ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.:	**CV-24-00732901-00CL**	**DATE:**	**March 06, 2025**

NO. ON LIST: 2

TITLE OF PROCEEDING: **CAMERON STEPHENS MORTGAGE CAPITAL LTD. v. 3803DSW TAS LP et al**

BEFORE JUSTICE: **Justice CAVANAGH**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Defendant, Respondent, Responding Party, Defence:

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
Bryan Tannenbaum	Proposed Receiver – TDB Advisory	btannenbaum@tdbadvisory.ca

ENDORSEMENT OF JUSTICE CAVANAGH:

[1] The Applicant, Cameron Stephens Mortgage Capital Ltd., brings this application for: (a) an order appointing TDB Restructuring Limited as receiver over real property municipally known as 3775-4005 Dundas Street West, Toronto (the "Property"); and (b) judgment, jointly and severally, against 3803 DSW TAS LP, 3803 DSW MR LP, and 3803 DSW Urban Properties Inc. (collectively, the "Borrower") and TAS DesignBuild LP (the "Guarantor").

Background Facts

[2] The Borrower does not dispute (i) the existence of the loan agreement dated April 19, 2021 (as amended, the "Loan"); (ii) the fact that the Loan is in default; or (iii) that the property that secures the Loan must be sold in order to repay the Loan.

[3] The Property is the Borrower's only material asset. The Property is vacant land that is not currently in development. The Borrower does not have ongoing operations at the Property. The Applicant is the only mortgagee of the Property.

[4] In mid-2021, the Borrower halted redevelopment work at the Property and decided to sell it. To provide the Borrower with sufficient time for a sale, the Applicant agreed to extend the Loan on three occasions between 2021 and 2024. The Borrower has not sold the Property.

[5] In 2022, working with Colliers as broker, the Borrower made an agreement to sell the Property for approximately $38 million. The sale was not completed.

[6] On April 11, 2024, the parties agree to enter into a Further Amendment for Mortgage Financing to renew the Loan for 12 months effective March 1, 2024. This amendment agreement was conditional on a pay down schedule requiring four payments. The Borrower made the first two payments but did not make the third payment in the amount of $1.5 million that was due by October 31, 2024. The Borrower has failed to pay the interest owing on the Loan after October 29, 2024.

[7] In late 2024, the Board commissioned Cushman & Wakefield ("Cushman") to undertake a marketing and sale process in respect of the Property. The Borrower intends to pay off the Loan upon receiving proceeds of any sale.

[8] On November 12, 2024, the Borrower's representative sent an email to the Applicant's representative and, among other things, advised that new capital was raised from investors to fund the first two payments under the amendment agreement, "despite the investors knowing that the asset was at or close to debt value, as an important and costly gesture of goodwill".

[9] On November 18, 2024, the Applicant's legal counsel wrote to the Borrower and demanded payment in full for the amount of the Loan as well as all interest and legal fees. The Applicant sent a Notice of Intention to Enforce a Security pursuant to s. 244 of the *BIA*.

[10] As of March 6, 2025, the total amount of indebtedness is $17,505,744.44 together with any additional costs and additional interest from March 6, 2025 at $4,106,92 per diem.

[11] This application was commenced by Notice of Application issued on December 6, 2024.

Analysis

Should a receiver be appointed?

[12] Second 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act* give this Court authority to appoint a receiver. Under both statutes, the test for appointing a receiver is whether it is just or convenient to do so.

[13] In determining whether it is just or convenient to appoint a receiver in any particular case, the Court will have regard to all the circumstances, but particularly to the nature of the property and to the rights and interests of all parties in relation thereto. See *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC), at para. 10.

[14] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security documents permit the appointment of a receiver. This is because the applicant is merely seeking to enforce the term of an agreement that was assented to by both parties. In such circumstances, the "just or convenient" inquiry requires the court to determine there is in the interests of all concerned to have the receiver appointed by the court. See *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866, at paras. 27-28.

[15] The Borrower agrees that the Property must be sold to repay the Loan. This has been the case since the Borrower decided not to proceed with redevelopment of the Property in mid-2021. Since the failed sale transaction in 2022, the property has not been listed for sale. In his affidavit responding to this application, Khan Tran, the Chief Investment Officer of the sole shareholder of the general partner of two of the Borrowers, explains that since the failed closing in 2022, the Borrower "has continued to consider options" to sell the Property. He explains that in light of the development land market (due to external market factors), a sale has not been made to date.

