



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-24-730779-00CL

DATE: February 25, 2025

NO. ON LIST: 1

TITLE OF PROCEEDING: KING CAPITAL MORTGAGE v 2353110 ONTARIO LTD

BEFORE: JUSTICE J DIETRICH

**PARTICIPANT INFORMATION**

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

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

Name of Person Appearing	Name of Party	Contact Info
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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
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## **ENDORSEMENT OF JUSTICE J. DIETRICH:**

### **Introduction**

- [1] King Capital Mortgage Corporation (the “**Lender**”) seeks the appointment of TDB Restructuring Limited as receiver (the “**Receiver**”) over the real property municipally known as 137 Berkeley Street, Toronto, Ontario (the “**Real Property**”) owned by 2343110 Ontario Limited (the “**Borrower**”) pursuant to s 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the “**BIA**”) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “**CJA**”).
- [2] The Borrower opposes the appointment of the Receiver.

### **Background**

- [3] Defined terms not otherwise defined herein have the meaning given to those terms in the Lender’s factum filed on this application.
- [4] The Real Property is a commercial building with various offices leased by the Borrower. The respondents also operate out of the Real Property.
- [5] The Borrower granted the Lender a charge on the Real Property in connection with a \$1.9 million loan which was advanced to the Borrower on March 23, 2022 (the “**Loan**”).
- [6] The Borrower does not dispute that in connection with the Loan a Mortgage, GSA and Assignment of Rents were delivered by the Borrower to the Lender. The Borrower also does not dispute that the GSA provides the Lender with a contractual right to appoint a receiver over the Real Property.
- [7] In December of 2023, the Borrower missed a number of interest payments under the Loan. At that time, the Lender commenced enforcement steps and sent notices to attorn rents to the tenants at the Real Property. The notices were not complied with, however on or about April 2, 2024, the Borrower put the mortgage into good standing (other than with respect to certain disputed legal fees).
- [8] The Borrower again failed to pay monthly interest payments on August 1, 2024 and thereafter. The Loan matured on October 1, 2024 and has not been repaid.
- [9] The Lender commenced an action against the Borrower on September 6, 2024 (the “**Action**”). That Action has been previously stayed by Justice Kimmel pending a determination in this receivership application.
- [10] On October 21, 2024, counsel for the Lender sent a demand letter and Notice of Intention to Enforce Security under section 244 of the BIA to the Borrower.
- [11] There is a dispute regarding the total amount outstanding. During oral argument, the Borrower agreed that at least \$1.9 million is outstanding and owed to Lender. The dispute relates to certain fees and expenses which the Lender claims are owing (the “**Disputed Amounts**”).
- [12] In a scheduling endorsement dated December 9, 2024, made by Justice Kimmel in this matter, the Borrower was permitted, if they decided to, to bring a cross motion to address the Disputed Amounts. That motion was to be brought by January 15, 2025. The Borrower failed to bring such a motion, but in a

case conference on February 13, 2025, indicated again that it needed to do so. Justice Kimmel noted in her endorsement of February 13, 2025 that respondents had failed to bring a motion as required by the existing schedule and were positioning to seek an adjournment of the receivership application scheduled for February 25, 2025. She declined to grant any adjournment, but made certain scheduling adjustments including permitting the Borrower until February 18, 2025 to deliver answers to undertakings and to deliver its responding factum. The Borrower did not comply with that revised timeline and on February 21, 2025 answered part of one undertaking and delivered its factum.

- [13] Farrage Developments Inc. has registered a Second Mortgage in the amount of \$1,750,000 on the Real Property. It appears that this mortgage matured on September 15, 2022. The Second Mortgagee was given notice of the receivership application but did not attend the hearing or advise of any position on the matter.
- [14] No other creditors have filed registrations under the Personal Property Security Registration system in Ontario against the Borrower.

### **Issues**

- [15] The issues to be determined are whether it is just or convenient to appoint the Receiver over the Real Property and if so, whether the terms of the receivership order proposed by the Lender appropriate.

### **Analysis**

- [16] There is no dispute about the relevant law. The test for the appointment of a receiver under s. 243 of the BIA or s. 101 of the CJA is whether it is just or convenient.
- [17] 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 when considering whether it is just or convenient to appoint a receiver. The circumstances 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 (“*Freure Village*”)
- [18] As noted in *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 at para. 42 although, the appointment of a receiver is generally an extraordinary equitable 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, courts do not regard the nature of the remedy as extraordinary. However, the presence of a contractual entitlement to a receiver is not determinative of the issue.
- [19] As observed by Justice Osborne in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25), citing *Bennett on Receivership*, 2nd 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. These include:

[20] 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;

[21] 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;

- [22] the nature of the property;
- [23] the apprehended or actual waste of the debtor's assets;
- [24] the preservation and protection of the property pending judicial resolution;
- [25] the balance of convenience to the parties;
- [26] the fact that the creditor has a right to appointment under the loan documentation;
- [27] the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- [28] the principle that the appointment of a receiver should be granted cautiously;
- [29] the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- [30] the effect of the order upon the parties;
- [31] the conduct of the parties;
- [32] the length of time that a receiver may be in place;
- [33] the cost to the parties;
- [34] the likelihood of maximizing return to the parties; and
- [35] the goal of facilitating the duties of the receiver.

