant reports appended to the Third Report referenced above. As set out in the Environmental Report of A&A Environmental Consultants Inc. dated October 30, 2023, the Property does not meet certain environmental standards. This is not surprising, given its prior use as a gas station. The Environmental Report recommends that a remediation cleanup program be undertaken to reduce the environmental contamination of the Property to within acceptable guidelines.

[14] I defer to the judgment of the Receiver, supported by the environmental consultant it has engaged, that the work is appropriate, necessary and will be accretive to the value of the estate for the benefit of all stakeholders. I am reinforced in this deference by the fact that the senior secured creditor fully supports the expenditure for the proposed work, and by the fact that no other party opposes it.

[15] However, in my view it is not appropriate to grant at this time a release and discharge of the Receiver in respect of any liability arising out of the proposed Environmental Remediation Work, (recognizing that the proposed release would exclude gross negligence or wilful misconduct).

[16] Having heard my concerns, both the Receiver and RBC as senior secured creditor are content to proceed with the proposed work absent that release and are therefore content with a form of order that does not include that relief. It follows that the proposed increase in the

Borrowings Charge remains appropriate as it is the intention of the Receiver to proceed with those remediation efforts in any event.

[17] However, in the circumstances, it is appropriate that I explain, at least in brief, the basis for my concerns.

[18] Parliament and the Ontario legislature have already provided certain relevant statutory protections.

[19] A trustee or a receiver is not personally liable as such for any environmental condition that arose or environmental damage that occurred before or after its appointment unless it is established that the condition arose or the damage occurred as a result of the receiver's gross negligence: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*"), s.14.06(2).

[20] Protection is afforded to secured creditors and secured creditor representatives from orders that are issued by the Ministry of the Environment, Conservation Parks in certain specific circumstances set out in the *Environmental Protection Act*, R.S.O. 1990, c.E.19 (the "*EPA*") and particularly s. 168.17 thereof.

[21] A "secured creditor" is defined in the *EPA* as:

> a person who holds a mortgage, hypothec, pledge, charge, lien, security interest, encumbrance or privilege on or against property, but does not include a person who has taken possession or control of the property.

[22] The actions that may be taken by secured creditors and which attract the statutory protection include, as provided for in ss. 168.17(2) 2 and 3:

a. any action taken for the purpose of conducting, complete or confirming an investigation relating to the secured property;

b. any action taken for the purpose of preserving or protecting the secured property including action to:

   i. ensure the supply of water, sewage services, electricity, artificial or natural gas, steam, hot water, heat or maintenance;

   ii. secure the property by means of locks, gates, fences, security guards or other means;

   iii. ensure that the property is insured under a contract of insurance; or

iv. pay taxes due or collect rents owing with respect to the property;

c. any action taken on the secured property for the purpose of responding to:

i. any danger to the health or safety of any person that results from the presence or discharge of a contaminant on, in or under the property;

ii. any impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it that results from the presence or discharge of a contaminant on, in or under the property; or

iii. any injury or damage or serious risk of injury or damage to any property or to any plant or animal life that results from the presence or discharge of a contaminant on, in or under the property.

[23] In addition, s. 168.26 of the *EPA* creates a category of exemptions for a person who conducts, completes or confirms an investigation or who takes any action to reduce the concentration of contaminants in, on or under a property from being categorized as in occupation of the source of contaminant or a person in charge, management or control of a source of contaminant.

[24] The release and discharge language sought by the Receiver is based on its position that the proposed Environmental Remedial Work is an action taken by the Receiver to respond to damage at the Property, with the result that the Receiver is entitled to the statutory protection against any order that may be made in relation to the Environmental Remedial Work undertaken.

[25] Counsel for the Receiver submitted that there appears to be no guidance one way or the other in the jurisprudence as to that interpretation of the *EPA*, with the result that it requested the release and discharge language.

[26] The Receiver submits that the proposed Environmental Remedial Work is for the benefit of the estate and will improve the Property, and further that it has taken all necessary care in identifying and reporting on the environmental issues, with the result that it should be released and discharged from any liability it now has or may hereafter have arising out of the proposed Environmental Remedial Work, save and except for gross negligence or wilful misconduct, all in accordance with the *BIA* and the *EPA*.

