Court File No. CV-21-00656398-00CL

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:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 593651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

MOTION RECORD OF THE RECEIVER, ROSEN GOLDBERG INC.

(Returnable July 11, 2022)

July 5, 2022

MINDEN GROSS LLP
145 King Street West, Suite 2200
Toronto ON M5H 4G2

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Tel: 416-369-4149
rslattery@mindengross.com

Lawyers for the Receiver, Rosen Goldberg Inc.

TO: **THE SERVICE LIST**

SERVICE LIST

TO: **THE MIDAS INVESTMENT CORPORATION**
c/o Maurice J. Neirinck & Associates
Barristers & Solicitors
20 Adelaide Street East, Suite 1100
Toronto, ON M5C 2T6

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Michael G. McQuade
Tel: 416-361-2400
Email: mmcquade@mjnlaw.ca

Respondent

AND TO: **DEPARTMENT OF JUSTICE**
The Exchange Tower
130 King Street West, Suite 3400
Toronto, ON M5X 1K6

Attention: Diane Winters
Tel: 416-973-3172
Email: diane.winters@justice.gc.ca

AND TO: **HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BYTHE MINISTER OF FINANCE**
Insolvency Unit
33 King Street West, 6th Floor
Oshawa, ON L1H 8H5

Attention: Leslie Crawford
Tel: 416-433-5657 (Reception)
Email: leslie.crawford@ontario.ca; insolvency.unit@ontario.ca

AND TO: **DICKINSON WRIGHT LLP**
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199 Bay Street, Suite 2200
Box 447
Commerce Court Postal Station
Toronto, ON M5L 1G4

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Lawyers for Auto World Imports

AND TO: **MILLER THOMSON LLP**
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Lawyers for John Kavanagh

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AND TO: **TYR LLP**
488 Wellington Street West, Suite 300-302
Toronto,ON M5V 1E3

James Bunting
jbunting@tyrllp.com
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AND TO: **MILLS & MILLS LLP**
Barristers & Solicitors
2 St. Clair Avenue West, Suite 2101
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Gordon A. Ullman
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INDEX

TAB		DATE		PAGE NO.
1		July 5, 2022	Notice of Motion and Draft Order	1 – 23
2		July 5, 2022	Sixth Report of the Receiver	24 - 35
	A	April 6, 2021	**Appendix "A"** – Appointment Order of Justice Cavanagh	36 – 51
	B	December 31, 2020	**Appendix "B"** – Reasons for Judgment of Justice Koehnen	52 – 87
	C	March 16, 2021	**Appendix "C"** – Costs Endorsement of Justice Koehnen	88 – 99
	D	April 6, 2021	**Appendix "D"** – Endorsement of Justice Paciocco	100 – 109
	E	May 31, 2021	**Appendix "E"** – Order of Justice Dunphy	110 – 113
	F	May 31, 2021	**Appendix "F"** – Endorsement of Justice Dunphy	114 – 117
	G	August 5, 2021	**Appendix "G"** – Approval and Vesting Order of Justice Koehnen	118 – 129
	H	August 9, 2021	**Appendix "H"** – Endorsement of Justice Koehnen	130 – 142
	I	August 12, 2021	**Appendix "I"** – Approval and Vesting Order of Justice Koehnen	143 – 154
	J	August 13, 2021	**Appendix "J"** – Endorsement of Justice Koehnen	155 – 164
	K	August 23, 2021	**Appendix "K"** – Reasons for Decision of Justice Fairburn	165 – 181
	L	September 10, 2021	**Appendix "L"** – Endorsement of Justice Koehnen	182 – 183

TAB	DATE		PAGE NO.
M	September 17, 2021	**Appendix "M"** – Email from John Tracy of FCT to the Receiver	184 – 185
N	November 19, 2021	**Appendix "N"** – Letter to John Tracy from Raymond M. Slattery of Minden Gross LLP	186 – 187
O	January 17, 2022	**Appendix "O"** – Endorsement of Justice Cavanagh	188 – 202
P	April 6, 2021 to June 30, 2022	**Appendix "P"** – Receiver's Statement of Receipts and Disbursements	203
Q	November 30, 2021	**Appendix "Q"** – Draft unaudited financial statements for Midas for the year ended November 30, 2021	204 – 207

TAB 1

Court File No. CV-21-00656398-00CL

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:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 593651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

NOTICE OF MOTION

Rosen Goldberg Inc., in its capacity as court appointed receiver and manager (in such capacities, the "**Receiver**") of all of the assets, undertakings and properties of the Respondent, The Midas Investment Corporation ("**Midas**"), will make a

Motion to the Honourable Justice Dietrich on Monday, July 11, 2022 at 11:00 a.m., or as soon after that time as the motion can be heard, at Toronto, Ontario.

PROPOSED METHOD OF HEARING: The Motion is to be heard:

[ ] In writing under subrule 37.12.1(1) because it is [insert on consent, unopposed or made without notice];

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[X] By video conference.

Zoom video conference details will be provided prior to the hearing.

THE MOTION IS FOR:

1. An Order substantially in the form attached hereto as Schedule "A":

(a) If necessary, abridging the time for service of this Notice of Motion and the Motion Record, declaring that the motion is properly returnable today, and validating service of this Notice of Motion and Motion Record;

(b) Approving the activities of the Receiver as described in the Sixth Report dated July 5, 2022 (the "**Sixth Report**");

(c) Advice and directions in connection with a claim for interest by FCT on the costs awarded by Justice Koehnen;

(d) Approving and authorizing the Receiver's proposed Claims Process;

(e) Approving the Receiver's Interim Statement of Receipts and Disbursements for the period April 6, 2021 to June 30, 2022; and,

(f) Such further and other relief as counsel may advise and this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

(a) The Receiver was appointed by Order of the Honourable Justice Cavanagh dated April 6, 2021 over all of the assets, undertakings and properties of Midas.

(b) Midas was the owner of two properties, 90 Eastern Avenue, Toronto, Ontario and 205 Yonge Street, Toronto, Ontario (the "**Properties**").

(c) The properties were encumbered by a mortgage registered on behalf of the Applicants. Protracted litigation relating to the enforceability of the mortgage took place over a number of years culminating in the Judgment of the Honourable Justice Koehnen dated December 31, 2020.

(d) The Applicants were successful in the litigation and Justice Koehnen made substantial costs awards in their favour, as well as in favour of other parties to the litigation.

(e) The Receiver entered into a court approved sale process in respect of each of the Properties. The Properties have been sold pursuant to Approval and Vesting Orders issued by Justice Koehnen.

(f) After payment of the first secured creditor and legal fees ordered by Justice Koehnen and the costs of the receivership the Receiver is in the possession of the sum of $2,215,422.00.

(g) No financial statements or tax returns had been prepared on behalf of Midas for many years. The Receiver is in the process of bringing those financial statements and tax returns up to date, including HST filings.

(h) A number of parties, including potentially CRA, have asserted claims against the balance of the funds held by the Receiver. The Receiver proposes to undertake a Claims Process as detailed in the Sixth Report and the proposed draft order attached as Schedule "A" to facilitate a prompt determination of the claims to avoid protracted litigation.

(i) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The Sixth Report of the Receiver; and

(b) Such further and other materials as counsel may advise and this Honourable Court may permit.

July 5, 2022

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Raymond M. Slattery (LSO# 20479L)
rslattery@mindengross.com
Tel: 416-369-4149

Lawyers for the Receiver, Rosen Goldberg Inc.

TO: **THE SERVICE LIST**

B E T W E E N:

COSA NOVA FASHIONS LTD. et al.
Applicants

-and-

THE MIDAS INVESTMENT CORPORATION
Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

NOTICE OF MOTION

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Raymond M. Slattery (LSO# 20479L)
rslattery@mindengross.com
Tel: 416-369-4323

Lawyers for the Receiver, Rosen Goldberg Inc.

SCHEDULE "A"

Court File No. CV-21-00656398-00CL

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

THE HONOURABLE	)	MONDAY, THE 11th
	)	
JUSTICE DIETRICH	)	DAY OF JULY, 2021

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 593651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

ORDER

THIS MOTION, made by Rosen Goldberg Inc. in its capacity as court appointed receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of the Respondent, The Midas Investment Corporation ("**Midas**"),

for directions and ancillary relief, was heard this day by way of Zoom video conference as a result of the COVID-19 pandemic, at Toronto, Ontario.

UPON READING the Notice of Motion and the Sixth Report of the Receiver dated July 5, 2022 (the "**Sixth Report**"), and upon hearing submissions of counsel for the Receiver, , no one else appearing although properly served as appears from the Affidavit of Hayley Morgan sworn July ___, 2022, filed,

1. **THIS COURT ORDERS** that the time for service and filing of this motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the activities of the Receiver as described in the Sixth Report is hereby approved and authorized.

3. **THIS COURT ORDERS** that the Receiver is authorized and directed to undertake a Claims Process as follows:

a) Any Claimant that has a claim against Midas, with the exception of claims from CRA with respect to any assessments from the filing of corporate tax returns, is required to submit a claim by August 31, 2022 (the "**Claims Bar Date**");

b) The Receiver shall (i) no later than five Business Days following the date of the Claims Process Order, post a copy of the Notice to Claimants, and Proof of Claim form on the Receiver's website; and send such documents to all known creditors of Midas; and (ii) send a copy of the Claims Package to any persons claiming to be a creditor of Midas;

c) The Receiver shall publish and advertise the Notice to Claimants in the *Globe and Mail* as soon as practicable after the date of the Claims Process Order, if granted;

d) Every Claimant asserting a Claim against the Debtor is required to set out its claim in a Proof of Claim, including supporting documentation, and deliver that Proof of Claim to the Receiver so that it is received by the Claims Bar Date;

e) The Receiver shall review all Proofs of Claim and may:

    i. Request additional information from the Claimant to assist with its review:

    ii. Request the Claimant file a revised Proof of Claim;

    iii. Attempt to resolve and settle any issue arising in respect of a Proof of Claim;

    iv. Accept (in whole or part) the amount of any Claim and notify the Claimant in writing;

    v. Revise or disallow (in whole or in part) the amount of a claim by delivering a Notice of Revision or Disallowance to such Claimant.

f) Where a Claimant has received a Notice of Revision or Disallowance and wishes to dispute same. It shall file with the Receiver a Dispute Notice by no later than fourteen days upon receipt of the Notice of Revision or Disallowance;

g) The Receiver may attempt to resolve the disputed Claim as set out in the Dispute Notice, or refer such disputed claim to Court for adjudication;

h) Where a Claim has been accepted by the Receiver, such claim shall constitute a Proven Claim; and

i) The Receiver may from time to time apply to this Court to amend, vary, supplement or replace the Claims Process Order or for advice and direction concerning the discharge of its powers and duties under the Claims Process Order or the interpretation or application of the Claims Process Order.

4. **THIS COURT APPROVES AND AUTHORIZES** the Receiver to use the Claims Process documents attached as Schedules "A", "B", "C" and "D" to this Order.

_____

SCHEDULE "A"
NOTICE OF CLAIMANTS

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as Amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

THE MIDAS INVESTMENT CORPORATION

RE: NOTICE OF CLAIMS PROCESS

PLEASE TAKE NOTICE that this notice is being published pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) made (the "**Claims Process Order"**). If you believe you are a creditor of The Midas Investment Corporation, please continue reading this notice.

A Claims Process has been commenced pursuant to the Claims Process Order. All creditors of the Midas Investment Corporation, attached hereto are required to submit a Proof of Claim, to Rosen Goldberg Inc., the Court-appointed receiver of The Midas Investment Corporation (in such capacity, the "**Receiver**") on or before August 31, 2022.

Creditors may obtain the Claims Process Order and a Claims Package from the Receiver's website at https://www.rosengoldberg.com/current-files or by contacting the Receiver by telephone at 416-224-4210 or by email at brosen@rosengoldberg.com.

If you are a creditor of any of the Claim Parties and wish to assert a claim, you are required to submit a complete Proof of Claim to the Receiver by **5:00 p.m. (Toronto Time) on August 31, 2022** (the '"**Claim Bar Date**"). It is your responsibility to complete the appropriate documents and ensure that the Receiver receives your complete documents by the Claims Bar Date.

CLAIMS WHICH ARE NOT RECEIVED BY THE CLAIMS BAR DATE WILL BE BARRED AND EXTINGUISHED FOREVER.

DATED at Toronto this 15th day of July, 2022.

Rosen Goldberg Inc., in its capacity as court appointed Receiver of
The Midas Investment Corporation.
Per:

Brahm Rosen

SCHEDULE "B"
PROOF OF CLAIM

Court File No. CV-21-00656398-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

THE MIDAS INVESTMENT CORPORATION

PROOF OF CLAIM

---

1. **PARTICUALRS OF CLAIMANT**

(a) Full Legal Name of Claimant: _____

(b) Full Mailing Address of Claimant: _____

_____

_____

_____

(c) Telephone Number of Claimant: _____

(d) Facsimile Number of Claimant: _____

(e) E-mail Address of Claimant: _____

(f) Attention (Contact Person): _____

2. **PARTICULARS OF ORIGINAL CLAIMANT FROM WHOM YOU ACQUIRED THE CLAIM, IF APPLICABLE:**

(a) Have you acquired this Claim by assignment? Yes [ ] No [ ]
(if yes, attach documents evidencing assignment)

a. Full Legal Name of original creditor(s): _____

3. **PROOF OF CLAIM**

THE UNDERSIGNED CERTIFIES AS FOLLOWS:

All capitalized terms not otherwise defined herein have the meanings ascribed to them in the Claims Process Order granted by the Ontario Superior Court of Justice (Commercial List) on XXXX (the "**Claims Process Order**").

That I [am a Claimant/hold the position of _____ of the Claimant] [*select applicable*] and have knowledge of all the circumstances connected with the Claim described herein;

The Midas Investment Corporation is indebted to the Claimant as follows:

(*When completing the Proof of Claim form, please include the exact legal name of the party that you are asserting a Claim against. Any Claims denominated in a foreign currency shall be filed in such currency and will be converted to Canadian Dollars at rates set out in the Claims Process Order).*

	The Midas Investment Corporation	**Amount Claim**
1.		$
2.		$
3.		$

4. **PARTICULARS OF CLAIM**

The particulars of the undersigned's total Claim are attached.

(Provide full particulars of the Claim(s) and supporting documents, including the amount, description of transactions(s) or agreement(s) giving rise to the Claim(s), name of any guarantor(s) which has guaranteed the Claim(s), and amount of Claim(s) allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed.

