

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

HOME TRUST COMPANY

Applicant

- and -

VANDYK – BACKYARD HUMBERSIDE LIMITED

Respondent

APPLICATION UNDER SUBSECTION 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 a Receiver – Application Returnable March 5, 2024)

March 4, 2024

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FACTUM OF THE APPLICANT

PART I – NATURE OF THE APPLICATION

1. This factum is filed by Home Trust Company (the “**Lender**”) in support of its application for an order (the “**Receivership Order**”) appointing msi Spergel Inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”), without security, over the property, assets, undertakings Vandyk – Backyard Humberside Limited (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor, including the real property known municipally as 10 Neighbourhood Lane, Toronto, Ontario (the “**Property**”) but excluding the Debtor’s beneficial ownership interest in any unsold condominium units, parking units and storage lockers located at the property municipally known as 25 Neighbourhood Lane.

2. The facts underlying this application are more fully set out in the affidavit of Sergiu Cosmin sworn February 6, 2024 (the “**Cosmin Affidavit**”).¹ All capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Cosmin Affidavit, and all monetary amounts referred to herein are in Canadian currency unless otherwise stated.

PART II – FACTS

The Debtor and the Property

3. The Debtor is an Ontario corporation with its head office located in Mississauga, Ontario. John Vandyk is the sole officer and director of the Debtor.²

4. The Debtor is the owner of the Property.³

5. The two-storey tenanted commercial building situated on the Property houses retail and office space as well as 29 underground parking stalls.⁴

Financing for the Debtor and the Lender’s Security

6. Pursuant to a commitment letter dated April 3, 2020, as amended by a renewal letter dated April 19, 2022 (the “**Renewal Letter**” and collectively the “**Commitment Letter**”), the Lender made available to the Debtor a non-revolving bridge loan in the principal amount of \$10.0 million (the “**Loan**”) for the purpose of refinancing the first mortgage construction financing on the Property. The Loan was payable interest only monthly until maturity when the full amount of interest and principal owing was to be paid.⁵

¹ Applicant’s Application Record, Tab 2, Affidavit of Sergiu Cosmin sworn February 6, 2024 (the “**Cosmin Affidavit**”).

² Cosmin Affidavit, at para. 3; Exhibit “A” to the Cosmin Affidavit.

³ Cosmin Affidavit, at para. 4; Exhibit “B” to the Cosmin Affidavit.

⁴ Exhibit “C” to the Cosmin Affidavit.

⁵ Cosmin Affidavit, at para. 6; Exhibit “C” to the Cosmin Affidavit.

7. As security for the Loan, the Debtor granted, among other things, the following security documents in favour of the Lender (collectively, the “**Lender’s Security**”):⁶

- (a) a Charge/Mortgage registered on title to the Property on April 28, 2020 in the principal amount of \$10.0 million as Instrument No. AT5416487 (the “**Lender’s Charge**”); and
- (b) a Notice of Assignment of Rents – General registered on title to the Property on April 28, 2020 as Instrument No. AT5416488; and
- (c) a General Security Agreement dated April 17, 2020 (the “**GSA**”).

8. Pursuant to the terms of the Lender’s Charge and the GSA, failure by the Debtor to pay principal or interest when due is an event of default.⁷

9. The Debtor has also agreed that, upon default, the Lender is entitled to appoint a receiver in writing and/or make an application for the court appointment of a receiver.⁸

10. The Lender also registered a financing statement against the Debtor under the *Personal Property Security Act* (Ontario) on April 28, 2020, over all classes of collateral except “consumer goods” and “motor vehicle included” thereby perfecting the personal property of the Debtor located in Ontario.⁹

⁶ Cosmin Affidavit, at para. 9; Exhibits “D” to “F” to the Cosmin Affidavit.

⁷ Cosmin Affidavit, at para. 10.

⁸ Cosmin Affidavit, at para. 11.

⁹ Cosmin Affidavit, at para. 16; Exhibit “K” to the Cosmin Affidavit.

Other Creditors

11. In addition to the Lender's Charge, the following charges/mortgages are also registered on title to the Property:¹⁰

- (a) a \$2.0 million charge/mortgage in favour of Kay Family Investments Inc. ("KFI") registered against title to the Property on July 11, 2019 as Instrument No. AT5182926 (the "**KFI Charge**"), subordinated to the Lender's Charge pursuant to a Subordination and Standstill Agreement dated April 15, 2020 and registered as a postponement against title to the Property on April 28, 2020 as Instrument No. AT5416489; and
- (b) a \$2.20 million charge/mortgage in favour of 2233651 Ontario Limited ("**223 Ontario**") registered against title to the Property on October 11, 2019 as Instrument No. AT5261210 (the "**223 Ontario Charge**"), subordinated to the Lender's Charge pursuant to a Subordination and Standstill Agreement dated April 20, 2020 and registered as a postponement against title to the Property on April 28, 2020 as Instrument No. AT5416490; and
- (c) a \$1.15 million charge/mortgage in favour of Haleemah Muhammad registered against title to the Property on August 21, 2023 as Instrument No. AT6402821 (the "**Haleemah Charge**").

Construction Lien

12. On November 22, 2023, a construction lien in the amount of \$9,473.75 was registered by Live Patrol Inc. ("**Live Patrol**") against title to the Property as Instrument No. AT6464046 (the

¹⁰ Cosmin Affidavit, at para. 12; Exhibits "G" to "I" to the Cosmin Affidavit.

