

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

- and -

KING DAVID INC. and HELEN ROMAN-BARBER

Respondents

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

FACTUM OF THE APPLICANT

Application returnable December 21, 2023

December 12, 2023

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PART I. OVERVIEW

1. This is an application to appoint a receiver and for judgment on a loan in default.
2. The applicant, First Source Financial Management Inc. (the “**Lender**”), has a first mortgage over a vacant development site owned by the respondent, King David Inc. (the “**Borrower**”), which mortgage secures indebtedness of over \$55 million.
3. After the loan went into default, the parties entered into three forbearance agreements, each of which gave the Borrower additional time to repay the loan and provided that the Borrower consented to the appointment of a receiver if the loan was not repaid by the end of the forbearance period.
4. The forbearance period under the most recent forbearance agreement ended without any repayment, meaning that the Lender is now contractually entitled to appoint a receiver.
5. Not only has the Borrower already consented to the appointment, but a receivership is amply warranted in the circumstances. The Borrower owes over \$55 million to the Lender and has no credible plan to repay it; in fact, the Borrower has had the opportunity to pursue a refinancing since at least April, 2023 (the beginning of the forbearance period) and the evidence is clear that those efforts have failed.
6. This application should be granted with costs.

PART II. SUMMARY OF FACTS

7. The following summary of facts is drawn from the affidavit of David Mandel affirmed December 7, 2023 (the “**Mandel Affidavit**”).

A. Background – the Property, the parties, and the Loan

8. The Borrower is the registered owner of the four properties located at the west side of Victoria Square Blvd., approximately 900 meters north of Major Mackenzie Drive East, in Markham ON (collectively, the “**Property**”).¹

9. The Property is one of the sites of a residential condominium development known as Cathedral Courtyards (the “**Project**”). While parts of the Project are under construction, the Property – which is the anticipated site of Phases 2 & 3 of the Project – remains vacant land.²

10. On December 1, 2021, First Source completed a mortgage loan transaction with the Borrower for approximately \$54 million (together with all associated interest and other amounts payable thereunder, the “**Loan**”)³ in accordance with a Letter of Commitment dated October 3, 2021 (the “**Commitment Letter**”).⁴

11. The Loan is secured by, among other things, a first mortgage registered against the Property.⁵

12. The Commitment Letter expressly provides that the Lender can appoint a receiver if the Loan is in default.

¹ Mandel Affidavit, para. 4.

² Mandel Affidavit, para. 7.

³ Mandel Affidavit, para. 10; see also the Commitment Letter at AR, tab 2C.

⁴ Mandel Affidavit, para. 8. Commitment Letter, application record (“**AR**”) tab 2C.

⁵ Mandel Affidavit, para. 15; see also the charge document at AR, tab 2E.

13. There is a second mortgage on the Property in favour of Slovak Greek Catholic Church Foundation (the “**Second Mortgagee**”).⁶ The Lender understands that the Second Mortgagee is a related party of the Borrower and/or the Guarantor.

14. The Loan is repayable on maturity, which was initially scheduled for April 2023, approximately 16 months from the date of the initial advance.⁷

15. The Borrower’s obligations under the Loan are guaranteed by the principal of the Borrower, the respondent Helen Roman-Barber (the “**Guarantor**”), pursuant to a written guarantee agreement (the “**Guarantee**”).⁸

B. Defaults on the Loan and demands for repayment

16. There have been multiple events of default in respect of the Loan and multiple forbearance agreements which have been breached.

17. At the time the Loan initially matured in April 2023, the Borrower was unable to repay the Loan. As such, the Lender, the Borrower, and the Guarantor entered into a forbearance agreement dated April 1, 2023 (the “**First Forbearance Agreement**”) by which, among other things:

- (a) the Borrower acknowledged its actual or anticipated default under the Loan;
- (b) the Lender agreed to forbear on further enforcement steps until July 8, 2023 or the occurrence of an event of default;

⁶ Mandel Affidavit, para. 17.

⁷ Commitment Letter, AR tab 2C.

⁸ Mandel Affidavit, para. 14; AR tab 2D.

- (c) the Borrower agreed to make monthly interest payments during the forbearance period; and
- (d) in the event of a failure by the Borrower to repay the Loan by July 8, 2023 (or another event of default) the Borrower and Guarantor agreed to the appointment of a receiver over the property, assets, and undertakings of the Borrower, including the Property.⁹

18. On June 16, 2023, In anticipation of the Borrower's inability to repay the Loan by the forbearance date of July 8, 2023, the Borrower, Lender, and Guarantor entered into another forbearance agreement (the "**Second Forbearance Agreement**") on substantially the same terms – including that the Borrower and Guarantor again expressly agreed to the appointment of a receiver in the event of a default – with an extension of the forbearance period until October 8, 2023 or the occurrence of an event of default.¹⁰

19. After the Lender learned that the Loan was not going to be repaid October 8, 2023, the parties entered into a further forbearance agreement dated October 3, 2023 (the "**Third Forbearance Agreement**") on substantially the same terms as the First and Second Forbearance Agreements.¹¹

⁹ Mandel Affidavit, para. 26; First Forbearance Agreement, AR tab 2L.