[36] I agree that these are relevant factors to consider, and I agree with Justice Osborne's observations in *RBC v 2531961 Ontario Inc. et al.*, 2024 ONSC 1272 [*RBC v 253*] that the factors are not a checklist, but should be viewed holistically to determine whether, in all the circumstances, the appointment of a receiver is just or convenient.

[37] In applying these principles to the present case, is it just or convenient that a receiver be appointed? In my view it is.

[38] The Borrower argues that if the amount of the debt owed to the Lender is properly determined to be only \$1.9 million then the Borrower has committed financing to pay out the Lender. This argument has a number of flaws.

[39] First, the only financing commitment provided by the Borrower (the "**Commitment**") is undated, unsigned, has the new lender's name redacted and is subject to a number of conditions including a postponement from the Second Mortgagee. The Commitment also provides that if funds are not advanced by December 14, 2024, the Commitment will be null and void.

[40] In a wire statement produced as a partial answer to undertakings on February 21, 2025, there is an indication that \$2 million sits in a lawyer's trust account. The name of the beneficiary of that trust account is redacted. There is also an email indicating that if the Borrower pays \$20,000 the funds would sit in the trust account for a period of time. The email chain also indicates that perhaps that transaction would need take place by an assignment of the Lender's Mortgage to the new lender as the Second Mortgagee has not been responding regarding a potential postponement. No agreement on that point is apparent. None of these documents are attached to an affidavit nor do they provide details of the terms on which the funds are deposited (or for whose benefit they are deposited). On the record before me, there is no certainty that funds are available to payout the Lender.

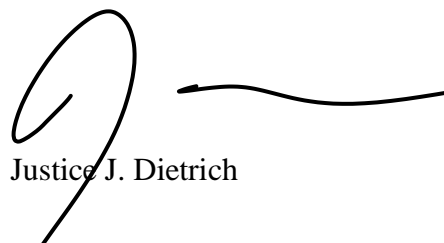
[41] Second, there is no agreement that that the amount owing by the Borrower to the Lender is only \$1.9 million. The Borrower submits that the receivership application should be stayed or dismissed to allow

the Action to proceed so determination of that issue can be made. This ignores the previous endorsements of Justice Kimmel. Her endorsement of December 9, 2024, provided that the Borrower was entitled to bring a motion for a determination of whether the Disputed Amounts were properly owed and if the Borrower chose to do so, it was to deliver that motion by January 15, 2025. The Borrower chose not to do so.

- [42] The Borrower also argues that the appointment of a receiver will only increase costs which will make it more difficult for the Borrower to pay out the Lender and retain ownership of the Real Property. That may be, however, the Loan matured almost five months ago. Default in payment occurred almost seven months ago.
- [43] There is no evidence before me as to the estimated value of the Real Property, so it is not clear where the value breaks as compared to the secured debt already encumbering the property. As the Real Property is a commercial building, it is not expected that the receivership will be complicated from an operational standpoint.
- [44] Moving forward with a receivership will provide a platform for the Real Property to be sold and the proceeds distributed to those who are entitled to them, including the Lender, the Second Mortgagee and the Borrower. Any disputes regarding the amounts owing to the Lender can be addressed in the receivership proceeding.
- [45] There was some dispute before me about whether other tenants had vacated the property or not. There is no evidence on the record before me that they had. The only evidence is that during the prior attempt to enforce in early 2024, none of the tenants complied with the notices of attornments of rent. The appointment of a receiver should bring clarity to this matter.
- [46] Accordingly, in considering the factors listed in paragraph 19 above, I find that it is both just and convenient to appoint the Receiver as requested by the Lender.
- [47] In considering the form of order requested, the Borrower raised a concern with the protection given to the Receiver in paragraph 17 which provides that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of the order, save an except for any gross negligence or willful misconduct. The Borrower took issue with the broad protections provided to the Receiver. The language requested mirrors that in the Commercial List model receivership order. The Receiver, once appointed, will be a court-officer and the protections granted to the Receiver in that paragraph are typical and are appropriate.

### **Disposition**

- [48] The form of order requested is consistent with the Commercial List model receivership order and I find it appropriate. Counsel for the Lender is requested to email a word version of the draft order to my judicial assistant for my review and signature.



Justice J. Dietrich

February 26, 2025