5. **FILING OF CLAIM**

This Proof of Claim must be returned to and received by the Receiver by 5:00pm (Toronto Time) on the Claims Bar Date August 31, 2022

In each case, completed forms must be delivered by prepaid registered mail, courier, personal delivery, or email to the Receiver at the following address:

Rosen Goldberg Inc.
5255 Yonge Street, Suite 804
Toronto, ON M2N 6P4

Attention: Brahm Rosen
Telephone: 416-224-4210
Email: brosen@rosengoldberg.com

Dated at Toronto, Ontario this 15th day of July, 2022.

SCHEDULE "C"
NOTICE OF REVISION OR DISALLOWANCE OF CLAIM

Court File No. CV-21-00656398-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

THE MIDAS INVESTMENT CORPORATION

NOTICE OF REVISION OR DISALLOWANCE

TO:

The Receive has reviewed your Proof of Claim dated _____, 2022, and have revised or rejected your Claim in respect of _____ for the following reasons:

Subject to further dispute by you in accordance with the provisions of the Claim Process Order, your Claim will be allowed as follows:

Respondents/ Party	**Original Claim Amount**	**Disallowed Amount**	**Revised Allowed Amount**

If you intend to dispute this Notice of Revision or Disallowance, you must notify the Receiver of such intent by delivery to the Receiver of the Dispute Notice in accordance with the Claims Process Order, such that it is received by the Receiver by 5:00 p.m. no later than fourteen (14) calendar days after you receive such Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, or email:

Rosen Goldberg Inc.
5255 Yonge Street, Suite 804
Toronto, ON M2N 6P4

Attention: Brahm Rosen
Telephone: 416-224-4210
Email: brosen@rosengoldberg.com

If you do not deliver a Dispute Notice in accordance with the Claims Process Order, the value of your Claim(s) shall be deemed to be as set out in this Notice of Revision or Disallowance.

Dated at _____ this _____ day of _____, 2022.

SCHEDULE "D"
DISPUTE NOTICE

Court File No. CV-21-00656398-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

THE MIDAS INVESTMENT CORPORATION

DISPUTE NOTICE

---

1. PARTICULARS OF CLAIMANT

(a) Full Legal Name of Claimant: _____

(b) Full Mailing Address of Claimant: _____

_____

_____

_____

(c) Telephone Number of Claimant: _____

(d) Facsimile Number of Claimant: _____

(e) E-mail Address of Claimant: _____

(f) Attention (Contact Person): _____

2. PARTICULARS OF ORIGINAL CLAIMANT FROM WHOM YOU ACQUIRED THE CLAIM, IF APPLICABLE:

(a) Have you acquired this Claim by assignment? Yes [ ] No [ ]
(if yes, attach documents evidencing assignment)

a. Full Legal Name of original creditor(s): _____

3. DISPUTE OF REVISION OR DISALLOWANCE OF CLAIM:

(*Any Claims denominated in a foreign currency shall be filed in such currency and will be converted to Canadian Dollars at rates set out in the Claims Process Order).*

We hereby disagree with the value of our Claim as set out in the Notice of Revision or Disallowance dated _____, as set out below:

Party*	**Claim as Allowed or Revised per Notice of Revision or Disallowance**	**Claim Per Claimant**
	$	**$**
	$	**$**
	$	**$**

(Insert particulars of Claim per Notice of Revision or Disallowance, and the value of your Claim as asserted by the Claimant).

Party* please include the full legal name of the Respondent or 7 Generations Development Group Limited that you are asserting a Claim against.

4. REASONS FOR DISPUTE:

(Provide full particulars of the Claim(s) and supporting documents, including the amount, description of transactions(s) or agreement(s) giving rise to the Claim(s), name of any guarantor(s) which has guaranteed the Claim(s), and amount of Claim(s) allocated thereto, date and number of all invoices, particulars of all credits, discounts, etc. claimed. The particulars provided must support the value of the Claim, as stated by you in the item 2 above).

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

If you intend to dispute this Notice of Revision or Disallowance, you must notify the Receiver of such intent by delivery to the Receiver of the Dispute Notice in accordance with the Claims Process Order, such that it is received by the Receiver by 5:00 p.m. no later than fourteen (14) calendar days after you receive such Notice of Revision or Disallowance at the following address by prepaid registered mail, courier, personal delivery, or email:

Rosen Goldberg Inc.
5255 Yonge Street, Suite 804
Toronto, ON M2N 6P4

Attention: Brahm Rosen
Telephone: 416-224-4210
Email: brosen@rosengoldberg.com

Dated at _____ this _____ day of _____, 2022.

B E T W E E N:

COSA NOVA FASHIONS LTD. et al. Applicants	-and-	THE MIDAS INVESTMENT CORPORATION Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Raymond M. Slattery (LSO# 20479L)
rslattery@mindengross.com
Tel: 416-369-4149

Lawyers for the Receiver, Rosen Goldberg Inc.

TAB 2

ROSEN GOLDBERG
INSOLVENCY & RESTRUCTURING

CRourt File No. CV-21-00656398-00CL

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 N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 593651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

SIXTH REPORT OF ROSEN GOLDBERG INC.

I INTRODUCTION

1. By Order of the Honourable Justice Cavanagh dated April 6, 2021 ("the **Appointment Order**"), Rosen Goldberg Inc. was appointed receiver (the "**Receiver**") of the assets, undertakings and properties of The Midas Investment Corporation (the "**Debtor**" or **"Midas**"), including the properties municipally known as 205 Yonge Street, in Toronto (the "**Yonge Street Property**")

ROSEN GOLDBERG
INSOLVENCY & RESTRUCTURING

and 90 Eastern Avenue, in Toronto (the "**Eastern Avenue Property**" and, collectively, with the Yonge Street Property, the "**Properties**"), pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*. A copy of the Appointment Order is attached as **Appendix A**.

II TERMS OF REFERENCE

2. In preparing this Sixth Report, the Receiver has relied upon information from third party sources (collectively, the **"Information"**). Certain information contained in this Sixth Report may refer to, or be based on, the Information. As the Information has been provided by other parties, or obtained from documents filed with the Court in this proceeding, the Receiver has relied on this Information, and to the extent possible reviewed the Information for reasonableness. However, the Receiver has not audited or otherwise attempted to verify the accuracy and completeness of the Information in a manner that would wholly or partially comply with Canadian Auditing Standards pursuant to the *Chartered Professional Accountants of Canada Handbook* and, accordingly, the Receiver expresses no opinion or other form of assurance in respect of the Information.

III PURPOSE OF REPORT

3. The Sixth Report is filed by the Receiver to:

a) Report on and seek approval of the Receiver's activities as described in the Sixth Report;

b) Seek the Court's advice and direction in respect of certain interest that may be payable to FCT, a secured creditor of the Debtor ; and

c) Seek the Court's approval for a Claims Process described in the Sixth Report in order to identify and pay the unsecured claims of the Debtor.

IV BACKGROUND

4. The Applicants are holders of the first mortgage over the Properties (the "**First Mortgage**"). The First Mortgage was registered on March 4, 2013 and secures payment of the principal amount of $5 million, together with interest at the rate of 10% per annum, calculated

monthly, not in advance, for a term of two years and matured on March 1, 2015. The First Mortgage has been in financial default since October 1, 2013.

5. The Applicants were unable to enforce the First Mortgage due to an action brought by Thomas Patrick Farrell ("**Farrell**") and the Debtor in 2013, in which they claimed for, among other things, a declaration that the First Mortgage is null, void and unenforceable.

6. The action was tried by the Honourable Justice Koehnen in 2020. In reasons released on December 31, 2020, the action was dismissed and the First Mortgage was declared to be valid. A copy of the reasons is attached as **Appendix B**. A copy of the costs endorsement in the action, dated March 16, 2021, is attached as **Appendix C**.

7. On January 7, 2021, the Applicants made demand on the Debtor for payment of the sum of $11,045,858.94 under the First Mortgage and issued a notice of intention to enforce security pursuant to section 244 of the *BIA*.

8. On February 5, 2021, the Applicants applied for the Receiver's appointment. Farrell and the Debtor thereupon filed a notice of appeal and moved to stay the Applicants from enforcing the First Mortgage. The stay motion was dismissed by Paciocco J.A. on April 6, 2021. A copy of the endorsement dismissing the stay motion is attached as **Appendix D**.

9. In refusing to grant a stay, Paciocco J.A. made the following observations in his endorsement:

> There is no suggestion that the responding party mortgagees could not pay a money judgment to recompense the moving parties, if required. [para 13]
>
> ….
>
> Quite simply, the money the responding parties advanced has been "sunk money" almost from day one. They have enjoyed no benefits from their investment. If granted the enforcement delay would only perpetuate this, effectively freezing the responding parties' investment for what the moving parties estimate will be at least another year. [para 22]
>
> …

> It is uncontested that Mr. Farrell benefited from a significant portion of the money advanced, which was used to pay other debts he owed or to increase Midas' equity in the properties by retiring prior encumbrances. [para 24]

10. The Yonge Street Property is the former Bank of Toronto building, on the east side of Yonge Street, north of Queen Street West. It is a 0.11 acre parcel with approximately 39 feet of frontage. The building has 4 storeys with approximately 17,400 square feet, and was built in 1905. A portion of the exterior and interior is protected by an Ontario Heritage Trust conservation easement. The building has been vacant for a considerable period and requires significant repairs.

11. Although prior to its recent sale, the Yonge Street Property was subject to a $9.2 million second mortgage registered in favour of Farrell, Justice Koehnen found that no advances were made under the second mortgage.

12. On March 15, 2021, Midas entered into an agreement of purchase and sale to sell the Yonge Street Property for $12 million, subject to a short due diligence period ending on April 16, 2021 (the "**Pre-Filing APS**"). Midas relied on the Pre-Filing APS when it moved before Paciocco J.A. to stay the Applicants from enforcing the First Mortgage and when it opposed the application to appoint the Receiver before Justice Cavanagh.

13. On April 15, 2021, the Receiver, after contacting Midas' listing agent, learned that the Pre-Filing APS had in fact been terminated by the buyer on March 23, 2021 (a fact which was not disclosed by Midas before Paciocco J.A. on the stay motion or before Justice Cavanagh on the hearing to appoint the Receiver).

14. The Eastern Avenue Property is an irregular rectangular parcel with 81.6 feet of frontage, improved with a one storey commercial building used to service Maserati and Alfa Romeo motor vehicles. Prior its recent sale by the Receiver, the Eastern Avenue Property was subject to a lease dated May 26, 2017 (the "**Lease**") between Midas and 1880607 Ontario Limited, as tenant, subsequently assigned to 2555572 Ontario Limited (the "**Tenant**")

15. Pursuant to Justice Koehnen's costs endorsement, the Applicants were awarded costs of the action of $1,573,669.16. Costs were also awarded to other parties, in the aggregate amount of

$415,853.88, and were ordered secured against the Properties according to three levels of priority, immediately subordinate to the First Mortgage (the "**Costs Awards**").

16. On April 19, 2021, the Receiver was advised by representatives of the Tenant that rents had been prepaid under the Lease up to 2027. The Receiver sought documents from the Tenant regarding the alleged pre-paid rent, but the Tenant was not prepared to provide the documents, purportedly due to confidentiality concerns.

17. On May 31, 2021, the Honourable Justice Dunphy approved the process recommended by the Receiver in its First Report to market and sell the Properties and ordered the Tenant to produce to the Receiver all documentation in relation to its tenancy (the "**May 31 Order**"). A copy of the May 31 Order is attached as **Appendix E**. A copy of Justice Dunphy's endorsement is attached as **Appendix F**.

18. Pursuant to the May 31 Order, the Tenant produced records which revealed that on July 30, 2018, it wired $1 million to Midas and on December 2, 2020, it wired a further $1 million to Farrell personally, pursuant to a direction signed by Farrell on behalf of Midas. The payments were purportedly made on account of rent. The Tenant also produced an agreement of purchase and sale dated January 17, 2019, between Midas and a company related to the Tenant for the sale of the Eastern Avenue Property.

19. Given that the Tenant had spent $2 million on prepaid rent without having obtained a non-disturbance agreement from the Applicants, the Receiver recognized that the Tenant, unlike an ordinary buyer, would likely be uniquely motivated to protect its financial outlay.

20. On June 25 2021, the Receiver entered into an agreement of purchase and sale with a company related to the Tenant for the sale of the Eastern Avenue Property (the "**Eastern Avenue Transaction**").

21. On August 5, 2021, Justice Koehnen approved the Eastern Avenue Transaction, with reasons to follow. A copy of the Approval and Vesting Order is attached as **Appendix G**. A copy of Justice Koehnen's endorsement is attached as **Appendix H**.

22. After implementing the marketing and sale process for the Yonge Street Property approved under the May 31 Order, on July 22, 2021, the Receiver entered into an unconditional agreement of purchase and sale with 2434874 Ontario Ltd, in trust for a company to be incorporated (the "**Yonge Street Transaction**").

23. On August 12, 2021, Justice Koehnen approved the Yonge Street Transaction, with reasons to follow. A copy of the Approval and Vesting Order is attached as **Appendix I**. A copy of Justice Koehnen's endorsement is attached as **Appendix J**.

24. John Kavanagh ("**Kavanagh**"), the guarantor of the First Mortgage, who did not participate in the trial before Justice Koehnen, served notices of appeal in respect of both Approval and Vesting Orders. The notices of appeal prompted competing motions to the Court of Appeal. The Receiver moved for directions as to whether leave to appeal was required and, if so, whether leave should be granted. Kavanagh moved for leave to appeal, if required. On August 23, 2021, Fairburn J.A. held that leave to appeal was required and denied leave. A copy of Fairburn J.A.'s endorsement is attached as **Appendix K**.

V COMPLETION OF SALE OF PROPERTIES

25. The Eastern Avenue Transaction was completed on September 2, 2021 for a sale price of $5.3 million.

26. The Yonge Street Transaction was completed on September 9, 2021 for a sale price of $9.418 million.

VI DISTRIBUTIONS OF PROCEEDS

27. On September 10, 2021, the Receiver sought the Court's approval, to make a distribution from the sales proceeds to pay the amounts owing to the secured creditors, which included the amounts owing to the Applicants and the Cost Awards. Issues were raised in respect of certain charges on the Applicant's payout statement by Mr. Kavanagh which required further adjudication. As a result of these issues, an appropriate reserve was calculated in order to make an interim distribution. The Court, on September 10, 2021, authorized the Receiver to make an interim distribution of $9.5 million. The interim distribution was to include the Costs Awards and a payment to the Applicants on account of

amounts owing. The endorsement of Justice Koehnen is attached as **Appendix L**. The Receiver made a distribution to the Applicants of $7,185,981. A date of September 19, 2021 was scheduled for the court to hear arguments in respect of the disputed amounts claimed by the Applicant.