[16] I do not consider this evidence to satisfactorily explain the apparent absence of a diligent effort by the Borrower to sell the Property to repay the Loan from 2022 to the fall of 2024. The appraisal commissioned by the Borrower as of February 10, 2024 addresses recent market conditions and concludes that demand for any type of property going forward remains unknown and speculative in nature. The appraiser adds that "the land development market has remained strong and has shown appreciation over the years".

[17] The Borrower retained Cushman in November 2024 to sell the Property. Cushman has not listed the Property for sale and, according to Mr. Tran's evidence, "is currently undertaking private solicitations of interest". Mr. Tran included in his affidavit his understanding of why Cushman has not launched a public sale process, stating that "if a receiver is ultimately appointed by the Court, that sale process would need to be withdrawn at reputational risk to Cushman". This statement of Cushman's explanation for not listing the Property is not admissible in evidence and, in any event, in my view, does not justify the Borrower's failure to take diligent steps to sell the Property. The Borrower, although stating that it is willing to cooperate with the Applicant in relation to a sale of the Property, has not included in its evidence any specific sale plan with firm actions or dates for the sale of the Property.

[18] When he was cross-examined on his affidavit, in re-examination, Mr. Tran was asked why there has not been a structures sales process since the Colliers mandate came to an end (in May 2022). He responded:

> For a number of reasons. In the commercial real estate industry, I think, you know, part of my job is to evaluate when is the best for the method as well as the timing to execute a sale or partnership transaction. Given the market turbulence over the

> last two years, there has been very limited transactions generally in the market, so having a structured sale process within that context would likely result in effectively failed processes. However, in the absence of a structured process, we do have conversations on an off-market basis on a regular basis where we think there is an opportunity to execute a sale transaction.

[19] This answer shows that the Borrower has not actively listed the Property for sale since May 2022 because, for this entire period of time, it has not considered the market conditions to be sufficiently favourable for the Property to be listed for sale. Given this history, in my view, the Borrower should not be left to continue to have the discretion to decide when, in its view, market conditions are sufficiently beneficial for the Property to be publicly listed for sale or, even if the Applicant is consulted, to make the decisions on how the Property will be sold.

[20] The Applicant filed the affidavit of Jerrold Marriott, the Interim Director of Special Accounts Management at the Applicant, in support of this application. Mr. Marriott deposes that the Applicant has lost confidence in the Borrower's willingness and ability to repay the amounts owing under the Commitment Letter and its amendments. Mr. Marriott was appointed by the Applicant to oversee this loan and he was designated by the Applicant to give evidence for this application. In this position, he would have knowledge of the Applicant's loss of confidence. I do not regard his evidence in this respect as inadmissible because of the absence of a statement that he was informed by an officer or employee of the Applicant of this information. This is information within his knowledge.

[21] There is an objective basis that reasonably supports Mr. Marriott's statement. This is the failure of the Borrower to make diligent efforts since 2022 to sell the Property by publicly listing it for sale. The fact that the Borrower negotiated an extension of the loan to give it more time to sell the Property, and then defaulted on the third payment required in exchange for the extension, in circumstances where, according to the Borrower, the value of the Property was close to the amount of the indebtedness, provides further objective support for Mr. Marriott's statement that the Applicant has lost confidence in the Borrower's willingness and ability to repay the Loan.

[22] The Applicant has a contractual right to seek the appointment of a receiver. The Borrower has been given extensions of the Loan to allow time for it to sell the Property, and it has not done so for reasons that, in my view, are not adequately explained. The appointment of a receiver by this Court, with duties to both the Applicant and the Borrower, will provide an effective and appropriate means for the Property to be sold.

[23] When I consider all of the relevant circumstances, I am satisfied that it is just and convenient for a receiver to be appointed.

Application for Judgment against the Borrower and the Guarantor

[24] The Borrower does not dispute the indebtedness owed by it to the Applicant. Judgment should issue against the Borrower, as requested.

