Court File No. CL-26-00000425-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

HILLMOUNT CAPITAL MORTGAGE HOLDINGS INC.

Applicant

- and -

FARIBA RAJABI and PARVIZ AHMADZADEH

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO 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

FACTUM OF THE APPLICANT
(Appointment of Receiver)

October 15, 2026

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PART I – OVERVIEW

1. This is an application seeking, *inter alia,* the appointment of a receiver over the property municipally known as 529 Yonge Street, Toronto, Ontario, M4Y 1Y5 (the "**Property**")[1]. The applicant is the first mortgagee on title to the Property. It also holds a general security agreement in respect of personal assets of the mortgagors.

2. Pursuant to the terms of its security, the applicant has a contractual right to the appointment of a receiver. This application falls into the class of cases in which the Court will appoint a receiver "*as a matter of course*". The applicant's mortgage loan matured on April 1, 2026 and the default continues. The mortgage expressly authorizes the appointment of a receiver. The respondents have had more than six months to refinance. This is therefore one of the classic mortgage enforcement cases in which a receiver is appointed as a matter of course.

PART II – THE FACTS

The Mortgage Matured on April 1, 2026 and is in Default

3. The respondents, Fariba Rajabi and Parviz Ahmadzadeh (the "**Mortgagors**" or the "**Borrowers**") are the registered owners of the Property.[2]

4. The applicant advanced a loan of $4,000,000 to the Borrowers on or about July 6, 2023 (the "**Loan**" or "**Mortgage Loan**") for a 12-month period. The Mortgage Loan accrued interest at the rate of 9.20% per annum or the Royal Bank of Canada prime

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1 Notice of Application, Application Record ("AR"), Tab 1, p. A14

2 Affidavit of Itzhak Levinson ("Levinson Affidavit"), para 2, p. A25

lending rate ("**RBC Prime**") plus 2.25% per annum, repayable monthly, in arrears.[3]

5. As security for the Loan, the Mortgagors granted a first mortgage (the "**Mortgage**") on the Property and a General Security Agreement ("**GSA**")[4].

6. The Property consists of a 5,678 square foot mixed use building on Yonge Street near Wellesley Avenue, Toronto.

7. The Mortgage contained, *inter alia*, the following terms:

> **APPOINTMENT OF RECEIVER**
>
> AT ANY TIME after the Security Documents hereby constituted become enforceable, or the monies hereby secured shall have become payable, the Chargee may from time to time appoint by writing, or apply to a court of competent jurisdiction for the appointment of, a Receiver (which term shall include a receiver and manager) of the Charged Property or any part thereof, with or without Bond, and may from time to time remove the Receiver and appoint another in his stead, and any such Receiver appointed hereunder shall have the following powers (but shall not be limited to such powers):
>
> (a) To take possession of the Charged Property and to collect and get in the same and for such purpose to enter into and upon any lands, premises and Improvements wheresoever and whatsoever and for such purpose to do any act and take any proceedings in the name of the Chargor or otherwise as he shall deem necessary;
>
> […]
>
> **PAYMENT OF COSTS**
>
> The Chargor shall pay to the Chargee on demand all legal fees payable on a full indemnity basis, Costs and out-of-pocket expenses incurred by any of the Chargee, its agents, officers and employees as herein set forth including costs incurred with respect to:
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> […]
>
> (b) the exercising of any or all of the rights, remedies and powers of the Chargee under this Charge or any of the instruments and documents comprising the Security Documents or relating thereto, or in defending or taking any measures

[3] Ibid, para. 3-5, p. A25

[4] Ibid, para. 7 and 11, p. A26 and A28

> to defend any action, claim, cause of action or in proceedings directly or indirectly relating to the provisions of any such instrument or document;[5]

8. The Mortgagors also granted an Assignment of Rents.[6]

9. The GSA was perfected by registration under the *Personal Property Security Act*.[7]

10. On or about July 26, 2024, the Mortgage was renewed for a further period of 12 months maturing on August 1, 2025.[8]

11. By a Mortgage Renewal Agreement dated November 7, 2025, the Loan was renewed for a further period of 8 months maturing on April 1, 2026. Interest accrues on the indebtedness under the Renewal Agreement at the greater of 9.5% or RBC Prime plus 2.25% per annum.[9]