28. Subsequent to September 10, 2021, the Receiver became aware of an issue between the Applicant and the FCT (why is the title insurer) in respect of the priority of the Applicant's mortgage over FCT. We understand the Applicant objected to FCT being paid under the Cost Awards, prior to the Applicant's mortgage being fully satisfied. As a result of the communications between the Applicants and FCT and the fact that the hearing was being held imminently, FCT wrote to the Receiver on September17, 2021 and advised that the Receiver should continue to hold the funds earmarked for the payment of the Costs Awards, pending the determination of the Court. We attach the email communication from Mr. John Tracy of FCT, as **Appendix M.** The Receiver, therefore, did not disburse the funds to FCT at this time.

29. The Honorable Justice Cavanagh heard the motion on September 19, 2021 and reserved his decision.

30. On November 17, 2021, counsel to the Receiver wrote to FCT and advised them that the Receiver would not pay interest beyond October 19, 2021, due to the fact that FCT had requested we hold the funds until the courts had made a determination of the issues. We attach the letter from Minden Gross LLP to FCT as **Appendix N**. FCT does not agree with the Receiver's position and believes the interest is payable in full.

31. The Receiver has been advised by counsel to Mr. Kavanagh that their position is that the Receiver should not pay the additional interest claimed by FCT.

32. On January 17, 2022, Justice Cavanagh released his reasons allowing a substantial amount of the disputed items to be paid to the Applicant. We attach the endorsement of Justice Cavanagh as **Appendix O**.

33. On January 18, 2022, the Receiver distributed $1,699,562.73 to FCT, which included accrued interest to October 19, 2021. The disputed interest from October 20, 2021 to date is approximately $43,000.

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34. The Receiver seeks the Court's advice and direction in respect of the payment of the additional interest to FCT.

VII. ACTIVITIES OF THE RECEIVER .

35. The activities of the Receiver since the Fifth Report include:

- Dealing with interim distribution of funds;
- Dealing with recovery of Debtor's funds held in court;
- Dealing with priority issue between Applicants and FCT including various meetings and correspondence;
- Ongoing communications with CRA;
- Dealing with MNP and the completion of outstanding financial statements and returns including compiling information, meetings and correspondence with MNP, review of information provided and preparation of various analyses;
- Communications with John Kavanagh and his counsel;
- Communications with Thomas Farrell;
- Communications with creditors;
- Prepare statutory filings;
- Communications with Applicant and its counsel; and
- Ongoing consultations with Receiver's counsel;

VIII. STATEMENT OF RECEIPTS AND DISBURSEMENTS

36. We attach as **Appendix P,** the Receiver statement of receipts and disbursements to Jinee 30, 2022. The current amount on hand is $2,215,421.

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37. As the secured creditors have been paid in full (subject to resolution of FCT interest) and after considering reserves for tax liabilities and unpaid and ongoing professional fees, there is significant surplus funds available for unsecured creditors and possibly the shareholders.

IX. PREPARTION OF FINANCIAL STATEMENTS AND TAX RETURNS

38. The Receiver has commutated with CRA throughout its administration regarding the status of the Midas income tax and HST filings. The Receiver informed the CRA representative of the status of the administration and that the returns would be brought up to date.

39. The Receiver contacted MNP, who had previously prepared the Debtor's tax filings and eventually retained them to bring the filings up to date. In reviewing the previous filings, we determined that the information used to prepare the financial statements and tax returns were not complete. The mortgage proceeds received by Midas from the Applicant was not accounted for nor was the mortgage payable or interest recorded in the Midas books. Proceeds received by Midas from an insurance settlement and paid directly to the shareholders was not properly recorded. Additionally, certain rent paid in advance by the Eastern Avenue tenant was unknown to MNP. This created significant challenges in preparing the tax returns.

40. MNP has now been able to complete the outstanding tax returns and we expect that they will be filed shortly. As a result of the interest expense and other costs incurred by Midas, no income tax is payable. We attach as **Appendix Q**, the draft unaudited financial statement for Midas for the year ended Number 30, 2021. The statement indicates that Midas has an amount receivable from its shareholders of $2,104,628 as a result of the funds that the shareholders have withdrawn from Midas.

41. The outstanding HST returns will be filed in July 2022. We estimate an amount payable of approximately $70,000. Depending on the results of the Claims Process described below, there is a possibility that there will eventually be an HST refund.

IX. CLAIMS PROCESS.

42. The Receiver is unable to determine the accounts payable at the time of its appointment due to the lack of complete books and records. In addition to CRA, during the course of its administration, the Receiver has been contacted by several parties indicating that they have outstanding accounts with

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Midas. This includes a potential claim by Maurice J. Neirinck & Associates, who represented Midas in the legal action brought against the Applicants. We understand that Neirinck has a significant claim against Midas. :

43. The Receiver has had ongoing communications Messrs. Farrell and Kavanagh, who each of asserted a claim against the surplus funds.

44. Given the incomplete books and records, the fact that the Receiver is aware of certain claims and that there are surplus funds, the Receiver recommends that a claims process be instituted.

45. A summary of the proposed Claims Process is as follows:

a) Any Claimant that has a claim against Midas, with the exception of claims from CRA with respect to any assessments from the filing of corporate tax returns, is required to submit a claim by August 31, 20222 (the "**Claims Bar Date**") ;

b) The Claims Process Order approved the form of Notice to Claimants, Proof of Claim and Notice of Revision or Disallowance for the purposes of administering the Claims Process and authorizes the Receiver to administer same;

c) The Receiver is required to (i) no later than five Business Days following the date of the Claims Process Order, if granted, post a copy of the Notice to Claimants, and Proof of Claim form on the Receiver's website; and send such documents to all known creditors of Midas; and (ii) send a copy of the Claims Package to any persons claiming to be a creditor of Midas;

d) The Receiver shall publish and advertise the Notice to Claimants in the *Globe and Mail* as soon as practicable after the date of the Claims Process Order, if granted;

e) Every Claimant asserting a Claim against the Debtor is required to set out its claim in a Proof of Claim, including supporting documentation, and deliver that Proof of Claim to the Receiver so that it is received by the Claims Bar Date;

f) Subject to the term of the Claims Process Order, the Receiver shall review all Proofs of Claim and may:

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(i) Request additional information from the Claimant to assist with its review:

(ii) Request the Claimant file a revised Proof of Claim;

(iii) Attempt to resolve and settle any issue arising in respect of a Proof of Claim;

(iv) Accept (in whole or part) the amount of any Claim and notify the Claimant in writing;

(v) Revise or disallow (in whole or in part) the amount of a claim by delivering a Notice of Revision or Disallowance to such Claimant.

g) Where a Claimant has received a Notice of Revision or Disallowance and wishes to dispute same. It shall file with the Receiver a Dispute Notice by no later than fourteen days upon receipt of the Notice of Revision or Disallowance;

h) The Receiver may attempt to resolve the disputed Claim as set out in the Dispute Notice, or refer such disputed claim to Court for adjudication;

i) Where a Claim has been accepted by the Receiver , such claim shall constitute a Proven Claim; and

j) The Receiver may from time to time apply to this Court to amend, vary, supplement or replace the Claims Process Order or for advice and direction concerning the discharge of its powers and duties under the Claims Process Order or the interpretation or application of the Claims Process Order.

46. The Receivers believes that the implementation of a Claims Process to identify Claims of creditors is appropriate and necessary in the circumstances. The Receiver is therefore seeking the Coutts's approval to administer the Claims Process with corresponding powers to determine and settle all Claims against the Debtor's, subject to the Court's supervision and approval.

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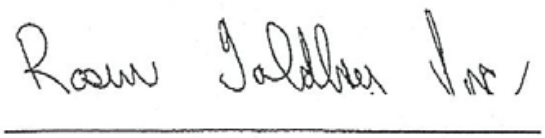
X.I RECEIVER'S RECOMMENDATION

47. On the basis of the foregoing, the Receiver respectfully requests that this Honourable Court grant the relief requested in paragraph 3 of this Sixth Report.

All of which is respectfully submitted,

Dated at Toronto, Ontario, this 5th day of July, 2022

ROSEN GOLDBERG INC., SOLELY IN ITS CAPACITY AS COURT-APPOINTED RECEIVER OF THE ASSETS, UNDERTAKINGS AND PROPERTIES OF THE MIDAS INVESTMENT CORPORATION



Appendix “A”

Court File No. CV-21-00656398-00CL

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

THE HONOURABLE	)	TUESDAY, THE 6TH
	)	
JUSTICE CAVANAGH	)	DAY OF APRIL, 2021

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY and CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

ORDER
(Appointing Receiver)

THIS APPLICATION made by the Applicants for an Order appointing Rosen Goldberg Inc. as receiver and manager (in such capacities, the "Receiver"), without security, of all of the

assets, undertakings and properties of the Respondent The Midas Investment Corporation (the "Debtor"), was heard this day by Zoom judicial videoconference.

ON READING the affidavit of Gary Gruneir sworn February 3, 2021 and the Exhibits thereto, the affidavit of Thomas Patrick Farrell sworn March 30, 2021 and the Exhibits thereto, the affidavit of Gary Gruneir sworn April 1, 2021 and the Exhibits thereto and on hearing the submissions of counsel for the Applicants, counsel for the Debtor, no one else appearing although duly served as appears from the affidavit of service of Janet Nairne sworn February 5, 2021, and on reading the consent of Rosen Goldberg Inc. to act as the Receiver,

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and Application Record is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. THIS COURT ORDERS that pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, Rosen Goldberg Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor, including the lands and premises legally described in Schedule "A" hereto, and all proceeds thereof (the "Property").

RECEIVER'S POWERS

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter

instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) with the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, and in each such case, notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the Receiver's administration, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and

(q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. THIS COURT ORDERS that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. THIS COURT ORDERS that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. THIS COURT ORDERS that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business

which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. THIS COURT ORDERS that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the “Post Appointment Accounts”) and the monies standing to the credit

of such Post Appointment Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

LIMITATION ON ENVIRONMENTAL LIABILITIES

14. THIS COURT ORDERS that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

15. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

16. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

17. THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

18. THIS COURT ORDERS that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

19. THIS COURT ORDERS that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may

consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000.00 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

20. THIS COURT ORDERS that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

21. THIS COURT ORDERS that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "B" hereto (the "Receiver's Certificates") for any amount borrowed by it pursuant to this Order.

22. THIS COURT ORDERS that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

23. THIS COURT ORDERS that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.rosengoldberg.com/]www.rosengoldberg.com/admin/companyview.php?company_id=52.

24. THIS COURT ORDERS that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

25. THIS COURT ORDERS that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

26. THIS COURT ORDERS that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

27. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

28. THIS COURT ORDERS that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and

that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

29. THIS COURT ORDERS that the Applicants shall have their costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicants' security or, if not so provided by the Applicants' security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

30. THIS COURT ORDERS that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

31. THIS COURT ORDERS that this Order is effective from today's date and is not required to be entered.

Digitally signed by
Peter Cavanagh

SCHEDULE "A"

LANDS AND PREMISES

PIN: 21078-0144 (LT)

PT LT 19 N/S SOUTH PARK ST W/S SUMACH ST PL 108 TORONTO; PT LT 20 N/S SOUTH PARK ST W/S SUMACH ST PL 108 TORONTO AS IN ES61367 & CT627853 EXCEPT PT 1 RD162; CITY OF TORONTO

Municipal Address: 90 Eastern Avenue

PIN: 21098-0085 (LT)

PT PARKLT 8 CON 1 FTB TWP OF YORK PT 5 63R4643 T/W CA797973; CITY OF TORONTO; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 6 & 7 ON PLAN 66R-15815 AS IN AT3757274; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 1, 2 & 8 PLAN 66R-15815 AS IN AT3757274; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 11, 12, 19M 20, 21, 22, 23, 24, 32. 34, 35, 37, 38, 40, 41, 52, 53, 57, 58, 59, 60, 61 & 62 ON PLAN 66R-27069 AS IN AT3757274; CITY OF TORONTO

Municipal Address: 205 Yonge Street

SCHEDULE "B"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that Rosen Goldberg Inc., the Receiver (the "Receiver") of all of the assets, undertakings and properties of The Midas Investment Corporation (the "Debtor"), including the lands and premises municipally known as 205 Yonge Street, in Toronto and 90 Eastern Avenue, in Toronto, and all proceeds thereof (the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the [DATE] (the "Order") made in an application having Court file number CV-21_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded monthly not in advance on the _____ day of each month after the date hereof at a notional rate per annum equal to the rate of _____ per cent.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2021.

Rosen Goldberg Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

COSA NOVA FASHIONS LTD., et al
Applicants

-and-

THE MIDAS INVESTMENT CORPORATION
Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

ORDER
(Appointing Receiver)

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street
Suite 2200, Box 447
Commerce Court Postal Station
Toronto, ON M5L 1G4

David P. Preger (36870L)
dpreger@dickinsonwright.com
Tel: (416) 646-4606

David Z. Seifer (77474F)
Email: DSeifer@dickinsonwright.com
Tel: 416-646-6867

Lawyers for the Applicants

Appendix “B”

CITATION**:** Thomas Farrell at al. v. John Kavanagh et al., 2020 ONSC 8154

Court File No. CV-13-10369-00CL and
CV-13-10369-00CLA1
DATE: 20201231

ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:	)	
	)	
THOMAS PATRICK FARRELL and THE MIDAS INVESTMENT CORPORATION	)	*Maurice Neirinck, Michael McQuade* for the plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	*Reeva M. Finkel and Brendan Jones* for Cosa Nostra Fashions Ltd., B & M Handleman Investments Limited, Comfort Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handleman, Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust Company and Canada Investment Corporation. *R. Leigh Youd and Peter Smiley* for Colina King
JOHN KAVANAGH, COSA NOVA FASHIONS LTD., B & M HANDLEMAN INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDLEMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION, COLINA KING, C & K MORTGAGE SERVICES INC. O/A RESCOM CAPITAL, GARY GRUNEIR, BILL SHIMBASHI, 1888871 ONTARIO INC. and CARLO PARENTELA	)	
	)	
Defendants	)	
	)	
-and-	)	
	)	
ROCCO COMMISSO, 1812340 ONTARIO INC., 2364788 ONTARIO LTD., 2364789 ONTARIO LTD., 1870561 ONTARIO	)	*Mauro Marchioni* for the Third Parties, Rocco Commisso and Maria (Grace) Commisso

INC., 2364789 ONTARIO INC., 2364798 ONTARIO LTD., PIETER WILLEM VROON, GRACE COMMISSO, MARGARET PASTORE, SOLID GENERAL CONTRACTORS INC. and 1864847 ONTARIO LTD. carrying on business as C.I.U.D.A.D. EQUPMENT SALES

Third Parties

Alfred Schorr for the Third Party, Margaret Pastore.

