

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF 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.

B E T W E E N:

C & K MORTGAGE SERVICES INC.

Applicant

- and -

KINGS DEVELOPMENT INC.

Respondent

FACTUM OF THE APPLICANT
(Application Returnable on June 11, 2024)

June 7, 2024

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PART I - OVERVIEW

1. The Applicant C & K Mortgage Services Inc. (“**Rescom**”) applies for the appointment of Rosen Goldberg Inc. (“**RGI**”) as receiver and manager of the Respondent Kings Development Inc. (the “**Debtor**”), including its property at 8, 10, 12, 14, 16 and 18 Bostwick Crescent and 2, 6 and 8 Bond Crescent, in Richmond Hill, Ontario (collectively, the “**Property**”) pursuant to section 243(1) 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**”).

2. The hearing of this application was originally returnable on March 7, 2024. It was adjourned a number of times while Rescom explored the potential of achieving a pre-packaged sale of the Property for the Court to approve contemporaneously with RGI’s appointment as receiver. Notwithstanding those efforts, no such transaction has been achieved. Given the extent to which the Property is leveraged with significant debt owing to numerous subordinate ranking mortgagees, it is critical that a receiver now be appointed over the Property so that it can be marketed and sold by a Court officer in a fair and transparent manner, with a view to maximizing realization and achieving a definitive sale of the Property within a reasonable timeframe.

3. The proposed receivership Order being sought is (with minor variations) consistent with the model receivership Order developed by the Commercial List Users’ Committee.

PART II - FACTS

A. The Loan

4. Rescom is a first-ranking secured creditor of the Debtor in connection with the Loan (hereinafter defined). The Loan has been in financial default since December 1, 2023. As of December 6, 2023, \$22,500,179.10 was due under the Loan.¹

¹ Affidavit of Gary Gruneir sworn February 7, 2024 (“**Gruneir Affidavit**”), Application Record (“**AR**”), at para 14, AR, p. 35, Caselines A39.

5. Pursuant to a commitment dated April 28, 2022 (the “**Commitment**”), Rescom extended a loan of \$22 million (the “**Loan**”) to the Debtor for a term of one year, with interest at the rate of 10.75% per annum, calculated and payable interest only monthly.² KDI’s principal is Fanseday Wang (“**Mr. Wang**”).³
6. The Loan proceeds were required to assist KDI in financing the purchase of the Property pursuant to an Approval and Vesting Order of the Ontario Superior Court of Justice dated May 18, 2022.⁴
7. The Property is an assembly of development land at the northwest corner of Bond Crescent and Yonge Street and consists of nine previously separate parcels, which were consolidated in November 15, 2023.⁵ The Debtor has been developing the Property for construction of a residential community consisting of stacked and freehold townhomes.⁶
8. Pursuant to the Commitment, the Loan is secured by:
 - (a) a first-ranking charge registered against the Property on May 30, 2022, as Instrument No. YR3431506 (the “**Rescom Charge**”);⁷
 - (b) an assignment of rents, notice of which was registered against the Property on May 30, 2022, as Instrument No. YR341507;⁸ and
 - (c) a general security agreement given by the Debtor, dated May 2022 (the “**GSA**”).⁹
9. Each of the Rescom Charge and the GSA contain contractual entitlements to appoint a receiver upon default.

² Exhibit C, Gruneir Affidavit, AR, p.50, Caselines A54.

³ Gruneir Affidavit at para 3, AR, p. 32, Caselines A36.

⁴ Gruneir Affidavit at para 7, AR, p. 33, Caselines A37.

⁵ Gruneir Affidavit at para 4, AR, p. 32, Caselines A36.

⁶ Gruneir Affidavit at para 5, AR, p. 32, Caselines A36.

⁷ Exhibit E, Gruneir Affidavit, AR, p. 77, Caselines A81.

⁸ Exhibit F, Gruneir Affidavit, AR, p. 90 Caselines A94.

⁹ Exhibit G, Gruneir Affidavit, AR, p. 95, Caselines A99.

10. The Loan initially matured on June 1, 2023. It was extended for a further six months and the interest rate payable under the Loan was increased from 10.75% to 12.8% *per annum*.¹⁰

B. The Subordinate-Ranking Charges against the Property

11. In addition to the Rescom Charge, the Property is subject to four subordinate ranking charges. As a result of various postponements of interest registered among the mortgagees, the subordinate charges rank in the following order of priority:¹¹

Order of Priority	Holder	Face Amount	Interest Rate	Date of Maturity
2	Cameron Stephens Mortgage Capital Ltd.	\$27,500,000	Not specified	On demand
3	WPC GPI Inc.	\$5,000,000	13.5%	August 1, 2024
4	Amercan Corporation	\$1,000,000	35%	On demand
5	Amercan Corporation	\$5,000,000	20%	Not specified

C. Demand and NITE Issued

12. Due to the Debtor's failure to pay monthly interest due under the Loan on December 1, 2023, on December 6, 2023, Rescom made demand under the Loan and issued a Notice of Intention to Enforce Security pursuant to section 244 of the BIA (the "NITE").¹²

D. The CSML Proceeding

13. On December 5, 2023, Cameron Stephens Mortgage Capital Ltd. ("**CSML**"), who holds the second-ranking charge against the Property, initiated proceedings in the Commercial List to appoint a receiver and manger over a number of entities controlled by

¹⁰ Gruneir Affidavit at para 8, AR, p. 33, Caselines A37.