12. Between March 19, 2026 and July 6, 2026, the respondents were in default under the Loan. Although a possible renewal of the Loan was being negotiated over a number of months, the Mortgagors failed to satisfy renewal conditions and they failed to remedy the substantial property tax and HST arrears that were outstanding.[10]

13. The respondents are insolvent persons because they are unable to meet

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5 Ibid, para. 8, p. A26
6 Ibid, para. 9, p. A27
7 Ibid, para. 13, p. A29
8 Ibid, para. 14, p. A29
9 Ibid, para. 15, p. A29
10 Ibid, para. 17, p. A30

obligations generally as they come due, including mortgage obligations, property taxes and HST.[11]

14. Demand for payment and a Notice of Intention to Enforce Security were served on the respondents on July 16, 2026.[12]

15. On or about July 26, 2026, the respondents wrote the applicant to advise that they were working with another lender to refinance the Mortgage and pay it out in full "*as soon as possible*".[13]

16. Notwithstanding assurances of payment, the last payment made by the respondents to the applicant was on July 1, 2026, in the amount of $31,666.67.[14]

17. The amount due under the Mortgage Loan as at September 30, 2026 was $4,211,401.73. Legal fees and interest continue to accrue. (the "**Indebtedness**")[15]

18. As indicated above, the Mortgage and the GSA entitle the applicant to realize on its security through a receiver over the Property.

19. Again, the Mortgage matured on April 1, 2026. That default continues. Realty taxes and HST have been and continue to be in arrears. The respondents failed to

[11] Ibid, para. 21, p. A31
[12] Ibid, para. 23, p. A31
[13] Ibid, para. 24, p. A31
[14] Ibid, para. 27, p. A32
[15] Ibid, para. 28, p. A32

complete the promised refinancing notwithstanding repeated extensions and accommodations by the applicant.

PART III – THE ISSUES AND THE LAW

20. The issues to be determined are as follows:

- should a receiver be appointed;
- should judgment be granted on the covenant;
- should a sealing order be made in respect of the valuation of the Property and any future agreement of purchase and sale?

ISSUE ONE: THE "*JUST OR CONVENIENT*" TEST FOR APPOINTING A RECEIVER IS MET AND THIS APPLICATION FALLS INTO THE CLASS OF CASES IN WHICH THE COURT WILL APPOINT A RECEIVER "*AS A MATTER OF COURSE*"

21. Section 101 of the *Courts of Justice Act*[16] ("***CJA***") permits the appointment of a receiver where it is "just or convenient" to do so. In addition, subsection 243(1) of the *Bankruptcy and Insolvency Act*[17] (the "***BIA***") provides that on an application by a secured creditor, a court may appoint a receiver to, *inter alia,* take possession of the assets of an insolvent person and exercise such control thereon that the court considers advisable, again, where it is "*just or convenient*".

22. The absence of evidence demonstrating a reasonable certainty that the debtor will repay the secured creditor in the near future,[18] and a creditor's loss of confidence in the

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16 R.S.O. 1990, c. C.43

17 RSC 1985, c B-3

18 *Royal Bank of Canada v. 1731861 Ontario Inc.*, 2023 ONSC 3292 at para. 33(e); *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at para. 51.

debtor's management[19] weigh in favour of a receivership order.

23. This Court has held that a secured creditor was entitled to appoint a receiver over real property because realty tax arrears constituted an event of default under its mortgage.[20]

24. "*The existence of defaults with respect to interest and principal payments and failure to pay principal on demand justify the appointment of a receiver*".[21]

25. In *Confederation Life Insurance Co. v. Double Y Holdings Inc.*[22], Justice Farley stated:[23]

> ***Appointment to Enforce Rights***
> *In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ...* ***In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property*** **(emphasis added).**

26. The appointment of a receiver over the Property, including all proceeds thereof, is both just and convenient for the following reasons:[24]

- the Mortgage matured on April 1, 2026, yet the Mortgagors have not made a single payment to the applicant since July 1, 2026. More than $4.2 million

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[19] *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755 at para. 20.

[20] *Ontario Securities Commission v. Paramount Equity Financial Corporation et al.*, 2018 ONSC 4326 at para. 31.

[21] *Royal Bank v. Brodak Construction Services Inc.*, 2002 CanLII 49590 (ON SC) at para. 11.

[22] [1991] O.J. No. 2613 (Gen. Div.) [Enclosed Below]

[23] *Ibid.* at para. 20.