) HEARD: February 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, June 11, 2020

KOEHNEN J.

I. Overview

[1] This action concerns the validity of two mortgages, each of which was registered against two properties in the city of Toronto: 205 Yonge Street and 90 Eastern Avenue.

[2] The first mortgage in the amount of $800,000 was registered on February 6, 2013. The second mortgage was registered on March 4, 2013 in the amount of $5,000,000. Its proceeds were used, among other things, to pay out the first mortgage.

[3] The plaintiffs allege that the mortgages were registered by the defendant John Kavanagh without authorization and that the remaining defendants had actual knowledge of the lack of authorization by virtue of discrepancies in documents that they received which discrepancies they should have noticed. Had the defendants noticed the discrepancies and made further inquiries, the plaintiffs say Mr. Kavanagh's deception would have come to light and fraud would have been prevented. I am unable to agree and dismiss the plaintiffs' claim.

[4] The corporation's bylaws gave Mr. Kavanagh actual authority to bind the corporation acting on his own. That alone should dispose of the action.

[5] Mr. Farrell trusted Mr. Kavanagh and gave him considerable discretion in the management of Mr. Farrell's affairs. Giving him the power to bind Midas was consistent with that practice.

[6] Mr. Farrell was in considerable financial difficulty in both Canada and Ireland. One way out of those difficulties was to mortgage the two properties and use the proceeds to pay off debts. That is exactly what was done. In the course of doing so, Mr. Farrell, Mr. Kavanagh and Renato Fellin developed a plan whereby they would try to insulate Mr. Farrell's

Canadian assets from his Irish creditors by removing him from the record books of Midas. Mr. Farrell was fully aware of the steps taken to mortgage the properties and benefited from the mortgages. Mr. Farrell's conduct after discovering the alleged fraud is inconsistent with what one would expect from someone who had been defrauded.

[7] Even if I am incorrect in my assessment of Mr. Farrell's knowledge of the mortgages, the fact that Mr. Kavanagh had the ability to bind the corporation and the fact that a good portion of the mortgage proceeds were clearly to the benefit of the plaintiffs is sufficient to dismiss the plaintiffs' claim.

[8] In the event I am incorrect on the question of authority and Mr. Farrell's knowledge of the mortgage, I have also addressed the plaintiffs' claims against Colina King and the mortgagees.

[9] Ms. King was the lawyer that Mr. Kavanagh retained to register the mortgages. I find that her conduct did not breach the standard of a prudent solicitor in the circumstances of this case. In the alternative, if her conduct did breach the standard of a prudent solicitor, her application of the appropriate standard would not have prevented the registration of the mortgages.

[10] The plaintiffs' claim against the mortgagees fails because the mortgagees were entitled to rely on Mr. Kavanagh's authority under the indoor management rule. In addition, the mortgagees had no actual knowledge of any wrongdoing in connection with the mortgage. At best the plaintiffs' claim is that the mortgagees were put on notice and should have made additional inquiries. That is not, however, legally sufficient to prevent the mortgagees from enforcing their mortgage. Finally, the plaintiffs claim that the mortgages were conditional on satisfactory appraisals and leases being produced for the Yonge Street property. The appraisals and leases contained irregularities which the plaintiffs claim should have led the mortgagees to make further inquiries. The law is clear that conditions of this sort are for the sole benefit of the mortgagee. The mortgagee is free to waive those benefits at will. Conditions of that sort do not impose any duty on a mortgagee to conduct a forensic analysis of the documents provided in order to protect the mortgagor.

a. The Parties

[11] The plaintiff, Thomas Farrell is a 71-year-old Irish businessperson who lives in Ireland. He testified that he went to school until age 10, does not read or write English, worked at various odd jobs after leaving school including as a farmhand, contractor, roofer and ultimately as a mechanic. He then developed his own business initially acquiring a gas station. He parlayed that into a group of nine gas stations with convenience stores, three car dealerships and approximately 70 Properties in Ireland that he rents out for income. He says he has his staff or family members, particularly his daughter Jackie, read documents to him. In a similar vein, he dictates documents to them to write on his behalf. When, in these reasons, I refer to emails from Mr. Farrell, they were prepared in this manner.

[12] The plaintiff Midas Investment Corporation is the owner of the two properties at issue in this action. It was incorporated to purchase the 205 Yonge St. property and later acquired the Eastern Avenue property.

[13] The defendant John Kavanagh is an Irish accountant. Before beginning to work for Mr. Farrell, he worked at Coopers Lybrand in Ireland. By the time Midas acquired the Yonge Street property, Mr. Kavanagh had been working for Mr. Farrell as his in-house accountant for approximately 16 years. They appear to have had a close and trusting relationship.

[14] Mr. Kavanagh was responsible for placing the mortgage on the Yonge Street and Eastern Avenue properties. Mr. Farrell takes the position that he did so without his knowledge or authorization.

[15] The defendant Colina King is the lawyer that Mr. Kavanagh retained to mortgage the two properties.

[16] The defendant Bill Shimbashi is a real estate valuator who prepared an appraisal for the Yonge Street property. The action has been settled against him.

[17] The defendants 1888871 Ontario Inc. and Carlo Parentela were sometime potential tenants of the Yonge Street property. The action has been settled against them.

[18] The defendant C & K Mortgage Services Inc. operating as Rescom Capital is a mortgage broker that was involved in funding and registering the two mortgages. The defendant Gary Gruneir is the principal of Rescom. The action has been settled against both Rescom and Mr.Gruneir.

[19] The remaining defendants are all mortgagees under the impugned mortgages.

b. Credibility and Reliability Issues

[20] My decision in this case turns largely on my assessment of the Mr. Farrell's credibility and reliability. Mr. Farrell's explanations frequently contradicted themselves, contradicted the contents of contemporaneous documents or seemed logically improbable.

[21] Mr. Farrell had a tendency to deny signing documents when it no longer appeared convenient to have his signature on the documents, denied that his legal or accounting advisors brought something to his attention or denied that those he trusted to read documents and report to him actually did so when the denial seemed highly improbable.

[22] He also evidenced an unfortunate pattern of assuming debt, reneging on the debt and then using aggressive delaying tactics to persuade the creditor to accept less than the amount owing.

[23] Whether these tendencies result from a lack of credibility because Mr. Farrell is willing to tailor his evidence to whatever he believes is convenient at a particular moment, or whether they are the result of a lack of reliability because Mr. Farrell's inability to read deprives him of the visual cues that assist memory, does not matter. Whatever the source of the

evidentiary frailty, where Mr. Farrell's evidence conflicts with that of other witnesses who testified at trial, I prefer the evidence of the other witnesses.

[24] While I have sympathy for the challenges that an inability to read causes, that inability cannot excuse Mr. Farrell from responsibility for obligations that he and/or Midas have assumed. Mr. Farrell is a man of considerable means. He testified that his net worth had been estimated at approximately €100,000,000. An individual with even a fraction of that wealth has the means to ensure that he is made aware of issues that face him. If he is genuinely not made aware of those issues because a string of lawyers, accountants, business advisors and family members truly did not read documents to him, then that is unfortunate but it does not mean that he should be excused from his obligations nor does it mean that others, like the mortgagees in this case, should bear those obligations for him.

II. Authority of John Kavanagh to Register the Mortgages

a. Mr. Kavanagh as Trusted Advisor

[25] The principal issue in this proceeding is whether John Kavanagh had actual or ostensible authority to register two mortgages against the Yonge Street and Eastern Avenue properties.

[26] Mr. Farrell takes the position that the mortgages were unauthorized, that he played no role in them and that they were the result of fraudulent actions by Mr. Kavanagh.

[27] For me the case resolves itself on the question of actual authority. For the reasons set out below, I find as a fact that Mr. Kavanagh had actual authority to register the mortgages.

[28] When Midas purchased the Yonge Street property, Mr. Kavanagh had been working for Mr. Farrell for approximately 16 years. Despite Mr. Farrell's sometimes contradictory evidence, I find that he trusted Mr. Kavanagh and gave Mr. Kavanagh considerable discretionary scope to run Mr. Farrell's affairs. At one point Mr. Farrell agreed that Mr. Kavanagh had become a trusted employee. Mr. Kavanagh took care of the accounting, financial statements and tax returns of all of Mr. Farrell's five businesses. Mr. Farrell had come to rely on Mr. Kavanagh.

[29] In September 2006, Mr. Farrell was in Toronto on a promotional trip arranged by the Suzuki Motor Company, one of whose automobile dealerships Mr. Farrell owned in Ireland. Mr. Farrell asked Mr. Kavanagh to accompany him to Canada for companionship and in case any documents needed to be read. He chose Mr. Kavanagh to accompany him above his wife or children who also helped with the business. During the course of that trip Mr. Farrell saw the Yonge Street property and decided to purchase it.

[30] At trial, Mr. Farrell tried to downplay Mr. Kavanagh's role with the Yonge Street property. Mr. Farrell essentially tried to describe Mr. Kavanagh as a caretaker who was responsible for attending to basic maintenance work on the property. Contemporaneous documentation gives Mr. Kavanagh a significantly more material role.

[31] The agreement of purchase and sale was entered into by "John Kavanagh in trust". The purchase was ultimately made in the name of Midas.

[32] Mr. Kavanagh accompanied Mr. Farrell when he opened the bank account for Midas at TD Bank and was given signing authority over the account. In addition, Mr. Farrell gave Mr. Kavanagh blank signed checks on Midas company bank accounts and allowed Mr. Kavanagh to fill them in.

b. Mr. Kavanagh's Authority Under the Articles and By-Laws

[33] The law firm of Loopstra Nixon was retained for the purchase and to incorporate Midas.

[34] Midas' share capital consisted of 100 common shares at a subscription price of one dollar each. Mr. Farrell and Mr. Kavanagh held 50 shares each. Mr. Kavanagh was also appointed as Secretary and Treasurer and was recorded as such on the corporation's Form 1 which constitutes the formal public record of the corporation's directors and officers.

[35] Loopstra Nixon addressed its reporting letter to both Mr. Kavanagh and Mr. Farrell. The reporting letter set out that each of Mr. Farrell and Mr. Kavanagh held 50 shares for consideration of $50. It listed the officers of the Corporation as follows:

> President – Thomas Farrell
> Secretary – John Kavanagh
> Treasurer – John Kavanagh

[36] The reporting letter directed the reader to section 11 of By-Law Number one for guidance on signing authority. Section 11.01 of By-Law Number one reads in part:

> Deeds, transfers, assignments, contracts, and obligations of the Corporation may be signed by the president or a vice-president or a director or the secretary or treasurer or an assistant secretary or assistant treasurer.

[37] In other words, Mr. Kavanagh as the Secretary or Treasurer could sign any such documents on behalf of Midas. It is especially noteworthy that the provision originally required that such documents be signed by the "president or a vice-president or a director together with the secretary or treasurer". The words "together with" were struck out and replaced by the word or. In other words, the standard form by-law used by Loopstra Nixon would not have allowed Mr. Kavanagh to sign documents alone. Striking out the words "together with" and replacing them with "or" allowed Mr. Kavanagh to sign documents alone.

[38] Although Mr. Farrell took the position that he never had anyone read the reporting letter to him, he admitted that the lawyer at Loopstra Nixon who handled the purchase and

incorporation knew that Mr. Farrell could not read and ran through the documents with him.

[39] At trial, Mr. Farrell took the position that By-Law Number one was invalid because the signatures above the entries where his typewritten name appeared at the end of the By-Law were not actually his. During his examination for discovery he had acknowledged that the signatures were his.

[40] In addition, the plaintiffs took the position at trial that By-Law Number one was not validly enacted because it was not signed by the second director at the time, John D'Agostino. I do not find this argument persuasive. Just beneath the signature line for Mr. D'Agostino is a paragraph indicating that, in lieu of confirmation at a general meeting of shareholders, the undersigned, being all of the shareholders, confirm the by-law. The signatures of Messrs. Farrell and Kavanagh follow. Section 116 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA") requires shareholder approval for by-laws. Moreover, Mr. D'Agostino's missing signature on By-Law Number one did not prevent the plaintiffs from affirming in the Agreed Statement of Facts prepared for this trial that Midas had passed the by-law.

[41] By-Law Number two is the Midas borrowing by-law. Among other things, it authorizes the board to borrow money and to delegate any of its powers under By-Law Number two to any officer of the Corporation. Mr. Farrell has no memory of it being passed and denies the presence of his signature on the by-law. It does not surprise me that Mr. Farrell does not recall the by-law being passed. It is dated December 15, 2006. The trial occurred in February 2020. It would not be at all unusual that someone would no longer have a specific recollection of having signed a document 14 years earlier. Mr. Farrell takes the position, however, that the absence of a signature that he acknowledges to be his on the borrowing by-law renders the by-law invalid. I disagree.

[42] I came to the conclusion during the course of the trial that Mr. Farrell tended to assert that his signature had been forged on a document when the document was not convenient for him to have signed but agreed to his signature when it was convenient. When Mr. Farrell denied his signature, he never once identified anything in the allegedly falsified signature that led him to conclude that it was a forgery. Nor has Mr. Farrell introduced evidence from any handwriting expert to distinguish true signatures from false ones.

[43] I find as a fact that Mr. Farrell signed and approved both By-Laws one and two.

[44] Moreover, the concern about By-Law Number two is a bit of a red herring because it is unnecessary. Under s. 15 of the OBCA, a corporation has all of the powers of a natural person including the power to borrow money. Section 17(1) of the OBCA provides that it is not necessary for a by-law to be passed to confer any particular power on the corporation or its directors. By-Law Number one, which at discovery Mr. Farrell acknowledged he had signed, already allows Mr. Kavanagh to sign a variety of documents on behalf of the corporation, including lending documents.

[45] In 2008, Midas purchased the Eastern Avenue property. The Loopstra Nixon reporting letter for the Eastern Avenue purchase indicates that all contacts between the firm and Midas occurred through Mr. Kavanagh. Mr. Farrell's name does not appear in the detailed account entries. Mr. Farrell had no explanation for that at trial and asserted that Mr. Kavanagh was having these interactions on his own initiative. I do not find that evidence credible. Mr. Farrell knew that the Eastern Avenue property was being purchased. He had negotiated the business deal with the vendor himself. He knew he would require a lawyer to complete the purchase. While suggesting that Mr. Kavanagh had no authority from Mr. Farrell to deal with Loopstra Nixon is consistent with Mr. Farrell's narrative to characterize Mr. Kavanagh as a caretaker, it is simply not believable. I infer from the circumstances that Mr. Farrell explicitly or implicitly authorized Mr. Kavanagh to deal with Loopstra Nixon.