¹⁰ Mandel Affidavit, para. 29; Second Forbearance Agreement, AR tab 2M.

¹¹ Mandel Affidavit, para. 31; Third Forbearance Agreement, AR tab 2N.

20. Under the Third Forbearance Agreement, the Borrower also agreed to make a partial repayment of the principal amount of the Loan in the total amount of \$2 million, which it did.¹²

21. The forbearance period under the Third Forbearance Agreement expired December 8, 2023.¹³

22. Under the Third Forbearance Agreement, the Borrower specifically covenanted to pay monthly interest on November 1, 2023.

C. Default under the Third Forbearance Agreement

23. The Borrower failed to make its monthly interest payment to the Lender on November 1, 2023 or at all.¹⁴

24. This failure constitutes an event of default under the Third Forbearance Agreement and the Commitment Letter.

D. The demands for payment

25. As a result of the foregoing breaches, the Lender delivered a notice of default on November 3, 2023 which, under the terms of the Forbearance Agreement, resulted in all amounts owing to the Lender (the “**Indebtedness**”) becoming immediately due and payable.¹⁵

¹² Mandel Affidavit, para. 32.

¹³ AR tab 2N.

¹⁴ Mandel Affidavit, para. 35.

¹⁵ Mandel Affidavit, para. 37; AR tab 2O.

26. On November 10, 2023, the Lender issued a Notice of Intention to Enforce Security under section 244 of the *Bankruptcy and Insolvency Act*.¹⁶

27. The Borrower failed to repay all amounts in a timely manner upon receiving the Lender's demand. This failure constituted a further event of default.¹⁷

28. As a result of the foregoing, the entire amount of the Indebtedness is now due and owing pursuant to the Loan, the Commitment Letter, and the Third Forbearance Agreement.

29. Notwithstanding multiple demands to date, the Indebtedness has not been repaid and the events of default have not been cured.¹⁸

30. As of December 4, 2023, the total amount of the Indebtedness was \$55,855,203.58 plus legal fees and plus a per diem of \$27,602.82 in respect of ongoing interest.¹⁹

E. This application

31. The Lender seeks the appointment of RSM Canada Limited to act as Receiver of the Property, in accordance with the consent to receivership granted by the agreements referenced above. The Lender also seeks judgment on the Indebtedness as against the Borrower and the Guarantor.

32. The Property remains vacant and there has been no appreciable progress in the Borrower's development of the Project. The Lender is concerned that its security position

¹⁶ Mandel Affidavit, para. 39; AR tab 2P.

¹⁷ Mandel Affidavit, para. 40.

¹⁸ Mandel Affidavit, para. 42.

¹⁹ Mandel Affidavit, para. 43; AR tab 2Q,

is eroding, particularly given the ongoing deterioration in the real estate financing markets in the Greater Toronto Area generally.²⁰

33. Despite having been granted forbearance since April, 2023, the Borrower has been unable to refinance the Loan or otherwise to bring the Loan back into good standing. The Borrower has not articulated any plan to refinance or sell the Property.²¹

PART III. ISSUES

34. The only issues in this application is whether a receiver ought to be appointed over the Property and whether judgment should be granted against the Borrower and the Guarantor.

PART IV. LAW & ARGUMENT

A. Preliminary issue: the Respondents have consented to the receivership

35. As a threshold matter, both the Borrower and the Guarantor have consented to this application by entering into the Third Forbearance Agreement which, like the two precedent forbearance agreements, expressly provided that the Lender would appoint a receiver if the Loan was not repaid by the end of the forbearance period.

36. The Lender submits that this agreement should presumptively be enforced.

37. Of course, despite that agreement, the Court retains the discretion to assess whether the Lender is entitled to the relief sought based on the facts and the law. However, even on a traditional analysis, it is clear that a receiver ought to be appointed.

²⁰ Mandel Affidavit, para. 45.

²¹ Mandel Affidavit, para. 46.

B. Legal framework for a receivership

38. The Lender seeks the appointment of a receiver pursuant to: (i) its contractual authority under the Commitment Letter and each of the three forbearance agreements; (ii) subsection 243(1) of the *BIA*; and (iii) section 101 of the *Courts of Justice Act* (“**CJA**”).

39. Subsection 243(1) of the *BIA* is clear that where it is "just or convenient" to do so, the court may appoint a receiver. Similarly, the *CJA* enables the court to appoint a receiver and manager where such appointment is "just or convenient".²²

40. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. (as he then was) described the basic principles governing the judicial appointment of a receiver as follows:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so [citation omitted]. In deciding whether or not to do so, it 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. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently [citations omitted]. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed [citation omitted].²³

41. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, Mesbur J. said: “while appointing a receiver is generally viewed as an ‘extraordinary remedy’, it is

²² *Bankruptcy and Insolvency Act*, RSC. 1985, c. B-3, s. 243(1) [**“BIA”**]; *Courts of Justice Act*, RSO 1990, c. C.43, s. 101.