[27] In my view, such a prophylactic or anticipatory release and discharge should not be granted at this time.

[28] To be clear, I accept the submissions of the Receiver summarized above that it has acted appropriately. I also accept that completion of the proposed work will add value to the Property.

The fact that a property without environmental contaminants in the soil would have a greater value than property with contaminants present, seems self-evident.

[29] The question of whether the expected increase in the value of a property exceeds the cost of the remediation is another issue. Should the property be sold "as is" at a reduced price, or remediated and sold at what would presumably be a higher price?

[30] I defer to the judgment of the Receiver in that regard, consistent with the well-established reluctance on the part of courts to second-guess the expertise and considered business decisions of their receivers in arriving at their recommendations: see *Regal Constellation Hotel Ltd., Re,* 2004 CanLII 206 (ONCA) at para. 23.

[31] However, in my view it is not appropriate for the court to grant at this stage what is effectively declaratory relief and moreover is declaratory relief that is anticipatory in nature since the proposed remediation work has not yet been undertaken.

[32] The statutory protections afforded to receivers and secured creditors (such as the secured creditor here who is funding and supporting the proposed Environmental Remediation Work) are as set out in the statutory provisions summarized above. Those protections have been crafted and framed by Parliament and the legislature.

[33] In my view, the issue of whether those protections apply to any remediation efforts is best determined on the basis of a full record and not in a factual vacuum. I appreciate that this means that the work would have to be undertaken before the issue arises, but a court would then have the factual matrix within which to determine the issue and evaluate the conduct as against the statutory protection provisions.

[34] I also appreciate that this means that in some circumstances, a receiver or a secured creditor may decline to undertake the work in the first place. However, this risk does not provide a sufficient basis here for what amounts to a "pre-determination" of the issue of whether conduct that has not yet occurred falls within the sphere of statutory protection or not.

[35] There is a general reluctance on the part of the courts to grant declaratory relief and determine issues in the absence of a full evidentiary record. In *Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.* (2023), 2023 CarswellOnt 7509, 2023 ONCA 363 (Ont. C.A.), the Ontario Court of Appeal upheld the decision of Cavanagh, J. declining to grant declaratory relief that would have extinguished certain potential claims or insulated potential challenges to rights that were being granted.

[36] The Court of Appeal concluded that the proposed declaratory relief was anticipatory in nature and went beyond the normal scope of declaratory relief as recently described by the Supreme Court of Canada in *S.A. v. Metro Vancouver Housing Corp.*, 2019 CarswellBC 98, 2019 CarswellBC 99, 2019 SCC 4, 2019 CSC 4, 19 B.C.L.R. (6th) 1, 430 D.L.R. (4th) 621, [2019] 4 W.W.R. 1, [2019] 1 S.C.R. 99 (S.C.C.), at para. 60:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought.

[37] In my view, the same analysis applies here, with the result that the proposed release and discharge language amounts effectively to a declaration in advance that the proposed Environmental Remediation Work falls within the scope of the statutory protections provided for in the *BIA* and/or the *EPA*, and should not be granted at this time.

[38] Finally, such relief should be sought on notice to the environmental regulator in any event.

Approval of the Receiver's Conduct and Fees

[39] I have reviewed fee affidavits of the Receiver and its counsel respectively, together with the copies of the accounts appended as Exhibits to those affidavits. In my view, the fees are reasonable, appropriate and are reflective of work properly undertaken by the Receiver and its counsel that was appropriate, reasonable and in accordance with the mandate given to the Receiver in the original Appointment Order: see *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), at paras. 33 and 45.

[40] The fees of the Receiver and its counsel are approved. The Statement of Receipts and Disbursements is also appropriate and is approved.

Result and Disposition

[41] As stated above, the Receiver, supported by RBC, was content that its motion be granted without the release and discharge language related to the Environmental Remediation Work.

[42] The balance of the relief sought is appropriate and is granted.

[43] Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Osborne J.

Court File No. CV-24-00730869-00CL

TWO SHORES CAPTIAL CORP.	and	**PRODUCTIVITY MEDIA INC., PRODUCTIVITY MEDIA INCOME FUND I LP, and PRODUCTIVITY MEDIA LENDING CORP. I**
Applicant		Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES
Motion Returnable April 16, 2025

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