[46] To this point in the narrative, Mr. Kavanagh is a trusted confidant of Mr. Farrell's who was authorized to deal with lawyers and banks on behalf of Midas and whom the by-laws of Midas empowered to bind the corporation.

c. The Development of Financial Difficulties

[47] Although the Eastern Avenue property was rented out, the Yonge Street property never had a tenant. It did, however, incur operating costs of approximately $300,000 per year without a regular stream of income to pay them.

[48] Shortly after purchasing the Yonge Street property, Midas began falling into arrears on property taxes.

[49] As Mr. Farrell described it, in 2011 he left it to his Canadian accountant, Mr. Rudensky to solve the issue and send cheques to the city to pay the tax bill. Mr. Farrell had given Mr. Rudensky six cheques of $19,000 for a total of $114,000 based on his unilateral calculation of the taxes owing. At that point, tax arrears stood at approximately $380,000. The only way that the six cheques would solve the tax issue was if the city accepted the manner in which Mr. Farrell had unilaterally calculated certain rebates to which he felt he was entitled. The city had consistently refused to accept that calculation.

[50] Mr. Farrell claims he was unaware of any further tax arrears after 2011. The issue is important because of the $800,000 advanced on the first mortgage, over $600,000 was used to pay off tax arrears. That portion of the mortgage was therefore clearly to the plaintiffs' benefit.

[51] Although Mr. Farrell states that he was not aware of any subsequent tax arrears, a witness was called from the City of Toronto tax department who testified to the effect and produced documents demonstrating that the city had sent over 40 tax arrears notices to Mr. Farrell at his home in Ireland. As time went on, the notices became more forceful and culminated in steps to sell the property for tax arrears. Mr. Farrell claims he was never told about any of the 40 tax notices. In addition, tax arrears notices were also sent to Mr. Farrell's accountant, Mr. Rudensky. Mr. Farrell claims that Mr. Rudensky never informed him of any of those notices. However, Mr. Farrell's daughter Jackie, the family member who

helped him most with his businesses, did forward an overdue tax notice to Mr. Rudensky that showed tax arrears of $471,000 in August 2011. This clearly demonstrates that the tax notices reached Mr. Farrell's home. Although Jackie forwarded at least one tax notice to Mr. Rudensky, Mr. Farrell claimed that Jackie never brought any tax notices to his attention.

[52] Although Mr. Farrell testified that his daughter Jackie never brought any of the 40 tax notices to his attention, and although Jackie continues to work for him, she did not testify at trial. According to Mr. Farrell she could not do so because her teenage daughter has a serious eating disorder and requires her mother's presence to encourage her to eat. No request was made to allow Jackie to testify by videoconference at trial or by pre-recorded video at a time more convenient to her.

[53] At the same time as tax arrears were growing, Mr. Farrell claimed that the rebates owing in his favour would eliminate the outstanding taxes. The evidence does not support that. The annual tax bill remained considerably larger than even what Mr. Farrell claims he was entitled to by way of rebates.

[54] Mr. Farrell dismissed the tax issues by saying that he would have expected Mr. Rudensky to obtain a tax clearance certificate because Mr. Farrell had told Mr. Rudensky to have the taxes paid. It is difficult to understand how that could be possible without sufficient funds.

[55] The City's tax records also disclose numerous instances of Mr. Kavanagh communicating with the City either in person or by telephone about the tax arrears. Those records contain similar communications with Mr. Rudensky.

[56] Mr. Farrell maintained that, had he known of the tax arrears of $600,000, he would simply have paid them off. I do not accept that evidence. Even when tax arrears stood at only $380,000, Mr. Farrell was not prepared to provide enough money to pay them off.

[57] In addition to tax arrears, by September 2012, construction liens had also been placed on the Yonge Street property. In September 2012, Mr. Kavanagh appeared in court on behalf of Midas to adjourn the lien claimants' efforts to force a sale of the property. Mr. Kavanagh asked for time to find financing to pay off the liens. Mr. Farrell claims not to have been aware of that.

[58] Mr. Farrell also had creditors in Ireland who were becoming ever more forceful. The Allied Irish Bank ("AIB") had obtained a judgment against him for approximately €4,500,000. The judgment related to a mortgage on three properties in Ireland in respect of which Mr. Farrell had never made any payments. The bank had begun taking steps to enforce its judgment. In addition, Esso Oil demanded payment of €580,000 from Mr. Farrell.

d. Renato Fellin and the Plan to "Remove" Mr. Farrell from Midas

[59] In 2011, Mr. Kavanagh had encountered difficulties with construction contractors on the Yonge Street property. His search for a solution to those problems led him, through a mutual acquaintance, to Renato Fellin.

[60] This ultimately led to a meeting between Mr. Fellin, Mr. Kavanagh and Mr. Farrell sometime in 2011. During the course of that discussion, Mr. Fellin became aware of Mr. Farrell's problems with AIB and Esso in Ireland. Mr. Farrell asked for his help with those issues and asked him to help Mr. Kavanagh with the Yonge Street property.

[61] Mr. Fellin's understanding was that Mr. Kavanagh was doing the best he could with a limited budget. Mr. Fellin advised Mr. Kavanagh to clear up the tax arrears and mortgage the property to do so.

[62] By mid-2012 it is agreed that Mr. Kavanagh began looking for mortgage financing on the property. Mr. Fellin also made extensive efforts to find financing.

[63] According to Mr. Fellin, he retained Bill Shimbashi, a real estate valuator to prepare an appraisal. Mr. Fellin produced invoices from Mr. Shimbashi to corroborate his evidence.

[64] Mr. Fellin says he met Mr. Farrell on numerous occasions at various restaurants and bars throughout Toronto to discuss his problems with his Irish creditors.

[65] Mr. Fellin says he discussed changes to the board and shareholdings of Midas with Messrs. Farrell and Kavanagh on several occasions. Mr. Fellin says he advised Mr. Farrell to remove himself as a director and shareholder of Midas in order to protect Mr. Farrell's Canadian assets from Irish creditors. If Mr. Farrell was facing bankruptcy or execution issues in Ireland and wanted to protect his Canadian assets, he needed to move himself out of those assets and put someone else in in in his place. I understood the concept to be that someone else would hold Mr. Farrell's assets in a secret, informal trust to hide them from creditors, although Mr. Fellin did not use that specific language.

[66] Mr. Fellin understood that Mr. Kavanagh was putting this plan into place.

[67] The plaintiffs dispute Mr. Fellin's testimony and ask me to prefer the testimony of Mr. Farrell. Mr. Fellin was called as a witness by the mortgagees. During cross-examination, counsel for the plaintiffs pursued a direct attack on his credibility.

[68] Mr. Fellin was disbarred as a lawyer. The decision disbarring him described Mr. Fellin as having engaged in trickery, outright dishonesty and as being ungovernable. After being disbarred, Mr. Fellin became a mortgage broker. His mortgage broker's license was later revoked after he provided false information to his regulator. Mr. Fellin no longer operates under his real name but operates under the pseudonym of Walter Rossi.

[69] Despite this admittedly challenged ethical history, I nevertheless prefer Mr. Fellin's evidence over that of Mr. Farrell.

[70] Mr. Farrell tried to downplay his relationship with Mr. Fellin and his involvement with Mr. Farrell's creditors. Mr. Farrell dismissed Mr. Fellin as one of a number of people who had

purported to offer help and dismissed his efforts as "pie-in-the-sky" but if something came of it, Mr. Farrell was content to go along with it. Contemporaneous documents tell a very different story. A string of email correspondence which will be examined later in these reasons shows Mr. Farrell was deeply involved in Mr. Fellin's efforts and shows Mr. Farrell pressing Mr. Fellin with a level of urgency and frequency that is completely inconsistent with Mr. Farrell's attempts to downplay Mr. Fellin's role.

[71] In addition, Mr. Fellin's explanation about why Mr. Farrell should remove himself as an officer, director and shareholder of Midas was consistent with Mr. Farrell's own concerns.

[72] Mr. Farrell testified that in Ireland it is possible to conduct a global search to determine whether an individual is a director of any corporations by entering the individual's name into a particular database. The search result then lists all of the corporations of which that individual is a director. Mr. Farrell thought that this was the case in Canada as well. If it were the case in Canada, it would have allowed any creditor to enter Mr. Farrell's name into the Canadian equivalent of the Irish database and discover that Mr. Farrell was a director of Midas. That could lead his Irish creditors to the Yonge Street and Eastern Avenue properties.

[73] I will provide additional reasons for preferring the evidence of Mr. Fellin in paragraphs 114 to 125 below when the evidentiary groundwork for those reasons has been developed.

[74] Given that contemporaneous documents referred to Mr. Rossi rather than to Mr. Fellin and given that all witnesses knew him as Mr. Rossi, I will refer to Mr. Fellin by his pseudonym of Mr. Rossi in the remainder of these reasons.

e. Events of October 2012 – March 2013

[75] Mr. Rossi had been active in finding financing for Midas throughout 2012. By October, 2012 Mr. Kavanagh had retained Colina King to act as Midas' counsel on the registration of the mortgages. Ms. King began corresponding with Mr. Kavanagh and Mr. Rossi about documentation necessary for the mortgage.

[76] On November 14, 2012 a new Form 1 Notice of Change was filed in respect of Midas. It removed Mr. Farrell and the Canadian resident director Mr. Papastamos as directors of Midas and replaced them with Mr. Kavanagh alone. In addition, it removed Mr. Farrell as President and left Mr. Kavanagh as the only officer. Ms. King knew Mr. Kavanagh as the sole shareholder of Midas, consistent with Mr. Rossi's proposal.

[77] In the fall of 2012, Mr. Rossi introduced Midas to the mortgagee defendants. The initial contact was between Mr. Rossi and Arthur Kraus, a mortgage broker who worked in the office of Gary Gruneir through whose company mortgage financing was ultimately provided. By mid-December Mr. Rossi was providing documents to Mr. Gruneir, attended a site visit with Mr. Gruneir and gave Mr. Gruneir access to the Yonge Street property. Mr. Gruneir believed Mr. Rossi was an employee of Midas because Mr. Rossi was involved in the details of the loan to an extent that the borrower would usually be. Mr. Rossi would,

for example, deliver things personally to Mr. Gruneir and would follow up on the status of the mortgage and the timing of advances.

[78] By December 2012, Mr. Farrell's Irish creditors were becoming more aggressive. Although Esso had reached a settlement with Mr. Farrell pursuant to which it would accept €350,000 in satisfaction of its €580,000 claim, the Agreed Statement of Facts filed for this trial indicates that the €350,000 had to be paid by the close of business on December 21, 2012. Mr. Farrell denied this at trial, claimed he had 12 months to pay the Esso settlement and asserted that the Agreed Statement of Facts was wrong.

[79] By December 18, 2012 Mr. Rossi was having conversations with the lawyers for AIB to purchase the debt Mr. Farrell owed to the bank. Mr. Farrell admits that he told Mr. Rossi to contact the lawyers for the bank to purchase the debt. The overall plan was that Mr. Farrell was trying to get into a better position with the bank by having someone purchase the debt but that he would still need to negotiate terms with the purchaser.

[80] By January, 2013 Mr. Rossi was contacting the lawyers for Esso to make inquiries about purchasing the already reduced €350,000 debt that Mr. Farrell owed Esso at a further discount.

[81] Mr. Farrell claims not to know where Mr. Fellin would get the money to purchase either the AIB or the Esso debt.

[82] The overall plan seems to have been for Mr. Rossi to pose as a member of an investment fund that purchased distressed debt at a discount. Mr. Rossi admits that this was a fiction and that he was not involved with any such fund.

[83] On February 5, 2013 Mr. Rossi wrote to Ms. King sending her a Form 1 that was filed on January 23, 2013. In doing so, Mr. Rossi explained that the January 23 filing was required because the earlier filing showed only John Kavanagh as a director and that Mr. Kavanagh had received a notice from the ministry to the effect that they were "going to kill the company because of the lack of Canadian director" as a result of which Mr. Papastamos was put back on the board as a resident Canadian director. This is consistent with Mr. Rossi helping implement the plan to remove Mr. Farrell from his Canadian assets.

[84] The first mortgage of $800,000 was registered on February 6, 2013. Of that amount, just over $660,000 was paid to the city of Toronto for outstanding taxes and just shy of $115,000 was paid to Ms. King in trust. Of the amount paid to Ms. King, just over $96,000 was to be paid to construction lien claimants. In other words, approximately 760,000 of the $800,000 mortgage was used for legitimate purposes of Midas and protected the assets of Midas from seizure by creditors. It was in Mr. Farrell's interest that the properties be protected from seizure.

[85] Mr. Farrell was in Canada between February 11 and February 19, 2013. On February 14 he met with Mr. Rossi. He followed up the next day by email asking for a copy of correspondence between Mr. Rossi and AIB.

[86] On February 25, 2013 Mr. Farrell wrote to Mr. Rossi in connection with his negotiations with AIB stating:

> I cannot stress to you enough the urgency of this matter, it must end this week with AIB and by this week I mean up to noon on Thursday 28th of February 2013.
>
> I await hearing from you."

[87] By March 1, 2013 Mr. Farrell was writing Mr. Rossi stating:

> I cannot stress to you enough how important it is to secure a final settlement with AIB. Please could you keep me posted on any emails/letters that you sent to AIB and received from AIB.
>
> I would like to thank you for your input to date, I do realize that I am pressuring you a slight bit but I just want to get this matter resolved.

[88] The parties prepared several agreements in pursuit of discussions with AIB including confidentiality agreements, business agreements, directions and releases. Mr. Farrell shared correspondence between himself and his own lawyer with Mr. Rossi.

[89] The $5,000,000 mortgage was registered on March 4, 2013. The funds were dispersed as follows:

(i) $3,043,674.92 was paid to Midas of which, $1,500,000 was paid to Peter Vroon, a Dutch business person from whom Mr. Farrell had borrowed money. Mr. Farrell acknowledged at trial that the repayment of this amounts to Mr. Vroon was of benefit to him and had to be taken into account somehow in the disposition of the action.

(ii) $804,095.30 was paid to discharge the first mortgage of $800,000.

(iii) $250,000 representing six months of prepaid interest on the $5,000,000 was paid to the mortgagee.

(iv) $49,500 representing six months of property taxes was paid to the mortgagee to ensure taxes would be paid.

