

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**IN THE MATTER OF 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**

**B E T W E E N:**

**COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS INC., 593651 ONTARIOLTD., 1031436 ONTARIO INC., ALRAE INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE, DA YID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778 ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M. HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL CONSULTANTS INC., YERUSHA INVESTMENTS INC., MIHAL TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE BANK OF NOV A SCOTIA TRUST COMP ANY IN TRUST FOR BAILEY LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP INC., MAXOREN INVESTMENTS, 2227046 ONTARIO LIMITED, DAST PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUCKONIC and B. & M. HANDELMAN INVESTMENTS LIMITED**

Applicants

- and -

**ANNIE YERETSIAN, 2399029 ONTARIO INC., 2457674 ONTARIO INC.,  
MOSS DEVELOPMENT LTD.  
and TERRY WILSON**

Respondent

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**FACTUM OF THE MOVING PARTY**

*(Returnable on August 16, 2018)*

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August 14, 2018

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## **PART I – THE NATURE OF THIS OBJECTION**

1. The parties, Canada Capital Corporation Inc., 2457647 Ontario Inc., Canada Investment Corporation and Terry Wilson (collectively, the “**Canada Capital Parties**”) submit this factum in opposition to the motion of the Applicants in these proceedings for the recovery of the three-month interest fee (the “**Three Month Interest Fee**”) being charged by the Applicants from the proceeds of the sale of the following properties (collectively, the “**Mortgaged Properties**”): 7 High Point Road, Toronto, Ontario (the “**Highpoint Property**”), 97 Bridge Street, Picton Ontario (the “**Bridge Property**”); 12497 Loyalist Parkway, Picton, Ontario (the “**Loyalist Property**”); and 13 vacant lots on Caldwell Drive in Oro-Medonte, Ontario (the “**Caldwell Property**”).

## **PART II – STATEMENT OF FACTS**

2. Pursuant to an Order dated February 28, 2018, Rosen Goldberg Inc. was appointed as receiver over the assets, property and undertakings of the Respondents (the “**Receivership Order**”).<sup>1</sup>

3. Pursuant to the Receivership Order, the Receiver was authorized to market and sell the Mortgaged Properties. The Receiver obtained offers to purchase each of the Mortgaged Properties and the sale of the Mortgaged Properties was approved by the Court on June 1, 2018.

4. On June 22, 2018, the Applicants sought a distribution by the Court from the proceeds of sale of the Mortgaged Properties on account of the indebtedness owing to them, which indebtedness was secured by mortgages registered in favour of the Applicants on the Mortgaged Properties.

5. As part of the indebtedness owing to the Applicants, the Applicants are claiming ‘bonus’ charges equivalent to the three-months’ interest as a penalty for defaults on the mortgages for each of the Mortgaged Properties.

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<sup>1</sup> Receiver’s Application Record (Court File No. CV-18-592103-00CL) [“Receiver’s Application Record”] at page 12.

6. The Court approved a distribution to the Applicants, save and except for the amount of the Three-Month Interest Fee being charged on each of the Mortgaged Properties, which amount is being held by the Receiver pending determination by this Court of the validity of such fee.

### **PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES**

7. The issue to be determined at this motion is whether the Applicants are entitled to recover Three Month Interest Fee charges from the proceeds of the sale of the Mortgaged Properties.

8. The Canada Capital Parties respectfully submit that the Applicants are not entitled to recover the Three-Month Interest Fee on the sale of properties conducted in a receivership. As mortgagees, the Applicants are not entitled to rely on s. 17 of the *Mortgages Act* to impose obligations on the mortgagors to pay a three-month interest charge.

#### ***The Right to Recover a Charge of Three-Months' Interest***

9. Entitlement to claim three-month interest charges must be established, either by way of section 17 of the *Mortgages Act* (the “*Act*”),<sup>2</sup> or based on the wording of the mortgage itself.<sup>3</sup>

10. Section 17 of the *Act* provides as follows:

17 (1) Despite any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property, the mortgagor or person entitled to make such payment may at any time, upon payment of three months interest on the principal money so in arrear, pay the same, or the mortgagor or person entitled to make such payment may give the mortgagee at least three months notice, in writing, of the intention to make such payment at a time named in the notice, and in the event of making such payment on the day so named is entitled to make the same without any further payment of interest except to the date of payment.<sup>4</sup>

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<sup>2</sup> *Mortgages Act*, RSO 1990, c M40 [*Mortgages Act*]

<sup>3</sup> 58 *Cardill Inc. v. Rathcliffe Holdings Limited*, 2017 ONSC 6828 [*Cardill*] at para 5.

<sup>4</sup> *Mortgages Act*, *supra* note 1 at s 17.