[24] The test is a disjunctive one, requiring only that the appointment of a receiver either be (i) "just" *or* (ii) "convenient". However, in the circumstances here, such appointment is both just and convenient. See *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881 at paras. 40-41 ("*[I]s it just or convenient to appoint a receiver in the particular circumstances of this case? In my view, it is not only just or convenient to appoint a receiver in the particular circumstances of this case, but it is both just and convenient*.")

is owed thereunder;

- realty taxes are in arrears;

- HST is in arrears;

- the applicant extended its mortgage from April 1, 2026 until commencement of its application on September 29, 2026 affording considerable time for the respondents to complete a refinancing which they stated they had arranged. No fee was paid for this six-month accommodation. Nor has any interest been paid on the Loan since July 1, 2026;

- the applicant has lost confidence in the respondents' ability to refinance the Mortgage;

- the applicant's security is in jeopardy;

- the real estate market for this type of potential development property is weak;

- a recent valuation of the Property suggests that the value of the Property has significantly decreased since the Loan was advanced;

- the Borrowers threatened litigation against the applicant; and

- a Court's receiver will conduct a sale in a transparent and court supervised process and will ensure that the Property is marketed and sold at the highest price obtainable. The Court's receiver will avoid further litigation that may otherwise arise among the stakeholders concerning the sales process.

ISSUE TWO: JUDGMENT ON THE COVENANT SHOULD BE GRANTED

27. The evidence establishes:

- a valid loan;
- valid security;
- maturity of the loan;
- continuing defaults; and
- service of a Notice to Intention to Enforce Security.

28. There is no evidence that the Indebtedness is in dispute, repaid or otherwise compromised.

29. The applicant is therefore, respectfully, entitled to judgment on the covenant.

ISSUE THREE: A SEALING ORDER SHOULD BE MADE

30. Consistent with standard practice in insolvency proceedings, a sealing order should be made in respect of the following documents which concern the Property: (i) the valuation obtained by the applicant and any court-appointed receiver, and (ii) any future

agreements of purchase and sale.

31. Pursuant to the *CJA*, this Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.[25] In addition, this Court has inherent jurisdiction to issue sealing orders.[26]

32. "*There is a public interest in maximizing recovery in an insolvency*" weighing in favour of sealing orders.[27] In insolvency proceedings, it is standard practice to keep all aspects of the bidding and sale process confidential to maintain the integrity of the process and prevent potential bidders from using the information to obtain an unfair advantage in any subsequent sale process (if the initial agreement fails to close).[28]

33. This Court has held that it is appropriate to seal documents filed in support of a motion to approve a court-supervised sale where such documents "*disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought*".[29]

34. The valuation and any future agreements of purchase and sale, if disclosed to the public, could detrimentally impact a receiver's sale efforts for the Property. The requested sealing order complies with *Sierra Club* and *Sherman Estate*.[30]

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[25] *Courts of Justice Act*, R.S.O. 1990, c C. 43, s. 137(2).
[26] *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789 at para. 34.
[27] See *Springer Aerospace Holdings Limited*, 2022 ONSC 6581 at para. 30; *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 84
[28] *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2 at para. 39.
[29] *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173 at para. 32.
[30] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38.

PART IV – ORDER SOUGHT

35. The applicant respectfully requests an order, appointing TDB Restructuring Limited as receiver over the Property and the collateral charged under the GSA, and for judgment, substantially in the form of the draft receivership order at Tab 3 of the application record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY



FRED TAYAR
OF COUNSEL FOR THE APPLICANT

October 15, 2026

SCHEDULE "A"

Authorities Cited

1. *Royal Bank of Canada v. 1731861 Ontario Inc.*, 2023 ONSC 3292
2. *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243
3. *Meridian v. Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755
4. *Ontario Securities Commission v. Paramount Equity Financial Corporation et al.*, 2018 ONSC 4326
5. *Royal Bank v. Brodak Construction Services Inc.*, 2002 CanLII 49590 (ON SC)
6. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, [1991] O.J. No. 2613 (Gen. Div.) [Attached Below]
7. *KEB Hana Bank as Trustee et al. v. Mizrahi Commercial (The One) LP et al.*, 2023 ONSC 5881
8. *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789
9. *Springer Aerospace Holdings Limited*, 2022 ONSC 6581
10. *Danier Leather Inc., Re*, 2016 ONSC 1044
11. *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2
12. *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173
13. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
14. *Sherman Estate v. Donovan*, 2021 SCC 25

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1991 CarswellOnt 1511
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1991 CarswellOnt 1511, [1991] O.J. No. 2613

Confederation Life Insurance Company, Plaintiff v. Double Y Holdings Inc. et al., Defendants

Farley J.