(v) $100,868.18 was paid to discharge a writ of seizure and sale

(vi) $68,808 was paid to Ms. King.

A further $300,000 advance was delivered to Ms. King in May which she in turn passed on to Midas minus a small deduction for an insurance payment.

[90] As a result, it is undisputed that $2,704,463.18 went to pay obligations that were of direct benefit to Midas because the payment preserved Midas's assets. The balance of those funds was paid into a Midas bank account. That too, presumably, was to the benefit of Midas. The funds paid to Midas were disbursed to various third parties (including Mr. Rossi) and unidentified bank accounts. If funds were dispersed improperly from the Midas bank account by Mr. Kavanagh or others, the fraud or lack of authorization lies not in the mortgage but in the misuse of funds generated by the mortgage. That is not something for which the defendants, other than potentially Mr. Kavanagh, are responsible.

f. The Vroon Loan

[91] As noted approximately $1,500,000 of the $5,000,000 mortgage was used to pay a debt of €1,000,000 owing to Peter Vroon. I take a moment to digress from the chronological narrative to discuss the Vroon loan because it provides additional reason for doubting Mr. Farrell's reliability as a witness.

[92] Mr. Farrell's evidence on the Vroon loan is full of contradictions. During his examination for discovery Mr. Farrell testified that Mr. Vroon had in fact advanced the funds to Mr. Farrell so that Mr. Farrell could invest them on behalf of Mr. Vroon. During the same discovery Mr. Farrell stated that he had authorized Mr. Kavanagh to enter into the arrangement with Mr. Vroon. At trial Mr. Farrell denied this and said that the answer about Mr. Kavanagh being authorized to enter into arrangements with Mr. Vroon was not correct.

[93] At trial Mr. Farrell tried to describe the loan as being for the benefit of Mr. Kavanagh because the loan proceeds were to be the funds that Mr. Kavanagh was using to "buy into Midas". However at the same time he admitted that €$650,000 of the Vroon funds were used to pay the legal fees of AIB. The remaining €350,000 went to Mr. Farrell personally. None of the money went to Mr. Kavanagh or to Midas. Later in his evidence, Mr. Farrell described the Vroon loan as an investment in Mr. Farrell's Irish properties or as "an investment in Thomas Farrell".

[94] The terms of the loan are embodied in a loan agreement dated March 16, 2009. It appears to bear signatures of Mr. Kavanagh and Mr. Farrell. Despite the fact that Mr. Farrell described the loan as an investment in himself, he denies that it is his signature on the document. He claims never to have seen the loan agreement. I do not accept this. Mr. Vroon sent the loan agreement to Mr. Farrell's Irish lawyer, Mr. Breheny, to be signed by Mr. Breheny's clients. Mr. Vroon delivered the loan proceeds to Mr. Breheny's trust account. In addition, paragraph nine of the loan agreement refers to a letter dated March 13, 2009 from Mr. Breheny to Mr. Vroon. According to paragraph nine of the loan agreement, the letter provides:

> Dear Mr.Vroon,

> In consideration of the transfer to my client account of an amount of € 1,000,000 I have been directed by my clients and its directors to confirm that I hold to your order certain title documents to the Company's property 205, Yonge St. in Toronto. The title documents I hold are specifically a transfer of that property into the name of my client. I confirm and undertake that I will hold the Deed of Transfer in trust for you and to your order, and I will deal with it only as directed by you. If you have any further queries in this regard please do not hesitate to contact me.
>
> Yours sincerely,
>
> Neil J. Breheny

[95] In his evidence, Mr. Farrell took the position that Mr. Breheny had sent a forged loan agreement to Mr. Vroon and was taking instructions from Mr. Kavanagh in this regard.

[96] While it is possible for a lawyer to be involved with forged documents and to send documents with a client's forged signature against his client's wishes, I do not accept Mr. Farrell's evidence in this regard. Mr. Farrell has never complained about Mr. Breheny's conduct to the Irish legal regulator, has never brought any lawsuit against Mr. Breheny and does not even appear to have complained to Mr. Breheny personally.

[97] On March 10, 2010, Mr. Vroon wrote to Mr. Breheny to confirm that he was still holding title documents to the Yonge Street property because the borrowers had not repaid the loan. Mr. Farrell claims that Mr. Breheny never brought this to his attention.

[57] Mr. Vroon testified that he believed Mr. Kavanagh was authorized to deal on behalf of Midas. No one ever brought to Mr. Vroon's attention any limitations on Mr. Kavanagh's ability to act for Midas. Although $1,500,000 was transferred from the Midas account to Mr. Vroon on March 10, 2013 to pay the principal owing on the loan, Mr. Vroon testified that no interest was ever paid despite Mr. Vroon sending regular invoices for interest.

g. Events after Registration of the Second Mortgage

[98] I now resume the chronological narrative.

[99] On March 6, 2013 Mr. Rossi advised Mr. Farrell that AIB's lawyers would not engage with Mr. Rossi.

[100] On March 8, 2013 Mr. Farrell replied telling Mr. Rossi to ask AIB what the full amount of the debt was but then tell AIB that if the full debt were paid, Mr. Rossi did not think he would be able to get a release from Mr. Farrell in favour of the bank. Mr. Farrell's next instruction was telling:

> We will have to then wait and see the reaction of AIB but just in case Peter that they call our bluff **can you confirm to me that the said funds are available to then be paid over to AIB. Perhaps yourself and John Kavanagh could put your heads together and make sure that this can happen** but Peter I cannot stress to you enough that AIB has the strongest hand at the minute and it is getting stronger by the day and by the week and indeed the month (emphasis added).

Mr. Farrell concluded the email by asking Mr. Rossi to call Mr. Breheny.

[101] On March 5, 2013 Mr. Rossi wrote to the lawyers for AIB threatening them with a complaint to the Law Society of Ireland and to the Financial Services Ombudsman if they did not respond to him. He followed up again on March 14, 2013 when no response had been received. Mr. Rossi sent copies of both emails to Mr. Farrell who responded to Mr. Rossi on March 14 noting:

> … If this does not put a move on them Peter[1] you will have to make the next email to them harsher letting them know you mean business.
>
> Peter, I just need the matter out of the way.

[102] Mr. Farrell followed up with a further email to Mr. Rossi on March 26, 2013 stating, among other things:

> Could you now please speak with John Kavanagh and revert back to me as soon as possible as seriously Peter, time is of the essence.

[103] Mr. Farrell was in Toronto between April 5, 2013 and June 14, 2013.

[104] In early April 2013, Esso was taking steps to have Mr. Farrell assigned into bankruptcy. On April 7, 2013 Jackie Farrell, on Mr. Farrell's instructions, sent Mr. Kavanagh payment details for Esso's lawyers in Ireland. On April 12, 2013 Mr. Kavanagh arranged for a transfer of funds to pay off the Esso debt. Mr. Farrell says he has no idea where the funds came from. At the same time, however, Mr. Farrell asserts that he had plenty of money to pay Esso and AIB. Mr. Farrell's evidence in this regard is inconsistent with his contemporaneous emails to Mr. Rossi urging him to resolve the situation with AIB and put his head together with Mr. Kavanagh to make that happen.

[1] It was explained at trial that Mr. Farrell referred to Mr. Rossi as Peter because Mr. Farrell did not like the name Walter.

[105] The only evidence before me of any funds to pay the Esso judgment were the proceeds from the $5 million mortgage on the Yonge Street and Eastern Avenue properties.

[106] By June 20, 2013, Mr. Farrell says he became aware of the $5,000,000 mortgage and had Mr. Breheny write to the lawyer for the mortgagees, Kimberly Gabriel to investigate.

[107] On June 24, Mr. Breheny wrote to Colina King advising her of the alleged fraud. In Mr. Breheny's letter he specifically refers to Mr. Farrell being the 50% shareholder, President and a Director of Midas. Ms. King replied on July 16, 2013 referring to a Form 1which demonstrated that Mr. Farrell was not the president or a director of Midas.

[108] I contrast this correspondence with Mr. Farrell's evidence. He testified that at one point he visited Ms. King in her office on Warden Avenue. According to Mr. Farrell, after he introduced himself Ms. King responded "goodness goodness you are supposed to be dead." Ms. King denies ever making such a statement and says that "goodness goodness" is not an expression she would use. I prefer Ms. King's evidence over Mr. Farrell's.

[109] It is unclear from Mr. Farrell's evidence whether Ms. King's alleged statement about Mr. Farrell being dead arose before or after Mr. Breheny's letter of June 24. In either scenario, the statement makes little sense in light of contemporaneous documents.

[110] If I assume that Mr. Farrell visited Ms. King after she received Mr. Breheny's letter of June 24, it is unlikely that Ms. King would have been taken by surprise and said words to the effect of "Goodness, goodness you are supposed to be dead" because she would already have learned of Mr. Farrell's existence from Mr. Breheny's letter. Had Ms. King in fact believed that Mr. Farrell was dead, one might expect her to have explained this in her reply to Mr. Breheny of July 13, 2013.

[111] If I assume Mr. Farrell's visit to Ms. King occurred before Mr. Breheny's letter of June 24, it is odd that Mr. Breheny would not have referred to that meeting in the letter. One would expect Mr. Farrell to have told his lawyer about the statement because it would only strengthen the allegation that there had been a fraudulent transaction. That would be relevant for Mr. Breheny to know and would be a relevant factor for him to include in his letter to Ms. King.

[112] When Mr. Farrell says he learned of the mortgage, he made no effort to contact Mr. Kavanagh. The mortgage was fraudulent as Mr. Farrell claims, one might have thought that Mr. Kavanagh would be the first person Mr. Farrell would contact to, at the very least, ask questions. Mr. Farrell says he contacted Mr. Kavanagh at some later point by telephone but could not recall the details of the conversation. Later in his evidence Mr. Farrell asserted that Mr. Kavanagh said during the conversation that things were not as they seemed and that he did not do what Mr. Farrell thought he had done.

[113] Although Mr. Farrell maintains that Mr. Kavanagh has defrauded him, he has raised no complaint against Mr. Kavanagh in Ireland and has not, for example, even made a complaint against him to Irish accounting authorities.

h. Farrell and Rossi Dealings After "Discovering the Fraud"

[114] After Mr. Farrell says he discovered the "fraudulent" mortgage, he continued to deal with Mr. Rossi in connection with the AIB debt.

[115] By September 2013 AIB was taking steps to enforce its security by selling the properties at issue. At that point, Mr. Rossi, at Mr. Farrell's direction, began pretending that he was interested in purchasing the property. Mr. Farrell sent Mr. Rossi details of the property listing and, at Mr. Rossi's request sent him contact information for a lawyer that Mr. Rossi could use who was in no way connected with Mr. Farrell.

[116] Even though Mr. Farrell continued to deal with Mr. Rossi after "discovering" the alleged fraud, Mr. Farrell says he did not speak with Mr. Rossi about the allegedly fraudulent mortgage

[117] That is striking.

[118] The email traffic between Mr. Farrell and Mr. Rossi makes it clear that Mr. Farrell was looking to Mr. Rossi for help and advice with problems. The emails also make it clear that Mr. Farrell had been encouraging Mr. Rossi to work with Mr. Kavanagh. It staggers belief that, if Mr. Farrell had been defrauded of $5,000,000 by the person he had told Mr. Rossi to deal with, he would not even tell Mr. Rossi to stop dealing with Mr. Kavanagh.

[119] Mr. Farrell has no explanation for the absence of such communications.

[120] Stranger still is that Mr. Farrell had no conversations with Mr. Rossi about Mr. Kavanagh even though Mr. Farrell came to learn that Mr. Rossi's credit card had been used to pay for the Form 1 that was part of the allegedly fraudulent scheme. One might have expected a question as simple as: "Why were you paying for this?" or "What did you think you are paying for?"

[121] Even more strange is that Mr. Rossi received over $400,000 from the allegedly fraudulent mortgage proceeds yet Mr. Farrell has made no effort to recover that money from Mr. Rossi even though Mr. Farrell sued the mortgagees, the lawyer acting for Midas, the property valuator and the potential tenant associated with the Yonge Street property.

[122] The final component of strangeness concerns Mr. Rossi's efforts on Mr. Farrell's behalf with AIB and Esso. As noted earlier, the plan was to have Mr. Rossi purchase the debt at a discount. Mr. Rossi was pretending to be a representative of a fund that engaged in those sorts of purchases. There is no evidence anywhere of Mr. Rossi's actual ability to pay AIB or Esso. Mr. Farrell agreed that he would have to come to an understanding with whoever bought the debt about how much Mr. Farrell would have to repay the purchaser and on what terms. Even though Mr. Farrell was pressing Mr. Rossi to wrap things up quickly to the point of threatening AIB with complaints to the Law Society and the Financial Services Ombudsman, there is no evidence that Mr. Farrell ever discussed terms of repayment with Mr. Rossi, let alone came to an agreement about the terms of repayment.

[123] The only inference I can arrive at is that Mr. Farrell never discussed terms with Mr. Rossi because Mr. Rossi was never going to pay for the debt with his own funds. Had the plan succeeded, Mr. Farrell would have used funds from the mortgages or other funds that Mr. Farrell had to pay AIB, just as he had apparently used mortgage funds to repay Esso.

[124] The only conclusion I can come to from these circumstances is that Mr. Farrell was aware of and consented to the plan to remove him as a shareholder and director of Midas to protect his Canadian assets from his creditors; that he was aware of the mortgages as they were being registered, that Mr. Kavanagh had authority to bind Midas to the Mortgage; that there was no fraud on Midas; and that the mortgage is valid. Mr. Farrell's allegations that the mortgages are fraudulent certainly fits the pattern of Mr. Farrell accepting credit but then taking aggressive steps to avoid payment on the debt with a view at some point of negotiating a heavy discount on it.

[125] Even if my inferences and conclusions about the degree of Mr. Farrell's knowledge are incorrect, the evidence demonstrates on a balance of probabilities that Mr. Kavanagh had authority to conclude the mortgages and that the plaintiffs received substantial benefit from the mortgages.

III. The Rule in Browne v. Dunn

[126] The plaintiffs submit that the defendants cannot challenge Mr. Farrell's narrative about the mortgages because they did not put a contrary version of events to him during cross-examination nor did they put to him that he knew about and was involved in the mortgages.

[127] The defendants were, however, under no obligation to do so.

