

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

BETWEEN:

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

- and -

2507448 ONTARIO INC.

Respondent

**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 RESPONDENT

March 6, 2020

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FACTUM OF THE RESPONDENT

PART I – INTRODUCTION

1. The purpose of this factum is to briefly address the legal issues raised in the Receiver's Motion Record for this March 10th motion. Specifically, the Applicant and Receiver take the position that the Respondent has no standing because only the Applicant and second mortgagee have a financial interest in the motion. The Respondent disputes this and contends that it does have standing on this motion.
2. In addition, this factum will set out the legal reasons why the Disputed Charges should be deducted from the Applicant's entitlement, and why the re-calculations must be taken into consideration as part of this Honourable Court's assessment.

3. All nicknames and short-form names, as defined in the Affidavit of Del Terrelonge found at tab one of the Respondent's Motion Record, are adopted herein.

PART II – FACTS

4. Del Terrelonge is the director and principal of the Respondent Corporation.¹ He entered into the three mortgages registered on title, on behalf of the Respondent, to facilitate the construction of the Property.
5. He is also a personal guarantor for all three mortgages registered on the Property.²
6. Mr. Terrelonge has been an active participant in the receivership process from the outset.

Interim Distribution & March 10th Motion

7. In or around November 2019, prior to the first closing date and before all the extensions were granted, it was agreed by the Receiver and the Respondent that, upon closing and receipt of funds, First Source would be repaid those amounts of the mortgage which were not being disputed by the Respondent and the Receiver would set aside any disputed amounts to be assessed on a later motion, if not resolved among the parties.
8. Prior to this, the Respondent had several times brought up concerns about the amounts set out in the Applicant's payout statements, but the parties agreed and it was always the understanding that the final accounting of the Applicant's entitlement would be dealt

¹ Affidavit Of Del Terrelonge, paragraph 1, Tab 1 of the Motion Record of the Respondent.

² Affidavit Of Del Terrelonge, paragraph 2, Tab 1 of the Motion Record of the Respondent.

with after the closing took place and the Receiver was in receipt of the funds for distribution.³

9. This process would facilitate repayment of the bulk of the Applicant's entitlement while ensuring that any ongoing disputes would be addressed prior to the final distribution of the sale proceeds.

PART III – THE ISSUES

10. Does the Respondent have standing on the motion?

11. Even if the Respondent does not have standing, which is denied, is there any juristic reason why this Honourable Court should not consider the Disputed Charges and the recalculation of the Applicant's remaining balance, as set out in the Affidavit of Del Terrelonge found at tab 1 of the Respondent's Motion Record?

PART IV – LAW & ANALYSIS

Standing on the motion

12. With respect to the standing issue, Mr. Terrelonge takes the position that he has standing on the motion, both in his capacity as the representative of the Respondent Corporation, as well as his status as a personal guarantor of the three mortgages registered on title to the Property.

³ Affidavit Of Del Terrelonge, paragraph 19, Tab 1 of the Motion Record of the Respondent.

13. In the case of a court-appointed receiver, the receiver is considered an officer of the Court put in to discharge the powers and duties afforded to it under the Court Order, and thus, the debtor or any interested party has a *prima facie* right to apply in the action for an accounting.⁴
14. The Receiver is required to prepare statements of receipts and disbursements, showing payments made to any creditors on account of arrears, as well as payments with respect to contracts and liabilities incurred during the receivership, such as an Agreement of Purchase and Sale. The debtor, along with the execution and subordinate creditors, are in turn expected to review each entry “with a view to challenging the *propriety* of such entry [emphasis added]”⁵.
15. Further, in a court-appointed receivership, the debtor has “every opportunity to defend and contest motions brought by the secured creditor and receiver and manager. Such motions may include motions for directions as to the disposition of particular assets [...] and generally all matters related to the administration. At each juncture, the debtor has an opportunity to contest the receivership proceedings [Emphasis added].”⁶
16. Also, previous caselaw has held that if the mortgagee, that being the Applicant, has not obtained judgment before the sale occurs, it would be entitled to sue the mortgagor, the Respondent, for any deficiency arising as a result of the sale. However, the mortgagee

⁴ See: *Bennett on Receiverships*, 3rd edition, by Frank Bennett, “Rights and Remedies of a Debtor”, page 719, paragraph 4, Respondent’s Book of Authorities (“Respondent BOA”), Tab 1 [“Bennett Receivership”]; and *Bennett on Creditors’ and Debtors’ Rights and Remedies*, 5th edition, by Frank Bennett, “Commentary on Parts I to VII”, page 366, paragraph (h), Tab 2 [“Bennett Creditors”], Respondent BOA.

⁵ *Bennett Receivership*, *Ibid*, at page 719, paragraphs 5-6, Tab 1, Respondent BOA.