Judgment: September 3, 1991
Heard: August 29, 1991
Heard: August 30, 1991
Docket: 91-CQ-72

Counsel: None given.

***Farley J.*:**

1 Transferred to Commercial List.

2 This motion for a court appointed receiver was heard on August 29 and 30, 1991 in conjunction with a companion motion brought by Canada Trustco Mortgage Company.

3 Canada Trustco Mortgage Company (CT) and Confederation Life Insurance Company (CL) jointly referred to as the plaintiffs.

4 Double Y Holdings Inc. (DY), The York-Trillium Development Group Limited (YT), Howard Hurst (H) and Martti Paloheimo (P) jointly referred to as the defendants. H and P are said to be the beneficial owners of York Mills Centre (YMC) with DY and YT being bare trustees. This is somewhat unclear, particularly in light of the general language H used in his judgment debtor examination wherein he referred to YT as being a very viable company which had been totally destroyed by the economy (in this context viability would be inconsistent with being a bare trustee); he also referred to his partner owning the project/company with him but then went on to refer to YT being owned by Bavlee Holdings which is owned by H's family.

5 CT fully advanced its construction mortgage financing and is presently owed about $114 million. CL is owed about $100 million - its financing arrangement contemplated an option exercisable by it to acquire DY (which holds a fifty percent undivided interest in YMC). It appears clear that this option is ancillary to the loan agreement (not vice-versa) and that there is no obligation on CL to convert its loan. Interest on these mortgages, all of which (there being some nine in total) matured March 1, 1991, accrues at the rate of about $2 million a month. No principal repayment has been made; no interest payment has been made since maturity (previously it appears that some of the interest payments were financed out of mortgage advances). Less than a million dollars a month is available from rent proceeds after paying operating expenses; this "excess" has been used (with the permission until now of the plaintiffs) to finance ongoing construction. Taxes are some $3.6 million in arrears. Liens ($3.3 million) were placed (and continue) on the project prior to the receivership motions; a half dozen have been placed on since the motions. Total claims against the project amount to some $250 million (including the plaintiffs' mortgages, claim by ANZ Bank $15 million, Church $1 million, taxes, lien claimants and other unpaid trades).

6 In January 1991 the major tenant Rogers Cantel (Cantel) for Phase IV disputed its obligation under a lease for 75 percent of the phase. The defendants sued it for $56 million but have not been able to value their residual lease value as yet. Proceeds of this litigation were assigned to the plaintiffs who hold a "veto" over settlement and who were to be kept informed. The defendants did not inform the plaintiffs of several settlement meetings and instructed their counsel not to reveal any details

of such meetings. It was only in cross-examination of H that the plaintiffs determined that no numbers were discussed. The plaintiffs have then explored settlement and feel that such might be possible with part of the space being taken by Cantel.

7 An interesting feature of YMC is its TTC local and regional bus terminals which are designed to tie in with the subway. Such passenger facility is of public interest but it is also a private interest in respect of increased traffic flow for potential and actual retail store tenants in YMC as well as a transport facility for employees of potential and actual office tenants. The defendants suggested in their material that the TTC was still contemplating that substantial completion would be accomplished by August 30, 1991 - this suggestion was made by the defendants on August 28th. However, information from the TTC indicates it would take a full-time crew of twenty commencing immediately to finish both terminals in seven weeks. It appears that two to six men have been the more usual compliment. I find the defendants less than candid.

8 There have been continued discrepancies as to the date of completion and the cost to complete (similarly there has been continued discrepancies as to the outstanding trades payable). It is clear from the November 6, 1990 loan documentation (wherein the plaintiffs loaned another $20 million of which over $18 million has been advanced) that completion was to have been "quickly" accomplished for this loan, as did the others, matured March 1, 1991.

9 Demand for payment was made April 8, 1991. No payment has been made. The defendants do not appear to have the financial resources available to them to complete the project or to pay off the indebtedness. A non-binding expression of interest has been received - but for less than the indebtedness; otherwise the efforts to sell YMC have been fruitless since the end of 1990.