¹¹ Gruneir Affidavit at para 11, AR, p. 34, Caselines A38.

¹² Exhibit O, Gruneir Affidavit, AR, p. 168, Caselines A172.

Mr. Wang and their properties, including the Debtor and the Property (the “**CSML Proceeding**”).¹³

14. As a result of Rescom’s objection, as first mortgagee of the Property, to CSML, as a subordinate-ranking mortgagee, directing the process to monetize the Property, CSML agreed to step back from appointing a receiver over the Property.

15. By Order of Justice Cavanagh dated December 21, 2023 in the CSML Proceeding, Albert Gelman Inc. was appointed receiver and manager of the respondents named in the CSML Proceeding and their properties, save and except for the Debtor and the Property.¹⁴

PART III - ISSUES

16. The issue raised on the within application is whether it is just or convenient to appoint a receiver on the terms of the proposed receivership Order.

PART IV - LAW AND ARGUMENT

A. Test to Appoint a Receiver

17. Pursuant to section 243(1) of the BIA and section 101 of the CJA, the Court may appoint a receiver and manager where it is “just or convenient” to do so.¹⁵

18. In determining whether it is just and 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”.

19. The applicant need not establish that it will suffer irreparable harm if the proposed receiver is not appointed.¹⁶

¹³ Gruneir Affidavit, para 16, AR, p. 36, Caselines A40.

¹⁴ Exhibit Q, Gruneir Affidavit, AR, p. 204, Caselines A208.

¹⁵ *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 101](#).

¹⁶ *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#) at [paras 24](#) and [28](#).

20. Where a debtor has expressly agreed to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.¹⁷

21. It is well established that the extraordinary nature of a receiver “is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements.” The appointment of a receiver “becomes even less extraordinary when dealing with a default under a mortgage”.¹⁸

22. Where, as here, an applicant seeks to enforce a term of an agreement assented to by the parties, the inquiry as to whether it is just and convenient to appoint a receiver “requires the court to determine whether it is in the interests of all concerned to have the receiver appointed”. These interests include the rights of the secured creditor pursuant to its security.¹⁹

23. In determining whether it is just or convenient to appoint a receiver, courts have been informed by the following factors, among others:²⁰

- (a) 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;
- (b) the need to preserve and maximize the return on the subject property;
- (c) apprehended or actual waste of the debtor’s assets;
- (d) the relationship between the debtor and its creditors;
- (e) the fact that the creditor has a right to appointment under the loan documentation;
- (f) the balance of convenience to the parties;
- (g) the risk of the lender’s security deteriorating;

¹⁷ *United Savings Credit Union v. F & R Brokers Inc.*, [2003 BCSC 640](#) at [para 16](#).

¹⁸ *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, [2020 ONSC 1953](#) at [paras 43-44](#) [“**BCIMC**”].

¹⁹ *Bank of Nova Scotia v Freure Village on the Clair Creek*, [1996 O.J. No. 5088](#), [1996 CanLII 8258](#).

²⁰ *BCIMC*, *supra* note 18 at [para 45](#); *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186](#) at [para 25](#).

- (h) loss of confidence in the debtor's management; and
- (i) the conduct of the parties.

B. Just and Convenient to Appoint a Receiver

24. Having regard to the foregoing considerations, Rescom submits that it is both just and convenient that RGI be appointed as receiver for the following reasons:

- (a) the Debtor has been financial in default under the Loan since December 1, 2023 and the Loan has matured;
- (b) notwithstanding the issuance of the demand and the NITE on December 6, 2023, the Loan has not been repaid;
- (c) the statutory notice period under the BIA has long since expired;
- (d) the Rescom Charge and the GSA each contain contractual entitlements to appoint a receiver upon default;
- (e) the Property is leveraged with significant, expensive debt owing to numerous mortgagees;
- (f) equity in the Property is eroding with the passage of time and the associated accrual of interest under the Loan;
- (g) RGI is well regarded as a Court officer for its skill and experience in marketing and selling real estate in Ontario; and
- (h) a Court-appointed receiver will ensure that the interests of all of the Debtor's stakeholders are considered and facilitate a fair and transparent marketing and sale process with a view to maximizing realization and achieving a definitive sale of the Property within a reasonable timeframe. a court-appointed receiver will ensure that the interests of all of the Debtor's stakeholders are considered and facilitate a fair and transparent marketing and sale process for achieving a definitive disposition of the Property; and
- (i) a court-supervised receivership will provide a convenient forum for the determination of legal priorities among creditors that may arise and facilitate distribution of proceeds from the sale of the properties to creditors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June, 2024.



David P. Preger

(June 7, 2024)

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SCHEDULE “A” LIST OF AUTHORITIES

1. *Bank of Montreal v Carnival National Leasing Limited*, [2011 ONSC 1007](#)
2. *United Savings Credit Union v. F & R Brokers Inc.*, [2003 BCSC 640](#)
3. *Bank of Nova Scotia v Freure Village on the Clair Creek*, [1996 O.J. No. 5088](#), [1996 CanLII 8258](#)
4. *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.*, [2020 ONSC 1953](#)
5. *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, [2022 ONSC 6186](#)

SCHEDULE "B" RELEVANT STATUTES

[Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3](#)

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

[Courts of Justice Act, R.S.O. 1990, c. C.43](#)

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

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-and- **KINGS DEVELOPMENT INC.**
Respondent

Court File No. CV-00084397-0000

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PROCEEDING COMMENCED AT
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