11. Section 17 of the Act confers rights on the mortgagor and provides equitable protections for the mortgagee. The Ontario Court of Appeal explained the rights conferred by this section (as it then was, s. 16) in the decision of *Mastercraft Properties Ltd. v. EL EF Investments Inc.*<sup>5</sup> At paragraph 21, McKinlay J.A. stated:

Section 16 gives a mortgagor a right, when in default of payment of principal, to repay that principal on giving three-months' notice to the mortgagee of his intention to pay, and protects him from *any further payment of interest except to the date of payment*. Such interest would merely constitute payment for the use of the principal during the notice period. The provision protects the mortgagor by permitting payment of arrears without penalty, or by permitting early redemption at a price. It protects the mortgagee by giving him a three-month period during which to arrange for reinvestment of his principal, or monies to compensate for lack of that notice. The option is that of the mortgagor. [Emphasis added]

12. Section 17 of the *Mortgages Act* is an implied term in every mortgage in Ontario and overrides any contrary provision of the mortgage.<sup>6</sup>

**(1) *The mortgagee cannot convert the statutory rights of the mortgagor into an obligation for the mortgagor to pay three-months interest***

13. The Applicants cannot use s. 17 of the *Mortgages Act* to impose an obligation on the mortgagor to pay three-months interest, unless the mortgagor is in default and exercises its equitable right of redemption. The mechanism of section 17 is designed to work in favour of, and as a shield for, the mortgagor.

14. Section 17 was enacted to codify the mortgagor's historical, equitable right of redemption. This right protects mortgagors who have defaulted on their mortgage from losing their property outright – equity provides the mortgagor with a limited right to redeem their mortgaged property after default. Historically, the mortgagor was required to give six months' notice, or interest in lieu of notice to the mortgagee, and to pay the balance of the mortgage to

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<sup>5</sup> *Mastercraft Properties Ltd. v. EL EF Investments Inc.*, [1993] OJ No 1704 [*Mastercraft*].

<sup>6</sup> *Ibid.*, at para 21; *O'Shanter Development Co. v. Genra Canada Investments Inc.*, [1995] OJ No 2546 [*O'Shanter*] at para 22.

redeem the property.<sup>7</sup> Under the *Act*, this term was reduced to three-months' notice, or three-months' interest.

15. It is well-settled law that section 17 of the *Act* is 'mortgagor-centric': according to Justice Sanfillipo in *58 Cardill Inc. v. Rathcliffe Holdings Limited*, section 17 is "not intended to constitute a basis for a claim by a mortgagee unless first the mortgagor seeks a pay-out".<sup>8</sup>

16. It is also well settled law that if the mortgagee moves to realize on its security – for instance, by issuing a notice of sale, this vitiates the effects of s. 17 of the *Act*.<sup>9</sup>

17. When realizing on security, Courts have explicitly held that s. 17 of the *Act* does not apply in a "receivership, or forced sale situation".<sup>10</sup> In *Cardill* the Court cited *Ialongo v. Serm Investments Limited* (2007), 54 R.P.R. (4th) 310 (Ont.) for the proposition that section 17 of the *Act* cannot be used to establish entitlement to three months' interest in the circumstances of a mortgage realization through appointment of a private receiver:

In my view the reasoning in *O'Shanter Development* is consistent with the view expressed by the Court of Appeal in *Mastercraft, supra*, that the rights afforded by section 17 are options made available to the mortgagor on default: it can give notice or pay the bonus prior to the expiry of the notice period. Once, however, the mortgagee takes steps to realize on its security, such as by issuing a notice of sale (see: *Shankman v. Mutual Life Insurance Co. of Canada* (1985), 52 O.R. (2d) 65 (Ont. C.A.)), it cannot convert the rights of the mortgagor under section 17 in obligations of the mortgagor upon the realization of the security.

18. In the case at bar, the mortgagors did not seek a "pay out". Instead, the Applicants are mortgagees who sought to realize upon their security of the Mortgaged Properties through a court-appointed receiver, thus vitiating the entitlement to three months interest. The law does not support the Applicants' entitlement to three-month interest charges on any of the Mortgaged Properties.

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<sup>7</sup> *O'Shanter, supra* note 5 at paras 12-13.

<sup>8</sup> *Cardill, supra* note at para 35.

<sup>9</sup> *O'Shanter, supra* note 5 at para 13.

<sup>10</sup> *Cardill, supra* note at para 21.

19. The Applicants incorrectly attempt to use *1220510 Ontario Inc. v. Radium-O Developments Ltd.* [*Radium-O*] as authority for the proposition that section 17 of the *Act* applies in a receivership.<sup>11</sup>

20. In *Radium-O*, the respondent was in default of a vendor take back mortgage and the respondent started an application for a court- appointed receivership. After negotiations, the respondent made a settlement offer which included principal, interest, three months' interest compensation, receivership and legal fees, other fees and taxes. The appellant paid the mortgage in full and requested a discharge. The appellant then commenced a counter-application seeking to be relieved of paying the three months' interest compensation and the receivership costs. The Court of Appeal found that the parties had entered into a contractual agreement with respect to the three months interest charge and the appellant had received what it had bargained for- discharge of the mortgage. The Court also found that the three-month interest charge did not violate the *Interest Act*.