10 It is recognized that the defendants' disputes against CL in particular as well as CT must be resolved in a trial forum. However it was recognized by the defendants that CL was not in default under its obligations as of November 27, 1990 (see Clarification Agreement, paragraph 1 entered into that day by DY, YT and CL with DY and YT having had legal counsel). CL indicated that the defendants' claims against it were unsupportable - e.g. non-existent statutory declarations.

11 The defendants' "position" as to CL disqualifying itself as to its interest in the project being partially earmarked for a segregated fund was not really pressed by the defendants.

12 The defendants claimed that they never agreed to a completion budget. However, attached to the November 6, 1990 agreement was a completion budget prepared by the defendants' side. See the second last recital of that agreement together with s.9.04(a) (the defendants agreeing to themselves pay any cost over-runs); s.10.01(h) (defendants representing and warranting that all materials were prepared fairly, honestly and in good faith); s.11.01(d) (defendants to utilize the dollars as specifically set out in the completion budget); and s.16.09 (a complete contract clause). In addition the defendants separately agreed not to oppose the appointment of a receiver (under the terms of the mortgages private receivers were possible). The plaintiffs indicate that their mortgages and other loan documentation are somewhat intertwined; they also have concern about the ANZ claim for priority as to rents. They say that tenant chaos may result if private receivers are appointed in that in a dispute between the defendants, the ANZ and the plaintiffs, conflicting notices as to rents may result in the tenants paying no one.

13 The defendants claim that the plaintiffs want a court appointed receiver to allow them to bid on YMC. Such however is permitted (see *London & Western Trusts Co. Ltd. v. Lucas*, [1937] O.W.N. 613 (H.C.J.) and *Receiverships*, Bennett (1985), at p.154. The receiver would be answerable to the defendants in effect for an improvident sale. Given the nature and size of the project, it appears desirable to complete the construction (all parties appear agreed on that), lease out as much of it as possible and then if the project is sold it may be desirable to have the plaintiffs involved to establish at least a floor bid and interest in a sale.

14 There is some question of whether the defendants have applied past advances in the manner and for such purposes as they were requested (e.g. the Church); however that is not now possible as the plaintiffs must approve each cheque. At present $950,000 stands in the "rent account" unused - the defendants wish to continue using this and future "excess" amounts to finance construction completion. O'Leary indicated that those trades pressing for payment on Phase I were instructed by the defendants to apply the deficiency to Phase II.

15 If Phase IV is not to be essentially a single tenant building then about $5 million of modifications will be required. In addition, it is estimated that $10 million of tenant inducements will be needed.

16 The plaintiffs suggested that a court receiver would avoid a certain multiplicity of litigation - or at least tend to do that. As well, such a receiver, if the project is sold, could obtain a vesting order to eliminate title and priority problems (e.g. Church, ANZ, lien claimants, plaintiffs).

17 The defendants indicated that the appointment of a receiver was a death wish for the project. It is unclear how this results if the receiver is able to borrow (as apparently it could not under the loan documentation) to complete the project and utilize funds to lease it out as much as possible.

18 The defendants position in the end result appears to be - allow matter to continue as before, allow the defendants to use the "excess" funds to complete construction on some ill- or non-defined basis. In other words, the plaintiff should be required to continue financing this project (under the management of the defendants as to construction) despite the fact the loans matured a half year ago. *Schwartzman v. Great West Life* (1955), 17 W.W.R. 37 (B.C.S.C.) and *Adriatic Development v. Canada Trustco* (1983), 2 D.L.R. (4th) 183 (B.C.C.A.) indicate that clearly there is no such obligation to continue to advance funds willy-nilly at the request of the borrower. I am puzzled by the defendants' factum which complains that YT was *forced* into a $20 million mortgage in November 1990 *which provided only limited funding for construction*. (Emphasis added). This is unsupportable in my view.

19 Is it "just or convenient" pursuant to s.114 *Courts of Justice Act* to appoint a receiver? *Bank of Montreal v. Appcorn Ltd.* (1981), 33 O.R. (2d) 97 (Ont. H.C.) indicates at p.101 that it should be kept in mind that the loan documentation gives the right to a private receivership and that such should not disqualify or inhibit in any way the more conservative approach of a court appointment.

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships*, Bennet (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

> There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.
>
> **Appointment to Enforce Rights**
>
> In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

This appears to be a first class of case.

