



ONTARIO SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00715191-00CL

DATE: March 5, 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: Home Trust Company vs. Vandyk – Backyard Humberside Ltd.

BEFORE JUSTICE: Justice Osborne

**PARTICIPANT INFORMATION**

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

Name of Person Appearing	Name of Party	Contact Info
Laura Culleton	Home Trust Company	<a href="mailto:laurac@chaitons.com">laurac@chaitons.com</a>
Harvey Chaiton		<a href="mailto:harvey@chaitons.com">harvey@chaitons.com</a>

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

Name of Person Appearing	Name of Party	Contact Info
Arif Raza	2233651 Ontario Ltd. and Haleem Muhammad	<a href="mailto:arifrazalaw@gmail.com">arifrazalaw@gmail.com</a>

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
Graham Phoenix	Kay Family Investments	<a href="mailto:gphoenix@ln.law">gphoenix@ln.law</a>
Bart Sarsh	MSI Spergel Inc.	<a href="mailto:sarshb@simpsonwagle.com">sarshb@simpsonwagle.com</a>

## **ENDORSEMENT:**

1. The Applicant, Home Trust Company, (the “Applicant” or the “Lender”) seeks the appointment of msi Spergel Inc. as Receiver pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*, of the assets, undertakings and properties of the Debtor, Vandyk-Backyard Humberside Limited acquired for or used in relation to a business carried on by the Debtor, including real property located at 10 Neighbourhood Lane, Toronto Ontario, but excluding any beneficial ownership interest of the Debtor in any unsold condominium units, parking units and storage lockers located at the adjacent property municipally known as 25 Neighbourhood Lane, Toronto, Ontario.
2. Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated.
3. Home Trust relies upon the Affidavit of Sergiu Cosmin sworn February 6, 2024 together with exhibits thereto.
4. The Debtor did not appear and was not represented. The Applicant seeks an order for substituted service given the repeated attempts to serve the Debtor and its principal.
5. The Debtor is an Ontario corporation that owns the property at 10 Neighbourhood Lane. That property consists of a two-story commercial building containing both retail and office space, together with 29 underground parking stalls, known as Stone Gate Plaza.
6. The Lender made available to the Debtor a non-revolving bridge loan in the amount of \$10 million pursuant to a commitment letter dated April 30, 2020 and amended April 19, 2022.
7. Proceeds of the loan were to be used to refinance existing first mortgage construction financing, provide equity repatriation and assist with financing costs.
8. The loan was originally to mature on May 1, 2022, which date was extended to May 2, 2024.
9. The indebtedness is secured a mortgage registered against the property in the principal amount of \$10 million and a general security agreement.
10. The Debtor has agreed to the appointment of a receiver upon the occurrence of an event of default.
11. Over the past five months, the Debtor has tried and failed to sell the property to repay the Lender. The lender has refrained from taking steps in reliance upon representations from and on behalf of the Debtor that an agreement of purchase and sale was imminent. While the closing date of one proposed agreement was extended from October and then again twice in December, 2023, it never closed.
12. The Debtor has failed to make any interest payments on the loan since September 1, 2023.
13. Demands were made and section 244 *BIA* Notices were served on January 8, 2024. The Lender demanded the amount of \$10,145,007.92 in respect of principal and interest.
14. No payments have been made by the Debtor since demand was made.

15. The property is subject, in addition to the mortgage in favour of the Lender, to three subordinate mortgages with principal amounts totaling in the aggregate \$5.35 million. There is also a construction lien of approximately \$10,000 registered against title.
16. The second mortgagee, Kay Family Investments, is represented in Court today. The third and fourth mortgagees, 2233651 Ontario Ltd. and Haleem Muhammad respectively, are also represented in Court today.
17. Accordingly, the Lender seeks the appointment of a Receiver today to take control of the property and realize on it. The proposed Receiver consents to the appointment. The relief sought is supported by the second mortgagee. Initially, counsel for the third and fourth mortgagees requested an adjournment of two weeks to allow for negotiations to permit his clients to attempt to reach an agreement to buy out either the prior ranking mortgages interests, or to buy the debtor. As more particularly described below, this was resolved.
18. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?
19. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, 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. These 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.
20. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the 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: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.
21. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage: *BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.*, 2020 ONSC 1953 at paras. 43-44.
22. As observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing *Bennett on Receivership*, 2<sup>nd</sup> 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 and with which I agree: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at para. 25):
  - a. 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;
  - b. 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;
  - c. the nature of the property;

- d. the apprehended or actual waste of the debtor's assets;
- e. the preservation and protection of the property pending judicial resolution;
- f. the balance of convenience to the parties;
- g. the fact that the creditor has a right to appointment under the loan documentation;
- h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- i. the principle that the appointment of a receiver should be granted cautiously;
- j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- k. the effect of the order upon the parties;
- l. the conduct of the parties;
- m. the length of time that a receiver may be in place;
- n. the cost to the parties;
- o. the likelihood of maximizing return to the parties; and
- p. the goal of facilitating the duties of the receiver.

23. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54).

24. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted: *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras. 24, 28-29.

25. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?

26. In my view, it is, for the reasons set out above.

27. The indebtedness is clear, demands and enforcement notices were delivered, and no repayment has been made in any amount whatsoever since September, 2023 and certainly following the demand. The Debtor has been unable to sell the property to repay the indebtedness, or otherwise raise funds to repay the indebtedness.

28. Accordingly, I am satisfied that it is not only just *or* convenient to appoint a receiver today, but indeed that it is both just *and* convenient.

29. For all of these reasons, msi Spergel is appointed Receiver on the terms of the order I have signed today. The order is consistent with the Model Order of the Commercial List. I note that the beneficial interests

in the adjacent property that are carved out of the receivership are carved out because they are already the subject of a separate ongoing receivership. Accordingly, that carveout is appropriate.

30. Mr. Raza on behalf of the third and fourth mortgagees initially sought an adjournment of this motion as described above. However, that issue was resolved on the basis of what I would have expected in any event, namely that the Receiver will engage in discussions with Mr. Raza's clients and consider any offers to buy out either the indebtedness of the Applicant and the other prior mortgagee, or to buy out the Debtor more broadly. Those discussions will occur shortly.
31. If such an agreement can be reached, there is no reason the Receiver cannot be discharged relatively quickly. That is for another day. But in the meantime, the Receiver will have the ability to consider next steps. It is extremely unlikely that the Receiver could sell the property within the two week period to which Mr. Raza referred in any event.
32. An order for substituted service of originating process and these motion materials on the Debtor is appropriate and is granted. The Debtor is well aware of the situation, and virtually all of its other properties and businesses are in receivership already. The Applicant has attempted to serve the Debtor and its principal via the email to his known email address, and has attempted to physically serve the Debtor at the corporate address reflected in the Corporate Profile, all as reflected in the affidavits of service filed, and all without success. The order for substituted service is granted. I observe that in any event, the receivership order has the usual seven day comeback provision.
33. The Applicant will attempt to deliver to the Debtor and its principal this endorsement and the order I have signed today. In addition, the Receiver will attempt to make the Debtor further aware, by providing copies to the Receiver in respect of the Debtor's other properties.
34. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.



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Justice Osborne

Date: March 5, 2024