[128] The principle underlying what has become known as the Rule in *Browne v. Dunn* is trial fairness. The point is to ensure that a witness is somehow aware that their story is being challenged. The Court of Appeal described the principle as follows in *R. v. Quansah*, 2015 ONCA 237:

> [81] Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. **The cross-examination should confront the witness with matters of substance on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted.**
>
> [82] In some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining

> party does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.
>
> [86] The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness's story. … (Citations omitted, emphasis added)

[129] Paragraph 81 of *Quansah* makes clear that the witness must be confronted only on those issues on which the party seeks to impeach the witness's credibility *and* which the witness has not had a chance to explain *because* there has been no suggestion that the witness's story is not accepted.

[130] The statements of defence made clear that the defendants alleged that the plaintiffs received the benefit of the mortgages and were seeking to set aside the mortgage Mr. Farrell placed on the property as a fraudulent conveyance.

[131] The defendants' written opening statements, which were exchanged five days before the trial began, could leave no doubt that Mr. Farrell's credibility was in issue. By way of example, Ms. King's opening statement says the following with respect to Mr. Farrell's claim that he had no notice of Mr. Kavanagh's dealings with the properties and that the plaintiffs received no benefit from those dealings:

> King submits that Farrell's narrative, unlikely on its face, is rendered untenable by the productions of the defendants… (p. 1)
>
> However, [the plaintiffs] have produced nothing to substantiate this beyond the word of Mr. Farrell, whose version of events contains a series of irreconcilable contradictions (p. 4)
>
> … Farrell's own version of events is fantastical. Even if Farrell's narrative were credible on its face, it is fatally undermined by the evidence uncovered by the defendants (none of which was volunteered by the Plaintiffs). (p. 5)
>
> These denials are, like so much of Farrell's testimony, incredible. (p. 7)

[132] This should have made it abundantly clear that Mr. Farrell's narrative was being challenged.

[133] Moreover, it is not necessary to confront a witness in a hostile manner to challenge credibility. It is sufficient to put to the witness facts that are inconsistent with his own narrative. In the case of Mr. Farrell it was up to his lawyer to decide whether he wanted to try to have Mr. Farrell explain those juxtaposed facts in re-examination.

IV. The Claim Against Mr. Kavanagh

[134] Mr. Farrell seeks an order vesting Mr. Kavanagh's shares in Mr. Farrell. The mortgagees oppose that relief. They obtained a guarantee from Mr. Kavanagh. The only material asset of Mr. Kavanagh's that the mortgagees know of is his interest in Midas.

[135] The plaintiffs base their claim to Mr. Kavanagh's shares on two core submissions. First, that Mr. Kavanagh did not pay the subscription price for his shares and second, that the issuance of shares to Mr. Kavanagh was subject to conditions that Mr. Kavanagh did not meet. Neither of these grounds, in my view, constitutes a basis for vesting Mr. Kavanagh's shares in Mr. Farrell.

a. Alleged Failure to Pay for the Shares

[136] Midas' share capital consists of 100 common shares at a subscription price of one dollar each. Each of Mr. Farrell and Mr. Kavanagh were issued 50 shares. Mr. Farrell submits that Mr. Kavanagh never paid the $50 for his shares. Mr. Farrell submits that the effect of Mr. Kavanagh's failure to pay is that his shares are somehow a nullity or should be transferred to Mr. Farrell. He relies on section 23 (3) of the OBCA in support of this submission.

[137] Section 23 (3) of the OBCA provides:

> "a share shall not be issued until the consideration for the share is fully paid in money or in property or past service that is not less in value than the fair equivalent of the money that the corporation would have received if the share had been issued for money."

[138] The Plaintiffs rely on *Dunham v. Apollo Tours Ltd*. (1978) 20 O.R. (2d) 9 at paras. 20-24 which held that a shareholder who did not pay for shares in similar circumstances could be deprived of the shares.

[139] The only evidence before me that Mr. Kavanagh did not pay the $50 is the assertion of Mr. Farrell. As noted earlier, I find Mr. Farrell to be an entirely unreliable witness. The mortgagees took a guarantee from Mr. Kavanagh based on the understanding that he held shares in Midas. I am not prepared to deprive the mortgagees of the benefit of the guarantee based on a bald assertion by Mr. Farrell to the effect that Mr. Kavanagh did not pay $50 fourteen years ago as he should have.

[140] The approach I am taking here is also consistent with that of the Supreme Court of Canada in *Mennillo v. Intramodal Inc*., 2016 SCC 51, at paragraph 22, where the shareholders' failure to pay for their shares contrary to s. 25(3) CBCA[2] did not affect their status as shareholders.

[141] It would seem additionally unfair to vest Mr. Kavanagh's shares in Mr. Farrell given that the minute book for the company went missing after Loopstra Nixon send it to Mr. Rudensky. The plaintiffs have not called Mr. Rudensky as a witness to explain what happened with the minute book. The minute book may well shed light on whether and how Mr. Kavanagh paid for his shares.

[142] If I am wrong in my analysis, I note that in *Dunham,* the shareholder who had not paid for his shares was given a certain period of time to do so. If I am wrong in my analysis of the evidence and Mr. Kavanagh's share should be paid for, I would grant leave to the mortgagees to pay $50 to Midas in full payment of Mr. Kavanagh's shares.

b. Alleged Conditions Relating to Mr. Kavanagh's Shares

[143] In addition to the allegation that Mr. Kavanagh did not pay the $50 subscription price for his shares, Mr. Farrell alleges that there were other conditions associated with the share issuance to Mr. Kavanagh which were never fulfilled.

[144] Mr. Farrell's evidence in this regard is contradictory. At times, Mr. Farrell spoke of a requirement by Mr. Kavanagh to contribute 50% of the value of the properties in cash.

[145] At other times Mr. Farrell spoke of the deal being that Mr. Kavanagh would have his contribution valued based on work he did for Midas over and above the usual week's work for which he was paid.

[146] Neither arrangement is anywhere in writing. There is no formal agreement, no email, not even a handwritten note. The method by which Mr. Kavanagh's work above his "usual work week" was to be calculated was never determined nor was the time by which Mr. Kavanagh was required to contribute cash or services for his 50%. Nor was the total value of the amount that Mr. Kavanagh would have to "work off" ever determined. In those circumstances, the agreement Mr. Farrell describes is too vague to be enforceable.

[147] In support of his argument, Mr. Farrell further relies on to Kavanagh's deemed admissions to paragraphs 20, 21, 24, 36, 38, 54 and 55 of the statement of claim which set out his arrangement with Mr. Kavanagh. These paragraphs do not constitute an enforceable agreement.

[148] The allegations about the obligation to make a cash investment are found in paragraph 20 of the statement of claim. It speaks of "a later financial investment from Kavanagh in an

[2] The equivalent of s. 23(3) of the OBCA.

amount to be subsequently agreed upon." That is nothing but an agreement to agree which is not enforceable.

[149] The gist of the remaining paragraphs is that it was a condition of the share issuance that Mr. Farrell would "devote whatever time was needed to fully and properly manage, oversee and look after the affairs of [Midas] in accordance with Farrell's directions and instructions."

[150] There is no evidence that any such condition was noted on the share certificates, in the minute book of the Corporation or was otherwise brought to the attention of others who may rely on the fact that shares were issued to Mr. Kavanagh. I note that Midas's tax returns from early on show both Mr. Farrell and Mr. Kavanagh as 50% shareholders without further qualification. The first time that appears to have been changed is in the 2017 tax return.

[151] Finally, although section 23 (3) of the OBCA contemplates past services as amounting to consideration for the issuance of shares, it does not contemplate future services as amounting to consideration for the issuance of shares. Indeed, on the very wording of section 23 (3) it would appear that future services are precluded as consideration for share issuances because, by definition, they could not be fully paid for before the shares are issued.

[152] For all of these reasons, I do not accept Mr. Farrell's evidence of any agreement that imposes any sort of condition on the shares of Mr. Kavanagh. I therefore dismiss the plaintiffs' claim for a declaration that Mr. Kavanagh is not entitled to any shares in Midas.

c. Damages Claim against Mr. Kavanagh

[153] The plaintiffs claim damages from Mr. Kavanagh in the event that the $5,000,000 mortgage is declared enforceable. They claim damages of $3,892,947.47 plus interest. They say that this is the difference between the $4.8 million advanced on the mortgage and a sum of $907,052.53 which has been repaid. Midas also seeks recovery from Mr. Kavanagh of all costs and legal fees in the proceedings with the mortgagee defendants.

[154] I decline to award any judgment in the plaintiffs' favour.

[155] The fact that a defendant has been noted in default does not entitle a plaintiff to judgment. Rule 19.02 (1) (a) provides that a defendant who has been noted in default:

> is deemed to admit the truth of all allegations of fact made in the statement of claim.

[156] The statement of claim does not make any allegations of fact on which to base the monetary judgment the plaintiffs seek. The claims against Mr. Kavanagh are set out in paragraphs 50 – 58 of the statement of claim. Those paragraphs do not contain allegations of fact.

Instead they make broad legal allegations about Mr. Kavanagh's conduct. These include allegations to the effect that he "fraudulently and unlawfully" arranged for the mortgages, that he "misappropriated and stole" the proceeds of the mortgage, that he "fraudulently and unlawfully" caused Mr. Farrell to be removed as a director.

[157] To the extent there are factual allegations in those paragraphs, they relate to the registration of a mortgage, spending the proceeds of the mortgage and removing Mr. Farrell as a director. Those facts alone do not support a monetary judgment. The overlay on those facts that might support a judgment are the allegations of fraud, misappropriation and theft. As pleaded, those are legal characterizations, not facts. As noted earlier in these reasons I have not accepted the legal characterizations of fraud, misappropriation or theft.

[158] Moreover, the judgment the plaintiffs seek would be based on deemed admissions to the allegations in the statement of claim based on Mr. Kavanagh's failure to defend. The effect of any such judgment would be to diminish the force of any judgment that the mortgagees would have against Mr. Kavanagh based on the guarantee.

[159] Although Mr. Kavanagh has been noted in default and is therefore deemed to admit the facts alleged against him in the statement of claim, those admissions do not bind other defendants: *Correia v. Canac Kitchens*, 2008 ONCA 506 at para 110. Using deemed admissions against Mr. Kavanagh to diminish the value of the mortgagees' judgment on Mr. Kavanagh's guarantee would not be appropriate given my earlier findings about the mortgages, the circumstances in which they were entered into and the use of their proceeds.

[160] To my mind, granting a default judgment against Mr. Kavanagh would be granting a judgment based on deemed admissions which judgment and deemed admissions go directly contrary to the evidence I heard and the findings of fact I have made. That would not be in the interest of justice.

[161] The mortgagees have advanced a cross-claim against Mr. Kavanagh on his guarantee. The cross-claim asserts the fact of the guarantee, the fact that the mortgage it guarantees is in default and that the default triggers the guarantee. Those facts were established at trial and entitle the mortgagees to judgment. To the extent that the mortgagees recover on the property itself, there can of course be no double recovery against Mr. Kavanagh.

V. The Claim Against Colina King

[162] The plaintiffs submit that Colina King, the lawyer Mr. Kavanagh retained on the mortgage transactions fell short of the standard of care required of a reasonably prudent lawyer in a real estate transaction. The plaintiffs argue that had Ms. King met the standard of care, irregularities would have been noticed and the nature of the fraud exposed.

[163] As noted above, I have found that there was no fraud. Strictly speaking it is therefore not necessary to address the negligence allegations against Ms. King. I will nevertheless do so briefly in the event I am wrong on the issue of fraud.

[164] The negligence allegations against Ms. King have to be viewed in proper context. She was retained in October for mortgages that were not registered until December and March. There was therefore no particular urgency in the registration of the mortgages. Urgency is a red flag for fraud. She was also retained by a long-standing officer of the corporation. That too is a source of some level of comfort. Finally, all of the funds on the mortgages appear to have been directed to legitimate payees. They were used to pay off tax arrears, construction liens, prepaid interest, prepaid taxes with the balance being paid to Midas. A further common red flag for fraud is payment to parties with no legitimate relationship to the mortgagor. That is not present here.

[165] The plaintiffs argue that Ms. King was negligent in accepting By-Law Number two, the borrowing by-law. The alleged negligence lies in the fact that the by-law is signed by Mr. Farrell as President and by Mr. Kavanagh as Secretary beneath a line that indicates that the by-law was enacted by the board. Mr. Kavanagh was not a board member at the time. In addition, the by-law is one of Midas and is dated December 15, 2006. As of that date the Corporation's name was 2122161 Ontario Limited. While there was a corporate resolution changing the name to Midas, it was dated the same day as the company was incorporated.

[166] The plaintiffs' expert, Robert Aaron, was of the view that this amounted to negligence. Ms. King's expert, Hartley Nathan was of the opinion that this did not amount to negligence and that the irregularities were such that a reasonable solicitor may not have noticed or may have chosen to ignore them. Mr. Aaron admitted that the irregularities in By-Law Number two did not rise to the level of a red flag but were evidence of sloppiness. On re-examination Mr. Aaron expressed the view that the irregularities in By-Law Number two were red flags.

[167] In the context of the by-law as a whole, the irregularities do not constitute red flags that ought to have put Ms. King on notice of any wrongdoing. As noted earlier, the by-law was not even necessary because the corporation already had the power to borrow. Moreover, the by-law was expressly affirmed by Mr. Farrell and Mr. Kavanagh signing as shareholders thereby assuaging any concerns that the by-law may not have been properly passed.

[168] Although Ms. King purports to have seen a copy of the corporate minute book, she made no copy of it and has no correspondence to demonstrate its chain of possession. The corporate minute book has now disappeared. While it would have been helpful for Ms. King to make a copy of the minute book or to prepare cover letters that showed a chain of possession, no one articulated any theory about how her failure to do so caused the mortgages to be registered. Had she kept a copy of the minute book or had covering letters the mortgages would still have been registered. The defendants try to avoid the causation argument by suggesting that Ms. King never actually saw the minute book. She says she did, that it was her practice to view minute books and that she would not have proceeded with the transaction without having seen the minute book. I have no reason to disbelieve her. I have even less reason to disbelieve her given that the last trail of possession for the minute book was its transfer from Loopstra .Nixon to Mr. Farrell's accountant, Mr. Rudensky, whom Mr. Farrell did not call as a witness.

[169] The plaintiffs also allege that Ms. King was negligent in respect of the certificate of incumbency that she delivered to the mortgagees. The certificate confirmed that Mr. Kavanagh and Mr. Papastamos were directors. The plaintiffs argue that Ms. King cannot demonstrate she met the standard of care in identifying the directors because she cannot produce the minute book that would contain resolutions appointing them. This goes back to the issue of the minute book which I have already addressed above.

[170] The plaintiffs further allege that Ms. King did not keep adequate records of her meeting with Mr. Papastamos. They allege she never met with him. Ms. King says she met an elderly Greek man who identified himself as Alex Papastamos, took copies of his identification, and reviewed the Certificate of Incumbency with him.