21 *Canadian Commercial Bank v. Gemcraft Ltd.* (1985), 3 C.P.C. (2d) 13 (Ont. H.C.) allowed a receivership where it was found that the bank's security had deteriorated. In the present case the mortgages have matured, the excess funds are being used to pay for construction to complete the project (but possibly on what might be euphemistically called a "never-never plan"), there is the Cantel situation which has thrown Phase IV into disarray and the defendants want to continue funding their Cantel lawyers with the "excess" amounts while disregarding their obligation of disclosure.

22 It seems to me that the plaintiffs have extended great latitude to the defendants in the past, I do not think that they are obliged to continue to do so. If they do not, the project is in a stalemate. It is in my view important that the project be swiftly completed and the Cantel matter resolved. Such will benefit the project and each party claiming an interest therein (including the

defendants who may yet benefit from a turn around in the market depending on the timing involved). As in *Ontario Development Corp. and Roynat v. Ralph Nicholas* (1985), 57 C.B.R. (N.S.) 186 (Ont. S.C.) there is no need to give the defendants more time.

23 Is there something in the weighing of the factors that would indicate that a receivership not be granted? I do not think that the defendants have shown any irreparable harm that is not compensable in damages. In fact the project has been up for sale by the defendants since the end of 1990. I note that both the plaintiffs are large and apparently solid financial institutions. I also note the fact that the defendants have no substantial equity in the project (see *Citibank Can. v. Calgary Auto Centre* (1989), 75 C.B.R. (N.S.) 74 (Alta. Q.B.) at pp.85-6.

24 I think that there would be prejudice to the plaintiffs if the project is continued in limbo; clearly they have lost faith in the defendants' ability to complete and to resolve the Cantel matter - apparently with some justification. I also note that the defendants agreed not to oppose the appointment of a receiver under the loan documentation. As well there is the factor that the lien claimants/trade creditors/Metro Toronto and the TTC either favoured the receivership or took no position on it - none apparently supported the defendants' position. It would be difficult to envisage a situation where the defendants could effectively persuade the trades to complete; however a court appointed receiver could borrow to complete and to finance tenant inducements. The receiver would have a neutral position vis-a-vis the various claimants in the project, which position should favour a lessening of litigation. The receiver provides an advantage not present in the present control situation of cheque approval - the receiver can initiate construction completion.

25 The defendants suggested that a receivership here was akin to that situation cautioned against in *Fisher Investments v. Nusbaum* (1988), 71 C.B.R. (N.S.) 185 (Ont. H.C.) at p.188:

> One has to recognize that the appointment of a receiver is tantamount to placing a notice in the window that the proprietors are not capable of managing their own affairs.

This, however, was said in the context of a shareholder dispute where one party was operating a going concern - not in the context of a matured loan or a continued failure to complete the project, etc. It appears to me that if any notice was hung out there, it was done implicitly by the defendants themselves.

26 As to the question of sufficient time to pay after demand (see *Mister Broadloom v. Bank of Montreal* (1979), 25 O.R. (2d) 198). I do not find there to be any precipitous action taken by the plaintiffs.

27 As to the question of the court not having jurisdiction to appoint a receiver to manage a business unless the business is included in the security (*Whitley v. Challis*, [1891] 1 Ch. 64 (C.A.)), it is said by the plaintiffs that YT and DY are single purpose companies. Nevertheless the order presented as a draft is to be revised to restrict the receiver to deal with the YMC aspect of the defendants. As well the plaintiffs are to give an undertaking that they will be responsible for any damages caused by the appointment if there is any subsequent determination that the appointment ought not to have been made. (see *Bennett* pp.99).

28 Subject to the modifications of the foregoing paragraph, there is to be an order in the form submitted to me on August 30, 1991 by CL and CT.

Note*: These reasons apply to both CL motion (Court File No. 91-CQ-72) and CT motion (court file 77328/91Q). A typed version of these handwritten reasons is provided for the convenience of counsel.*

Motion allowed.

SCHEDULE "B"

Statutes Cited

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 101 and 137(2)

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.

Terms

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

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…

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1)

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.

SCHEDULE "B"

Statutes Cited

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 101 and 137(2)

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.

Terms

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

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…

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Court File No. CL-26-00000425-0000

HILLMOUNT CAPITAL MORTGAGE HOLDINGS INC.	- and -	FARIBA RAJABI AND PARVIZ AHMADZADEH
Applicant		*Respondents*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

FACTUM OF THE APPLICANT
(Appointment of Receiver)

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