

Court File No. CV-23-00000065-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ROYAL BANK OF CANADA

Plaintiff

and

MARGARET LOIS MORRISON and JOHN ANTHONY MORRISON

Defendants

FACTUM

(Motion for an Order appointing Receiver
Hearing Date: Wednesday, January 10, 2024)

January 9, 2024

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TO: **SERVICE LIST**

FACTUM OF THE PLAINTIFF

PART I - OVERVIEW

1. The Plaintiff, Royal Bank of Canada (“**RBC**”), is seeking to appoint msi Spergel inc. as receiver over the real property known municipally as 274 Army Camp Road, Hagersville, Ontario, PIN # 38244-0190 (the “**Real Property**”) registered in the name of Margaret Morrison (the “**Debtor**”) pursuant to section 243 of the Bankruptcy and Insolvency Act (“**BIA**”) and section 101 of the Courts of Justice Act.
2. The Debtor has not served any responding material and has not defended the action and time to do so has expired.

PART II - SUMMARY OF FACTS

Parties

3. The Debtor owns the Real Property.¹

Credit Facilities and Security

4. Pursuant to a commitment letter agreement dated November 10, 2021, including an amending agreement dated October 25, 2022 (collectively, the “**Credit Agreement**”), RBC established a term loan (the “**Term Loan**”) in favour of the Debtor.²
5. Pursuant to the “Events of Default” section of the Credit Agreement, failure by the Debtor to pay any principal, interest or other amount when due constitutes default under the Credit Agreement.³

¹ Affidavit of Yatri Vagadia sworn December 8, 2023 (“**Vagadia Affidavit**”), para. 8.

²² Vagadia Affidavit, para. 12, Exhibit B.

6. Pursuant to the “General Covenants” and “Events of Default” sections of the Credit Agreement, the Debtor covenanted to pay or make provision for payment of all material taxes, including interest and penalties, and any failure to observe this covenant constitutes default under the Credit Agreement.⁴

7. Pursuant to the “Reporting Requirements” section of the Credit Agreement, the Borrower agreed to provide to RBC certain financial information (the "Outstanding Reporting Items").⁵

8. As security for the Term Loan, the Debtor granted a Charge/Mortgage to RBC in the principal amount of \$2,000,000.00 (the "**Mortgage**") against the Real Property.⁶

9. Pursuant to “Covenants Regarding Liabilities” section of Standard Charge Terms No. 20015, the Chargor covenants to pay to the Chargee each and every amount, indebtedness, liability and obligation forming part of the Liabilities in the manner agreed to in respect of such amount, indebtedness, liability or obligation.⁷

10. Pursuant to the “Receivership” section of the Standard Charge Terms No. 20015, at any time and from time to time when there shall be default under the provisions of the Charge, the Chargee may appoint a receiver of the Charged Premises and the rents and profits thereof.⁸

³ Vagadia Affidavit, para. 14.

⁴ Vagadia Affidavit, para. 15.

⁵ Vagadia Affidavit, para. 16.

⁶ Vagadia Affidavit, para. 18, Exhibit C.

⁷ Vagadia Affidavit, para. 19.

⁸ Vagadia Affidavit, para. 20.

11. As security for the Term Loan, the Debtor granted RBC a general security agreement ("**GSA**").⁹

12. Pursuant to the "Events of Default" section of the GSA, a) failure by the Debtor to pay when due any principal or interest forming part of the indebtedness or the failure of the Debtor to observe or perform any obligation, covenant, term, provision or condition contained in the GSA or any other agreement between the Debtor and RBC constitutes default under the GSA.¹⁰

13. Pursuant to the "Remedies" section of the GSA, upon default, RBC is entitled to appoint a receiver.¹¹

14. A realty tax certificate for the Real Property, effective December 5, 2023, indicates arrears are in the amount of \$53,936.51 (the "**Arrears**"). Total unpaid taxes are in the amount of \$123,169.88, which is the sum of Arrears and unpaid balance of \$69,233.37 for the current year (2023).¹²

Default and Transfer to Special Loans

15. RBC advised the Debtor that her accounts were being transferred to SLAS.¹³

16. During a call with the Debtor on September 27, 2023, RBC advised the Debtor, among other things:

⁹ Vagadia Affidavit, para. 21.