⁶ *Bennett Creditors*, *Ibid*, at page 364, paragraphs (d), Tab 2, Respondent BOA.

would be obligated to account to the mortgagor for the proceeds of the sale to establish the deficiency and it would also be required to establish the costs incurred in the sale, if disputed.⁷

17. This March 10th motion deals exactly with this issue of accounting for the proceeds of sale and the need to justify costs incurred. The Respondent is challenging the propriety of select entries, contemplated since at least November/December 2019, and has a *prima facie* right to participate in the motion.

18. In addition, as a guarantor, Mr. Terrelonge has a personal interest in ensuring that this Honourable Court properly assess the mortgagees' respective entitlements. According to the Applicant's calculations, there will be a shortfall for both the first and second mortgage registered on the Property after disbursement of the sale proceeds. The amount of any shortfall, however, will be determined by this Honourable Court's decision on this motion, and any subsequent action taken by either the first or second mortgagee on the guarantee will be limited to the amounts determined on this motion.

19. Plus, there may be an issue of estoppel which will prevent Mr. Terrelonge from disputing the amount of the shortfall sought on a subsequent action on the guarantees he provided. As an active participant in the receivership process from the beginning, it would be expected that Mr. Terrelonge would continue to participate until the Receiver is discharged. If he chose not to do so, and did not dispute the amounts sought by the Applicant, he could be prevented from disputing the shortfall amount at a later date.

⁷ *Central Trust Co v Kent*, 1987 CarswellOnt 1085 (ONSC), at paragraph 6, Tab 3, Respondent BOA.

20. Likewise, this Honourable Court should not bar Mr. Terrelonge from participating in this motion and having his position heard, as the outcome will determine the extent of his exposure on the guarantees, impacting his legal interests and causing him great prejudice.

21. This motion has been in the works for several months, the main purpose of which has been to determine exactly what the Applicant is rightfully entitled to collect from the sale proceeds. The time for determining this issue is now -- the motion has already been booked, the Respondent's position has been known to the Applicant since December 2019, such that there is no prejudice suffered, and the determination on this motion would be the most just, expeditious and least costly determination of these issues on their merits.⁸

22. The Respondent further seeks

Consideration of Disputed Charges and Re-calculation

23. Should this Honourable Court find that the Respondent has no standing on this motion, which is denied, the Respondent nevertheless states that this Honourable Court must take into consideration the amounts outlined in the Terrelonge Affidavit as part of its calculation for distribution, in the interests of justice.

⁸ Rule 1.04 *Rules of Civil Procedure*, RRO 1990, Reg 194, and section 71(e) of the *Courts of Justice Act*, RSO 1990, c C.43.

24. It is one of the goals of the justice system to encourage public confidence in the administration of justice.⁹ The pursuit of justice in the circumstances is highlighted throughout various rules in the *Rules of Civil Procedure* as well.¹⁰
25. The Respondent submits that the pursuit of justice requires this Honourable Court to examine the Disputed Charges and re-calculations, as set out in the Affidavit of Del Terrelonge, regardless of the ruling on standing. It would be against the interests of justice for a court to issue an inaccurate order which does not ascribe to current legal principles, elaborated below. In particular, where the order will set out entitlements of competing parties, it is fundamental that the amounts assessed accurately reflect each party's lawful entitlement.
26. As such, with respect to the Management Costs set out in paragraph 4a) of the Affidavit of Del Terrelonge, this Honourable Court has previously held that a "mortgagee is not allowed compensation for his own care and trouble in the management and administration of his security."¹¹ The thrust of this rule is that a mortgagee who has suffered a detriment due to default on a loan is simply acting as a "reasonable, prudent" investor when it oversees the operation of a secured asset and that it is not normal for a secured creditor to charge substantial management fees for doing what any prudent

⁹ Section 71(c) of the *Courts of Justice Act*, RSO 1990, c C.43.

¹⁰ For example, see: Rules 1.04(1), 1.04(1.1), 1.05, 2.01, and 2.03 *Rules of Civil Procedure*, RRO 1990, Reg 194, and section 71(e) of the *Courts of Justice Act*, RSO 1990, c C.43.