[25] The Guarantor disputes that Applicant's claim against it on the ground that there was no demand for payment given to the Guarantor and, therefore, a necessary condition to enforcement of the guarantee has not been satisfied.

[26] The Guarantee and Postponement of Claim dated April 22, 2021 provides in section 4:

> The Guarantor's liability to make payment under this Guarantee shall arise forthwith after demand for payment has been given to the Guarantor. Such demand

> may be given by personal delivery to the Guarantor (and if any Guarantor is a corporation, by personal delivery to any director, officer or employee thereof) or by sending such demand to the Guarantor by telefax or by prepaid registered mail to the last address of the Guarantor known to the Lender. If mailed, such demand shall be deemed to have been effectually made on the fourth day after an envelope containing such demand addressed to the Guarantor is mailed.

[27] In *Manulife Bank of Canada v. Conlin*, 1996 CanLII 182 (SCC), Cory J., writing for the majority of the Court, held that clauses binding on a guarantor must be strictly interpreted and construed and resolved in favour of the guarantor.

[28] The Applicant submits that it gave a demand for payment under the Guarantee to the Guarantor by a letter dated November 18, 2024 from the lawyers for the Applicant to the Borrower. The Guarantor was not named as an addressee of this letter although its business address is at the same address. This letter is not a demand that was given to the Guarantor for payment under the Guarantee. It is a demand for payment of the indebtedness owed by the Borrower.

[29] The Applicant relies on a letter dated November 26, 2024 from legal counsel to the Borrower and the Guarantor in which the author writes:

> We understand that you issued demand letters dated November 18, 2024 to the Borrowers and the Guarantor on behalf of your client, Cameron Stephens Mortgage Capital Ltd. as lender.

[30] The Applicant submits that this letter shows that the Guarantor treated the November 18, 2024 letter as a demand under the Guarantee. I disagree. The statement, which appears to reflect a misunderstanding that there was more than one letter sent, does not transform the November 18, 2024 letter to the Borrower into a letter to the Guarantor.

[31] At the hearing of this application, counsel for the Applicant, in reply submissions, referred to a decision of the Court of Appeal in *Cheng v. Grigoras*, 2022 ONCA 557. In its reasons, the Court of Appeal addressed whether a proper demand had been made on a guarantor, and referred to the reasons of the motion judge who held that a proper demand was made at a meeting and again by serving a statement of claim. The Court of Appeal noted that the motion judge drew an adverse inference from the respondent's silence during cross-examination when he was asked whether a statement of claim was a demand. The facts in *Cheng* are distinguishable because in that case there was proper oral demand, apart from service of the originating process. Until reply submissions, the Applicant did not rely on service of the Notice of Application as a demand under the Guarantee.

[32] On the authority of *Conlin*, I am required to strictly interpret and construe clauses in the Guarantee in favour of the Guarantor. I am not satisfied that the Applicant made a valid demand for payment under the Guarantee.

[33] At the hearing, I gave leave to the Respondents to make written submissions to address the Cheng decision cited by counsel for the Applicant in reply. It is not necessary for counsel for the Guarantor to provide such submissions.

[34] The Applicant and the Respondents each request a limited sealing order sealing certain confidential information. I am satisfied that the test in *Sherman Estate* is satisfied with respect to the requested orders.

[35] Counsel for the Applicant and counsel for the Respondents are directed to ensure that the documents are provided to the court clerk at the filing office in an envelope with a copy of this

endorsement and the signed order with the relevant provisions highlighted so that the confidential report and exhibits can be physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order, if necessary.

Disposition

[36] For these reasons:

a. The Applicant's application for the appointment of a receiver is allowed. Order to issue in form of appended to the Notice of Application. I ask counsel for the Applicant to provide me with a form of order to be signed.

b. Judgment to issue against the Borrower, as asked. I ask counsel to provide me with an approved form of Judgment to be signed.

c. The application for judgment against the Guarantor is dismissed, without prejudice to the Applicant's right to commence a fresh proceeding for this relief after giving demand for payment to the Guarantor as required by the Guarantee.

d. The Respondents' motion for a sealing order is granted. I ask counsel for the Respondents to provide me with a form of order to be signed.

[37] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable (with reasonable page limits) agreed upon by counsel and approved by me.