¹⁰ Vagadia Affidavit, para. 22.

¹¹ Vagadia Affidavit, para. 23, Exhibit D.

¹² Vagadia Affidavit, para. 28.

¹³ Vagadia Affidavit, para. 29, Exhibit H.

- (a) the Term Loan was delinquent for 130 days as at September 27, 2023;
and
- (b) the Term Loan matures on November 18, 2023 and would not be renewed by RBC due to ongoing monetary defaults and failure to provide the Outstanding Reporting Items.¹⁴

17. On October 3, 2023, RBC issued a non-renewal letter to the Debtor advising that all indebtedness must be repaid on maturity of the Term Loan. The non-renewal letter also confirmed the various defaults committed by the Debtor under the Credit Agreement, the Charge and the GSA.¹⁵

18. Prior to and after the non-renewal letter, RBC requested the Debtor to provide evidence of insurance for the Real Property. RBC's last records indicate insurance coverage for the Real Property was in 2020. To date, this information request remains outstanding.¹⁶

19. Given the Debtor's failure to address the monetary payment defaults under the Term Loan and the non-monetary events of default, including failure to provide evidence of insurance coverage for the Real Property, RBC decided to issue payment demands and the notice to enforce security pursuant to section 244 of the BIA (the "**BIA Notice**").¹⁷

¹⁴ Vagadia Affidavit, para. 32.

¹⁵ Vagadia Affidavit, para. 35, Exhibit K.

¹⁶ Vagadia Affidavit, para. 37.

¹⁷ Vagadia Affidavit, para. 38.

20. As a result, on November 1, 2023, RBC issued payment demands and the BIA Notice to the Debtor and the Guarantor, as applicable, in respect of the Term Loan.¹⁸

21. RBC's payment demand letters and BIA Notice expired on November 14, 2023 and the indebtedness remains outstanding.¹⁹

22. Section 13 of the GSA and section 42 of the Charge each provides for the appointment of a receiver upon default.²⁰

23. The Debtor has committed both monetary and non-monetary acts of default. RBC has provided the Debtor with more than sufficient time to remedy the defaults and the Debtor has failed and/or refused to do so.²¹

24. RBC has been accommodating and reasonable in providing the Debtor time to sell the Real Property. However, the Debtor has been unable to do so, despite being granted accommodations.²²

25. RBC is concerned about its security given i) prior to maturity, the Term Loan was delinquent for several months, ii) non-payment of realty taxes and arrears owing for prior years, iii) failure to provide written confirmation of insurance coverage for the Real Property, and iv) failure to provide the Outstanding Reporting Items.²³

¹⁸ Vagadia Affidavit, para. 39, Exhibit L.

¹⁹ Vagadia Affidavit, para. 44.

²⁰ Vagadia Affidavit, para. 45.

²¹ Vagadia Affidavit, para. 46.

²² Vagadia Affidavit, para. 47.

²³ Vagadia Affidavit, para. 48.

26. The Debtor is unable to fulfil her contractual obligations to RBC.²⁴
27. RBC is entitled to take any and all steps necessary to enforce its security and realize on same.²⁵
28. RBC considers it reasonable and prudent for it to begin enforcement of its security in an effort to recover the outstanding indebtedness.²⁶
29. The Indebtedness owing by the Debtor to RBC remains outstanding in full.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issues

30. The issues before this Court, and addressed below, are:
- (a) Should this Court appoint the Receiver?
 - (b) If this Court decides to appoint the Receiver, then are the terms of the Receivership Order appropriate in the circumstances of this receivership?

(a) This Court should appoint the Receiver

31. Section 244(1) requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.²⁷
32. RBC sent the payment demands together with its BIA Notice to the Debtor on November 1, 2023, more than two months ago.

²⁴ Vagadia Affidavit, para. 49.

²⁵ Vagadia Affidavit, para. 50.

²⁶ Vagadia Affidavit, para. 51.

²⁷ **BIA, s. 244(1), Schedule "B"**.

33. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the "**CJA**") provides for the appointment of a receiver by this Court where it is "just and convenient". Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.²⁸

34. Where the credit agreement and related security documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd*:

28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, 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, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion,

²⁸ **CJA, s. 101, Schedule "B"; BIA, s. 243(1) and 243(2), Schedule "B".**

whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

35. See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:²⁹

...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 document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, supra, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]).

36. The existence of a contractual right to appoint a receiver in the cred agreement and related security documents is key and transforms the appointment of a receiver from an extraordinary remedy to relief that is granted more as a matter of course, especially in cases in which the circumstances further support such an appointment. That is the case here.

37. This relief becomes even less extraordinary when dealing with a default under a mortgage.³⁰

²⁹ *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (CanLII), paras. 28-29.

³⁰ *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at paragraph 44.

38. This even further lowered burden in cases in which there has been a default by a mortgagor is described by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*³¹

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.

39. In the present case, the Debtor is in default under the credit agreement and related security documents and the Term Loan has matured, meaning that this is the first class of cases referred in *Confederation Life*. In this sort of case, allegations of

³¹ ***Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) ["Confederation Life"], para. 20, Tab 1 of the Applicant's Book of Authorities.**

danger to the property are not necessary, though such allegations do exist in this case, (i.e., lack of evidence of property insurance).³²

40. Thus, with RBC's contractual entitlement to appoint a receiver and the existence of monetary and non-monetary defaults and the maturity of the Term Loan, the appointment of a receiver is not extraordinary relief, and the burden has been lowered further. With this lower burden, the following additional "just or convenient" factors identified by Justice Farley in *Confederation Life* may be considered:³³

- (a) the lenders' security is at risk of deteriorating (i.e., failure to pay realty taxes);
- (b) there is need to stabilize and preserve the Real Property;
- (c) loss of confidence in the Debtor; and,
- (d) positions and interests of other creditors.

41. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.³⁴

42. When the above *Confederation Life* factors are applied to this case, RBC submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

³² *Confederation Life*, para. 20.

³³ *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) [*"Confederation Life"*], paras. 19-24, Tab 1 of the Applicant's Book of Authorities.

³⁴ *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49 at paragraph 28, Tab 2 of the Applicant's Book of Authorities.

- (a) ***The Debtor contractually agreed to the appointment of a receiver.***

The credit agreement and the GSA and Mortgage documents among RBCt and the Debtor expressly entitle RBC to appoint a receiver under certain circumstances, including the present circumstances. RBC now exercises these entitlements, subject to this Court's authority.

- (b) ***The Credit Agreement, Mortgage and GSA are in default.*** As set out

above, events of default have occurred and are continuing under the Credit Agreement and the related Security documents. RBC has demanded on the Indebtedness.

- (c) ***Position and interests of other Creditors.*** RBC is not the only creditor

of the Debtor. As at the date of this Factum, no creditor has opposed the receivership motion, although served. Realty taxes are owing to the . The Receiver will be able to the municipality. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Real Property.

- (d) the Debtor has demonstrated a serious failure to comply with its

obligations under the Credit Agreement, as evidenced by failing to make the monthly Term Loan payments for over 6 months and has failed to repay the Term Loan on maturity.

- (e) the Debtor actions have resulted in various Events of Default under the

Credit Agreement and the Security.

- (f) The defaults still continue.
- (g) Payment demands and the BIA Notice to the Debtor have long since expired.
- (h) the Indebtedness remains outstanding in full.
- (i) RBC has provided the Debtor with more than sufficient time to repay the Indebtedness.
- (j) The receiver will be in a position to market and sell the Real Property for the benefit of all stakeholders.
- (k) RBC has justifiably lost confidence in the Debtor.
- (l) The terms of the GSA and the Mortgage Security expressly permit the appointment of a receiver on default and the Debtor agreed to these contractual terms when it signed and delivered the GSA and the Mortgage Security to RBC in consideration of the Term Loan; and
- (m) msi Spergel inc. has consented to act as receiver.


(b) The Terms of the Receivership Order are Appropriate

43. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided.

PART IV - ORDER REQUESTED

44. It is respectfully requested that RBC be granted the relief sought in the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of January, 2024.



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Proceeding commenced at Cayuga

FACTUM OF THE MOVING PARTY

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