21. *Radium-O* does not stand for the proposition that the three-month interest charge is payable in a receivership under the *Act*, rather it stands for the authority that the parties contractually bargained for this charge to be payable and therefore the charge was permitted.

**(2) *The Three-Month Interest Clauses in the Loyalist Property and Bridge Property mortgages are not enforceable under the Mortgages Act***

22. The Applicants cannot enforce the Three-Month Interest Clauses on the Bridge and Loyalist mortgages notwithstanding the language contained in the mortgages.

23. The mortgage for the Bridge Property contains the following term:

“In the event default is made in the payment of any principal money, at the time or times provided herein, the Chargee will not be required to accept payment of the principal monies without first receiving three (3) months' notice in writing or

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<sup>11</sup> *1220510 Ontario Inc. v. Radium-O Developments Ltd.*, 2017 ONCA 490.



receiving three (3) months interest bonus in advance payment of the principal monies.”<sup>12</sup>

24. The mortgage for the Loyalist Property contains the following term:

“In the case of an event of default or the amount secured hereunder is not paid at the time or times provided herein, the Chargee shall not be required to accept payment in the satisfaction of the outstanding Principal Amount without, in addition to all monies payable under the Charge, a bonus equal to 3 months’ interest on the Principal Amount outstanding. The Charger shall not be entitled to a discharge of the Charge without payment of such bonus or 3 months’ written notice of such payment in lieu thereof. Nothing in this section shall, however, affect or limit the right of the Chargee to recover by action or otherwise the principal amount in arrears.”<sup>13</sup>

25. The mechanism of the aforementioned Three-Month Interest clauses at issue, as drafted, is substantially similar to that of s. 17 of the *Mortgages Act*: these clauses require three-month notice or payment in lieu of, for the mortgagor to be permitted to exercise its right of redemption by paying off the mortgage principal. For the reasons set out in the preceding section, the mortgagee is not entitled to rely on such terms to enforce obligations against the mortgagor.

26. The Three-Month Interest charges at issue in this case are not legally enforceable.

#### **PART IV – RELIEF REQUESTED**

27. For the reasons set out above, the Plaintiffs respectfully request an order to reject the Applicant’s request for three-month interest charges on the Mortgaged Properties and to redistribute these funds appropriately among the affected creditors; and

28. Such further and other relief as this Honorable court deems just.

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<sup>12</sup> Receiver’s Application Record, supra note 1 at page 426, para 14.

<sup>13</sup> Receiver’s Application Record, supra note 1 at page 586, para 31.

August 14, 2018

**ALL OF WHICH IS RESPECTFULLY  
SUBMITTED**



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## **SCHEDULE "A"**

### **List of Authorities**

1. *1220510 Ontario Inc. v. Radium-O Developments Ltd.*, 2017 ONCA 490.
2. *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2017 ONSC 6828.
2. *Gullett v. Income Trust Co.*, [1985] OJ No 200.
3. *Lalongo v Serm Investments Ltd.*, [2007] OJ No 789.
4. *Mastercraft Properties Ltd. v. EL EF Investments Inc.*, [1993] OJ No 1704.
5. *O'Shanter Development Co. v. Gentra Canada Investments Inc.*, [1995] OJ No 2546.

## **SCHEDULE "B"**

### **Statutory Authorities**

*Mortgages Act, RSO 1990, c M40.*

#### **Payment of principal upon default**

**17 (1)** Despite any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property, the mortgagor or person entitled to make such payment may at any time, upon payment of three months interest on the principal money so in arrear, pay the same, or the mortgagor or person entitled to make such payment may give the mortgagee at least three months notice, in writing, of the intention to make such payment at a time named in the notice, and in the event of making such payment on the day so named is entitled to make the same without any further payment of interest except to the date of payment.

*Interest Act, RSC 1985, c I-15.*

#### **No fine, etc., allowed on payments in arrears**

**8 (1)** No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

## **SCHEDULE "C"**

### **The Mortgaged Properties**

1. Seven (7) High Point Road, Toronto ON M3B 2A3
2. Ninety-Seven (97) Bridge Street, Picton ON K0K 2T0
3. Multiple Lots: thirteen (13x) lots located on Caldwell Drive, Oro-Mendonite ON
4. 12497 Loyalist Parkway, Picton, Ontario

**COMFORT CAPITAL INC. et al.**  
Applicants

-and-

**ANNIE YERETSIAN et al**  
Respondents

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(Commercial List)**

Proceedings commenced at Toronto

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**FACTUM OF THE MOVING PARTY**  
*(Returnable on August 16, 2018)*

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