“**Construction Lien**”). In the Construction Lien, Live Patrol alleges that it supplied monitoring and related services to the Debtor from August 11, 2022 to October 31, 2023.¹¹

Other PPSA Registrants

13. In addition to the Lender’s PPSA registration, the following financing statements were registered against the Debtor under the Personal Property Security Act (Ontario) (the “**PPSA**”) as of January 18, 2024:¹²

- (a) Aviva Insurance Company of Canada registered a financing statement on April 26, 2016 in respect of “accounts” and “other” in connection with a Deposit Trust Agreement dated April 15, 2016 made between the Debtor and Aviva Insurance Company of Canada with respect to the condominium project located at 144 Berry Road in the City of Toronto, Ontario;
- (b) CWB National Leasing Inc. registered a financing statement on May 7, 2020 in respect of “equipment” in connection with all industrial equipment, garbage containers, organic containers, 3 stream tri sorter, T-20x compactor, recycling containers with related components of every nature or kind described in agreement number 2954213 between the Debtor and CWB National Leasing Inc.;
- (c) Kubota Canada Ltd. registered a financing statement on June 2, 2020 in respect of “equipment”, “other” and “motor vehicle included” in connection with 2020 Kubota #BX2380 KBUC1BHRCLGE38802;

¹¹ Cosmin Affidavit at paras. 14-15; Exhibit “J” to the Cosmin Affidavit.

¹² Cosmin Affidavit at para. 16.

- (d) MCAP Financial Corporation registered a financing statement on June 25, 2020 in respect of “accounts” and “other” in connection with a Subordination and Assignment regarding Vandyk – Backyard Kings Mill Limited debt and charge of beneficial interest in the property known as 15 Neighbourhood Lane, Etobicoke, Ontario; and

- (e) Peoples Trust Company registered a financing statement on July 13, 2023 in respect of “inventory”, “equipment”, “accounts” and “other” in connection with property situate at or arising from the ownership, development, use or disposition of the lands municipally known as 25 Neighbourhood Lane, Toronto, Ontario as well as an assignment of accounts owing to the Debtor by Vandyk – Backyard Queensview Limited and an assignment of choses-in-action and other claims which the Debtor now or hereafter has against Vandyk – Backyard Queensview Limited and proceeds thereof.

Default and Demand

14. The Debtor defaulted under the Commitment Letter and the Lender’s Security as a result of its failure to make interest payments to the Lender due from September 1, 2023 onward.¹³

15. As a result of the above noted default, on January 8, 2024, the Lender demanded payment of the Debtor’s indebtedness in the amount of \$10,145,007.92 and delivered a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the “BIA”).¹⁴

¹³ Cosmin Affidavit, at para. 19.

¹⁴ Cosmin Affidavit, at para. 20; Exhibit “L” to the Cosmin Affidavit.

16. The Lender has received no payments from the Debtor since demand was made.¹⁵
17. The Debtor has unsuccessfully attempted to sell the Property for over 5 months.¹⁶

PART III – ISSUE

18. The sole issue before the Court is whether it is just and convenient in the circumstances to appoint Spergel as the Receiver.

PART IV – LAW AND ARGUMENT

It is just and convenient to appoint the Receiver

19. Pursuant to section 243 of the BIA, the Court may appoint a receiver where it is “just or convenient to do so.”¹⁷ Section 101 of the *Courts of Justice Act* (Ontario) further provides for the appointment of a receiver when it is “just or convenient” to do so.¹⁸
20. In making its determination if it is “just or convenient” to appoint a receiver, the Court must have regard to all of the circumstances of the case, including the nature of the property and the rights and interests of all parties in relation to the property.¹⁹
21. Where a debtor has expressly agreed to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.²⁰

¹⁵ Cosmin Affidavit, at para. 21.

¹⁶ Cosmin Affidavit, at para. 23.

¹⁷ [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 \(the “BIA”\), section 243.](#)

¹⁸ [Courts of Justice Act, R.S.O. 1990, c. 43, section 101.](#)

¹⁹ [Bank of Montreal v. Carinal National Leasing Ltd., 2011 ONSC 1007 \[“Carnival”\], at para. 24 citing Bank of Nova Scotia v. Freure Village on Clair Creek \(1996\) 40 C.B.R. \(3d\) 274 \(Ont. Gen. Div.\) \(“Freure Village”\), at para. 10.](#)

²⁰ [United Savings Credit Union v. F & R Brokers Inc., 2003 BCSC 640 \(B.C.S.C.\), at para. 16.](#)

22. A court-appointed receivership is just and convenient and appropriate in the circumstances as

- (a) the Debtor owes in excess of \$10 million to the Lender;
- (b) the Debtor has agreed to the appointment of a receiver upon default pursuant to the terms of the Lender's Charge and GSA;
- (c) the Debtor has not paid any interest on the Loan since September 1, 2023;
- (d) no payments have been made to the Lender since the demand for payment on January 8, 2024;
- (e) the Debtor has unsuccessfully tried to sell the Property for the past 5 months;
- (f) there is no prospect of payment being made to the Lender absent the appointment of a Receiver; and
- (g) there are encumbrancers with interests registered on title to the Property who would benefit from a transparent marketing and sale process under supervision of this Court.

23. The Lender submits that in the circumstances, it is in the best interests of the Lender and the other mortgagees and stakeholders generally, and is just and convenient, for the Court to appoint a receiver to take control and sell the Property for the benefit of the Lender, the subsequent mortgagees and other stakeholders.

24. Spergel has consented to act as receiver.

PART IV – ORDER REQUESTED

25. The Lender seeks an Order appointing Spergel as Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2024.



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SCHEDULE “A”

AUTHORITIES

1. [*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007](#)
2. [*Bank of Nova Scotia v. Freure Village of Clair Creek*, \(1996\) 40 CBR \(3d\) 274 \(ON S.C.J.\)](#)
3. [*United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 \(B.C.S.C.\)](#)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

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.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Courts of Justice Act, R.S.O. 1990, c. C.43

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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

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Court File No. CV-24-00715149-00CL

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PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT
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