¹¹ *Igloo Refrigeration Co v Industrial Acceptance Corp*, 1943 CarswellOnt 282 (ONSC) at paragraph 10, Tab 4, Respondent BOA ["Igloo"].

investor would do, including keeping “himself informed as to the operation” of the property.¹²

27. The law, however, does recognize that an investor can collect on certain costs actually incurred, known as “just allowances”, in the enforcement of the loan upon the default taking place, including the costs incurred to hire third parties to facilitate the process of collecting upon the loan, such as real estate agents and property managers, when the situation warrants such employment.¹³ The lender, however, must submit evidence demonstrating that the costs were actually incurred and are just, meaning just to all parties.¹⁴ Otherwise, “if there is no such cost, then the payment stipulated in the mortgage can only be a penalty as described in s. 8 of the Interest Act, which has the effect of increasing the charge on the arrears beyond the rate of interest payable”.¹⁵

28. It is the Respondent's respectful submission that the Applicant has failed to justify the \$15,000.00 / month being charged as Management Costs. These costs are not associated with any costs that were actually incurred by the Applicant and the Applicant has not provided a breakdown or supporting documentation to substantiate said Costs. In other words, there are no “just allowances” ascribed to the Management Costs.

29. In addition, pursuant to the terms of the mortgage, the Management Costs were meant to cover, *inter alia*, “communicating with investors, dealing with professional advisors, appraisal companies, environmental engineers, building inspector, receiver, legal

¹² 1141339 Ontario Ltd v Surgeoner, 2000 CarswellOnt 2347 (ONSC) at paragraphs 22-23, Tab 5, Respondent BOA.

¹³ Igloo, supra note 11, at paragraph 10, Tab 4, Respondent BOA.

¹⁴ 2088300 Ontario Limited v 2184592 Ontario Limited, 2011 ONSC 2986 at paragraph 30, Tab 6, Respondent BOA.

¹⁵ 2088300, *ibid*, at paragraph 22, Tab 6, Respondent BOA.

counsel, attending meetings, [and] checking property taxes”,¹⁶ among other activities. Nevertheless, the Applicant has included a separate charge for various activities which appear to be the exact type of activity that should be included in the Management Costs charge, such as:

- a. The charge for "each 3 phone calls/emails due to issues of the loan", which is the Administrative Fee set out under paragraph 4b) of the Terrelonge Affidavit, and is separately calculated and accounted for;
- b. The charge for “failure to provide proof of property taxes after requested”, as set out in **Appendix Q** of the March 10 Motion Record; and
- c. The charge for “default management \$350/hr (reduced to 40 hours)”, as set out in **Appendix Q** of the March 10 Motion Record.

30. These charges appear to be the exact type of activity contemplated by the Management Costs -- they are post-default activities that further the enforcement of the mortgage and attempts at repayment of the loan. And yet, they are separately listed and charged by the Applicant, ostensibly in an attempt to double recover for costs incurred and inflate the Applicant's outstanding balance on the mortgage.

31. In addition to the lack of substantive evidence to support that a cost was actually incurred by the Applicant, as the mortgage was drafted by the Applicant, the principle of *contra proferentem* should operate to bar the Applicant from collecting on all the Management Costs. Several of the activities presumably included as part of the Management Costs are

¹⁶ Third Report of the Receiver, dated December 3, 2019, **Appendix “I”** of the March 10 Motion Record.

also separately identified and charged under the mortgage terms, putting the provisions in direct conflict with each other. The Applicant should not be allowed to benefit from its own failure, neglect and/or unwillingness to clearly delineate the charges applicable upon default.

32. Furthermore, with respect to the Administrative Fee set out in paragraph 4b) of the Affidavit of Del Terrelonge, the Applicant has failed to particularize the amount being charged. For instance, the charges listed in the Account Statement of the Applicant found at **Appendix Q** specify the number of separate instances that occurred for each activity, triggering the charge.¹⁷ With respect to the Administrative Fee set out in paragraph 4b), however, the separate instances triggering the charge are not specified and the Applicant is essentially charging \$11,550.00 for one set of “3 phone calls/emails due to issues”. If the charge is permissible, it ought to be reduced to \$350.00 only, as per the mortgage terms.

33. With respect to the Receiver’s Certificate, and corresponding fees and interests, it is the Respondent’s position that this charge has already been repaid to the Applicant pursuant to the Interim Distribution.¹⁸

34. With respect to the \$6,182.00 charged by Schneider Ruggiero Spencer Milburn LLP, it is the Respondent’s position that this charge was never contemplated or discussed by the parties, when the discussions for the forbearance agreement were taking place.¹⁹

¹⁷ For instance, there was an NSF Payment charged for a bounced cheque on June 27, 2019. Likewise, the Applicant’s mortgage payout statement for June 18, 2018 was requested / produced on two separate occasions, twice triggering the charge.

¹⁸ Affidavit of Del Terrelonge, paragraphs 9-10, Tab 1 of the Motion Record of the Respondent.

¹⁹ Affidavit of Del Terrelonge, paragraph 6, Tab 1 of the Motion Record of the Respondent.