²³ *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CanLII 8258 \(ON SC\)](#) (Commercial List) [**“Freure Village”**] at para. 11; *1529599 Ontario Ltd v. Dalcour Inc.*, [2012 ONSC 5707](#) (Commercial List) [**“Dalcour”**] at para. 40.

less so when, as is the case here, a debtor has expressly agreed to the appointment of a receiver in the event of default.”²⁴

C. The test for the appointment of a receiver is met

42. In the present case, having regard to all of the circumstances, it is both just and convenient for this Court to appoint a receiver over the Property based on all the circumstances outlined above. To summarize:

- (a) the Respondents have consented to this relief;
- (b) the Respondents are deeply indebted to the Lender. Events of default have occurred and are continuing, and the Respondents are unable to satisfy their obligations;²⁵
- (c) the Respondents have had over eight months to pursue a refinancing, since the forbearance period began on April 1, 2023. Those efforts have failed; Mr. Mandel’s unchallenged evidence is that the Borrower has not articulated any plan to refinance or sell the Property;
- (d) the Borrower has failed to advance the Project and the Property remains vacant. This creates an ongoing risk that the Lender’s security position may erode;

²⁴ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, [2013 ONSC 1911](#) at para. 21 (Commercial List), leave to appeal denied, 2013 ONCA 282.

²⁵ See, for example, *Dalcor*, [2012 ONSC 5707](#) at para. 41; *Business Development Bank of Canada v. 2197333 Ontario Inc.*, [2012 ONSC 965](#) (Commercial List) [*"BDC"*] at para. 21; *BIA*, ss. 243(1.1) and 244(1).

- (e) the Commitment Letter and the three forbearance agreements contractually provide for and contemplate the appointment of a receiver in the circumstances;²⁶ and
- (f) the appointment of the Receiver will facilitate a transparent, orderly, and safe marketing and sale process for the Property.

D. Judgment is appropriate

43. The Lender also seeks judgment on the Indebtedness as against the Borrower and the Guarantor.

44. There is no serious question as to the liability of the Borrower and the Guarantor to the Lender arising out of their failure to repay the Indebtedness. The Lender respectfully submits that it is entitled to judgment pursuant to, among other things, the Commitment Letter, the Third Forbearance Agreement, and the Guarantee.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of December, 2023.



Jeff Larry/Daniel Rosenbluth

²⁶ *BDC*, [2012 ONSC 965](#) (Commercial List) at para. 21; *Dalcor*, [2012 ONSC 5707](#) at para. 40; *Freure Village*, [1996 CanLII 8258 \(ON SC\)](#) at para. 13; *Textron Financial Canada Ltd v. Chetwynd Motels Ltd*, [2010 BCSC 477](#) [*"Textron"*] at paras. 50, 55.

SCHEDULE A

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CanLII 8258 \(ON SC\)](#) (Commercial List)
2. *1529599 Ontario Ltd v. Dalcor Inc.*, [2012 ONSC 5707](#) (Commercial List)
3. *Business Development Bank of Canada v. 2197333 Ontario Inc.*, [2012 ONSC 965](#) (Commercial List)
4. *Textron Financial Canada Ltd v. Chetwynd Motels Ltd*, [2010 BCSC 477](#)
5. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, [2013 ONSC 1911](#)

SCHEDULE B

MORTGAGES ACT, R.S.O. 1990, C M.40

Receipts for purchase money sufficient discharges

25 A receipt for purchase money given by the person exercising the power of sale conferred by section 24 is a sufficient discharge to the purchaser, who is not bound to see to the application of the purchase money. R.S.O. 1990, c. M.40, s. 25.

Notice before sale

26 (1) No sale under the power conferred by section 24 shall be made until after forty-five days notice in writing in the form prescribed by the regulations made under this Act has been given to the persons and in the manner provided by Part III. R.S.O. 1990, c. M.40, s. 26 (1); 2017, c. 20, Sched. 11, s. 21.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243

Court may appoint receiver

- (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.

Restriction on appointment of receiver

- (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless
- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
 - (b) the court considers it appropriate to appoint a receiver before then.

Definition of "receiver"

- (2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who
- (a) is appointed under subsection (1); or

- (b) is appointed to take or takes possession or control — 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 — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

- (3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

- (4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

- (5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements - 5-

- (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements "

- (7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 244

Advance notice

- (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: Section 101

Injunctions and receivers

- (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.

Terms

- (1) An order under subsection (1) may include such terms as are considered just.

First Source Financial Management Inc.

Applicant

-and-

King David Inc. et al.

Respondents

CV-23-00710411-00CL

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