35. Finally, with respect to the compounded interest re-calculation, the Respondent submits that the Applicant has employed an unnecessarily complex calculation by breaking the interest rate down on a daily rate and multiplying by 30 days to get the monthly rate. In doing so, what the Applicant is effectively doing is doubling the monthly rate chargeable and hiding it from closer scrutiny.
36. As per the Respondent's calculations found at **Exhibit B** to the Terrelonge Affidavit, 9% per year, divided by 12 months, equals to 0.75% per month. As per the Applicant's interest calculations found at **Appendix L** to the March 10 Motion Record, the Applicant charged 0.05% per day, which multiplied by 30 days equals to 1.5% per month. When 1.5% is multiplied by 12 months, the effective annual rate is actually 18%, which would be acceptable pursuant to the mortgage terms, were it not for the fact that the Applicant has already received payment of the first 9% of the interest rate, up to January 31, 2020, in accordance with the Interim Distribution.²⁰ The Applicant's chosen method of calculation, therefore, results in an overcalculation of the outstanding interest in the amount of \$79,273.42.²¹
37. In light of the principles set out above, there is no juristic reason for not considering the Disputed Charges and re-calculation of the Applicant's entitlement as set out in the Affidavit of Del Terrelonge. The Respondent's standing on the motion has no bearing on the Applicant's rightful entitlement pursuant to the mortgage, and the only party that

²⁰ Fifth Report, paragraph 24 (page 30 of the March 10 Motion Record), Tab 2, March 10 Motion Record; and **Appendix "O"** of the March 10 Motion Record (page 169 of the March 10 Motion Record).

²¹ Affidavit Of Del Terrelonge, paragraphs 11-12, Tab 1 of the Motion Record of the Respondent.

stands to benefit from this Honourable Court *not* considering the arguments is the Applicant.

38. In addition, the authority of this Honourable Court and of the justice system as a whole is called into question whenever an order is issued that does not accurately reflect current legal principles, including the amount rightfully owed to a party, especially when there is information presently available before the court. The risk of reaching an incorrect decision is significantly diminished, if not entirely eliminated, by consideration of all information relevant to that decision.

39. As the purpose of this motion is to determine the Applicant's rightful entitlement to the proceeds from the sale, the Respondent submits that there is no juristic reason why this Honourable Court should not consider the amounts set out in the Affidavit of Del Terrelonge as part of its decision.

40. Lastly, the Respondent submits that this Honourable Court should grant it leave to extend / abridge the time for service of the Respondent's materials for use on this motion, as the issues and amounts in contention are not trifling and represent significant substantive amounts, and further, it would be in the interests of justice to have the matter fully canvassed, for the reasons set out above.

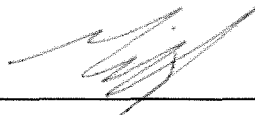
PART V – ORDER REQUESTED

41. In light of the forgoing, the Respondent respectfully requests the following relief:

- a. An Order for leave to extend / abridge the time for service of the Respondent's materials for this motion;

- b. A declaration that Mr. Terrelonge, as the representative of the Respondent Corporation and personal guarantor under the mortgages, has standing on this motion;
- c. A declaration that the re-calculation of the Applicant's remaining balance accurately represents the amount owing to the Applicant, prior to any consideration of the Disputed Charges; and
- d. An Order that the Applicant is not entitled to any of the Disputed Charges and that these are to be deducted from the Applicant's overall entitlement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF MARCH, 2020.



MAJA MILOSEVIC

Schedule "A"**Tab**

1. Excerpts from: *Bennett on Receiverships*, 3rd edition (2011), by Frank Bennett, Thomson Canada Limited: Toronto, Canada.
2. Excerpts from: *Bennett on Creditors' and Debtors' Rights and Remedies*, 5th edition (2006), by Frank Bennett, Thomson Canada Limited: Toronto, Canada.
3. *Central Trust Co v Kent*, 1987 CarswellOnt 1085 (ONSC).
4. *Igloo Refrigeration Co v Industrial Acceptance Corp*, 1943 CarswellOnt 282 (ONSC).
5. *1141339 Ontario Ltd v Surgeoner*, 2000 CarswellOnt 2347 (ONSC).
6. *2088300 Ontario Limited v 2184592 Ontario Limited*, 2011 ONSC 2986.

Schedule "B"

Courts of Justice Act, RSO 1990, c C 43 – s 71

Goals

71 The administration of the courts shall be carried on so as to,

- (a) maintain the independence of the judiciary as a separate branch of government;
- (b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;
- (c) encourage public access to the courts and public confidence in the administration of justice;
- (d) further the provision of high-quality services to the public; and
- (e) promote the efficient use of public resources.

Rules of Civil Procedure, RRO 1990, Reg 194 – Rules 1.04, 1.05, 2.03

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[...]

ORDERS ON TERMS

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

[...]

EFFECT OF NON-COMPLIANCE

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

[...]

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

[...]

EXTENSION OR ABRIDGMENT

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

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