[171] Mr. Papastamos died before trial. He had, however, been examined under rule 39 . The transcript of that examination was admitted into evidence at trial. During that examination he denied having met Ms. King. He was asked whether the signature on the certificate of incumbency was his. He responded:

> No, it is not my signature. It's close enough… copied.

[172] Mr. Papastamos denied having signed the document but said that he had given Mr. Kavanagh a copy of his passport and driver's license because Mr. Kavanagh needed a Canadian resident director for an unidentified business on Yonge Street. That sounds like it could relate to the Yonge Street property. He also testified to the effect that his relationship with Mr. Kavanagh was very good, he was not aware that he had been removed as a director of Midas, he was a director of Midas solely because it needed a resident Canadian director and that he was not involved in the business of Midas.

[173] The evidence of Mr. Papastamos is troubling. However even if I prefer his evidence over that of Ms. King, there are significant causation issues in respect of which the plaintiffs have not satisfied me.

[174] The plaintiffs' theory is that Ms. King never met Mr. Papastamos but merely accepted photocopied ID that she received from Mr. Kavanagh. If I accept that as true, I must still determine whether that act of negligence caused the mortgages to be registered.

[175] The British Columbia Court of Appeal's decision in *BSA Investors Ltd v. Mosly*, 2007 BCCA 94 is apposite in this regard. In that case, an agent of the plaintiff fraudulently registered a mortgage and took the proceeds for himself. The trial judge found the lawyer of the corporate plaintiff to have been negligent because he did not notice that its articles of incorporation required two signatures for debt instruments. The Court of Appeal overruled the trial judge on the basis that his causation analysis was faulty:

> 48. The question might therefore be asked: was it really a part of the plaintiffs' burden of proof to show that had Mr. Lester asked for the second signature it would have put a stop to Mr. Mosly's fraud. In my view, on these facts, the answer is yes. Obviously, the

> plaintiffs were not required to lead evidence negating every possible hypothetical situation. But here there was a sizeable body of evidence going to Mr. Mosly's dishonesty, which was accepted by the trial judge and summarized at paras. 57 to 72 of his reasons. Consequently, the plaintiffs' burden as to causation included the requirement to show, on a balance of probabilities, that had Mr. Lester performed his duty Mr. Mosly would have been stopped.

[176] Had Ms. King insisted on meeting Mr. Papastamos in person, one of two things would likely have occurred. Mr. Kavanagh could have made arrangements for Mr. Papastamos to attend Ms. King's office and sign the certificate of incumbency in person. Mr. Papastamos was not aware that he had ever been removed as a director so it would have come as no surprise to him to be required to sign a document indicating that he was a director. Mr. Papastamos also described his relationship with Mr. Kavanagh as being very good. In that context he would probably have attended in person had it been made convenient for him. Alternatively, Mr. Kavanagh could have found someone else to act as the resident director. Given the sophisticated and detailed nature of the fraud that the plaintiffs allege against Mr. Kavanagh, it is unlikely that he would have been stopped by the mere requirement to have someone attend at Ms. King's office in person in the capacity of a resident Canadian director.

[177] The plaintiffs also allege that Ms. King was negligent in having improper and ineffective resolutions signed approving the mortgages. The resolutions were prepared by Ms. Gabriel and sent to Ms. King for signature. The defect in the resolutions is that all of their dispositive paragraphs begin with the words "and whereas;" wording typically associated with recitals. While the error may lead to inelegant drafting, it does not affect the dispositive effect of the paragraphs in question. The actual language of those paragraphs remains dispositive in nature despite the two opening words. For example, the third paragraph reads:

> **AND WHEREAS** the terms of the above-mentioned Letter are hereby ratified and confirmed and the Corporation is authorized to comply in full with its terms, and to provide all security documentation is required, to be executed as shown thereon.

[178] While it is no doubt preferable that the dispositive language of this paragraph be found under a heading of something like "be it resolved that" or in a paragraph that begins with those words as opposed to beginning with the words "and whereas", the imperfect wording does not change the dispositive force of the paragraph.

[179] Regardless of its first two words, the language clearly evidences the ratification of the terms of the Letter referred to and affirms the corporation's authorization to comply with the Letter and provide security documentation as required. The language of the fourth and fifth paragraphs of the resolutions is to similar effect.

[180] This issue also raises causation questions. Had Ms. King noticed the error, she would presumably have phoned Ms. Gabriel who would have provided more carefully drafted resolutions. It would not have prevented the mortgages from being registered.

[181] Finally, Ms. King received a new Form 1. The original Form 1 had Mr. Farrell and Mr. Papastamos as directors. It was replaced by a Form 1 that listed only Mr. Kavanagh as a director. Shortly before the first mortgage was registered, Ms. King received a revised Form 1 which reinstated Mr. Papastamos as a director in addition to Mr. Kavanagh. This was the Form 1 in respect of which Mr. Rossi had written Ms. King advising that Mr. Kavanagh had received a notice from the ministry to the effect that they were "going to kill the company because of the lack of Canadian director."

[182] That was a reasonable explanation. The reinstatement of Mr. Papastamos was consistent with the requirements to have a Canadian resident director. It was reinstating an earlier, long-standing director and would not raise any particular concerns.

[183] For these reasons I find that a claim of negligence against Ms. King has not been made out.

VI. The Claim Against the Mortgagees

[184] The plaintiffs claim that the mortgagees had sufficient knowledge of the alleged fraud that prevents them from relying on the mortgage. I disagree. The plaintiffs claim against the mortgagees runs into three significant legal hurdles.

[185] The first legal hurdle is the indoor management rule embodied in ss. 19 (a) (b) and (d) of the OBCA which provides:

> 19. A corporation or a guarantor of an obligation of a corporation may not assert against a person dealing with the corporation or with any person who has acquired rights from the corporation that,
>
> (a) the articles, by-laws or any unanimous shareholder agreement have not been complied with;
>
> (b) the persons named in the most recent notice filed under the Corporations Information Act, or named in the articles, whichever is more current, are not the directors of the corporation;
>
> (d) a person held out by a corporation as a director, an officer or an agent of the corporation has not been duly appointed or does not have authority to exercise the powers and perform the duties that are customary in the business of the corporation or usual for such director, officer or agent;

> except where the person has or ought to have, by virtue of the person's position with or relationship to the corporation, knowledge to that effect.

[186] The effect of the plaintiff's claim against the mortgagees is to argue that Mr. Kavanagh, an individual named as an officer and a director in a Form 1 (the notice filed under the Corporations Information Act) and a person held out by Midas as an officer with the authority to bind the corporation (by virtue of By-Law Number one) did not in fact have that authority.

[187] The only way the plaintiffs can take that position successfully is to demonstrate that the mortgagees knew or ought to have known that Mr. Kavanagh had no such power by virtue of the mortgagees relationship with Midas. They have not done so.

[188] The second legal hurdle is the *Land Titles Act*, R.S.O. 1990, c.L5. The basic scheme of that act is to say that registered instruments are valid, end of story. That principle is embodied in s. 78 (4) of the *Act* which provides:

> Effect of registration
>
> (4) When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register.

[189] There are two limited exceptions to this principle. One is statutory, the other is based in case law. The statutory exception relates to certain types of fraud. The thrust of that exception is to capture instances where a party fraudulently impersonates the titleholder of property and, by doing so, fraudulently conveys an interest in property to themselves. The *Land Titles Act* contains limited exceptions to guard against that mischief. The plaintiffs agree that they do not fall into that exception because there was no fraudulent impersonation here. Mr. Kavanagh at all times purported to be who he actually was and was exercising the authority he had by virtue of the corporate by-laws.

[190] The exception rooted in case law holds that the protection of section 78 (4) only applies to *bona fide* registrants for value, that is to say registrants who do not have notice of an interest in land that differs from that shown in the register.

[191] The Ontario Court of Appeal set out what this means in *Stanbarr Services Limited v. Metropolis Properties Inc*. 2018 ONCA 244. In doing so the court made clear that in order to prevent someone from relying on a registered interest, one must demonstrate that the party had *actual knowledge* of an interest in land that differs from what is shown in the register. The Court of Appeal made this clear in paragraph 26 and 28:

> [26] Because notice has been considered to be one of a limited number of exceptions to the mirror principle, it has been strictly construed. Our courts insist on actual notice of a defect. Actual knowledge means just that; the party must actually know about the defect. It is not sufficient that it has become aware of facts that may suggest it should make inquiries: *Rose v. Peterkin* (1885), 1885 CanLII 16 (SCC), 13 S.C.R. 677, at pp. 694-695. Constructive knowledge is insufficient. Thus, the factual analysis in considering a notice argument is limited to a consideration of what the party knew, not what it could have known had it made inquiries.
>
> [28] … it is unnecessary and unhelpful to consider whether they received sufficient information to put them on inquiry. That is because receipt of such information does not amount to actual knowledge: *Rose,* at pp. 694-695. Therefore, whether the party received such information and what steps it took to investigate the situation is wholly irrelevant to the actual knowledge analysis.

[192] The plaintiffs have not demonstrated any actual knowledge on the part of the mortgagees. The best the plaintiffs can argue is that the mortgagees were aware of anomalies in by-laws, property appraisals or leases that should have led them to make further inquiries. This is clearly not enough and does not prevent the mortgagees from relying on their registration.

[193] The third legal hurdle concerns the legal duties of mortgagees to mortgagors or, more precisely put, the absence of such legal duties. In *Isaacs v. Royal Bank of Canada*, 2010 ONSC 3527 at paras. 38-44, aff'd at 2011 ONCA 88 the court affirmed that the relationship between a mortgagee and a mortgagor is one of debtor and creditor. The mortgagee owes the mortgagor no duties to adhere to its own internal lending procedures. Any steps a mortgagee takes are to protect its own interests. It is free to do or not do as it wishes. As a result, any condition in the lending agreement with respect to things such as satisfactory leases or satisfactory appraisals exist solely for the protection of the mortgagee. The mortgagee can wave them at will and has no duty to fulfil those conditions to protect the mortgagor.

[194] That is precisely the plaintiffs' claim against the mortgagees. The lending commitment was conditional on satisfactory appraisals and leases. The plaintiffs complain that there were anomalies in the appraisal and lease which should have led the mortgagees to make further inquiries and that such further inquiries would have disclosed the alleged fraud. *Isaacs* makes clear however that there is no duty on the mortgagee to enforce those conditions.

[195] The mortgagees' principal witness was Gary Gruneir. He is the directing mind of the defendant C & K Mortgage Services Inc. operating as Rescom Capital. Mr. Gruneir struck me as an honest, candid, direct and reliable witness. He described his business as being

that of an asset lender. That is to say he advances funds on his own assessment of the value of the asset, not on the basis of appraisals or income streams. What is critical for him is what he can generate from the property on a forced sale. This makes good sense given that his business tends to focus on lending that is more challenging than the sort of lending large banks might engage in.

[196] At the time these mortgages were extended, he had completed approximately 1000 mortgages and had been in business for approximately 30 years. As a result of that experience he had a good base on which to value properties quickly. In addition, he acted as a mortgage broker for a wide range of sophisticated clients. They also had extensive experience in real estate investment and were a further source of information about property values.

[197] The anomalies on which the plaintiffs rely are as follows:

(a) Mr. Gruneir was sent an appraisal of the Yonge Street property only 12 pages of which dealt with the Yonge Street property while the remaining 26 pages dealt with a different property in a different neighbourhood. The plaintiffs argue that Mr. Gruneir should have noticed the discrepancy, called the appraiser and that, had he done so, the alleged fraud would have come to light.

(b) Mr. Gruneir knew there was supposed to be a tenant going into the Yonge Street property and allegedly made no effort to contact the tenant and did not notice anomalies in the purported lease that would have led him to contact the purported tenant and would have disclosed the false nature of the lease.

(c) Mr. received an estimate from Bautech Developments Limited for landlord work required on the Yonge Street property which the plaintiffs allege was forged. Mr. Gruneir did not follow up with Bautech. Had he done so, he would have learned of the forgery and the allegedly fraudulent mortgage would come to light.

[198] Mr. Gruneir testified that he probably viewed the appraisal on a computer. He knew of the property valuator in question and described him as a "no-fly zone appraiser" because his appraisals were unrealistically high and sloppily prepared. In this case the appraisal was based on a tenant generating $845,000 a year in income. Mr. Gruneir indicated that while a tenant might be icing on the cake, rental income does not figure prominently in his asset valuations. For his business, the distressed sale value was the critical driver. For the same reasons, Mr. Gruneir paid little attention to the lease.

[199] The plaintiffs also criticized Mr. Gruneir for not following up on the Bautech estimate for the installation of heating and air conditioning. The plaintiffs called Mr. Buttner, Bautech's directing mind, as a witness. He said the estimate was a forgery and was not generated by his company. The plaintiff's theory was that Mr. Gruneir should have followed up with Bautech to satisfy himself about the legitimacy and accuracy of the estimate. According to Mr. Gruneir, he had no basis for believing that the Bautech

estimate was a forgery. I agree. There is nothing on the face of the document that would suggest that it was anything other than what it appeared to be.

[200] Moreover, tab 542 of Exhibit 1 is an email from Mr. Buttner to John Kavanagh attaching an estimate. This suggests that Mr. Buttner may have been mistaken when he concluded that the document he was shown during his examination in chief was a forgery. Even if the document Mr. Buttner was shown during his examination in chief contained irregularities visible to him, he had nevertheless provided Mr. Kavanagh with a legitimate estimate.

[201] The plaintiffs also allege that the mortgagees' lawyer, Kim Gabriel acted negligently because she failed to notice a number of discrepancies and anomalies in the documents she was given by Ms. King and that had she done so and made further inquiries, the alleged fraud would have been uncovered.

[202] According to the plaintiffs' expert, Mr. Robert Aaron, Ms. Gabriel, fell short of the standard of care in that she:

(a) Accepted without question Ms. King's solicitors opinion with respect to the borrower having taken all necessary steps to authorize the mortgage when the borrowing by-laws was apparently invalid.

(b) Failed to notice a number of red flags including:

i. The proximity between the dates of corporate changes and the mortgages.

ii. The urgency for completion of both mortgages, the documents.

iii. The absence of any covering letter accompanying the documents that Ms. Gabriel received from Ms. King including the absence of a list of documents or an envelope indicating that the documentation came from Ms. King.

iv. Failing to notice the irregularities with the borrowing by-law.

v. Failing to notice the incomplete and inaccurate appraisal for the Yonge Street property.

vi. The absence of any lawyer contact for the alleged tenant of the Yonge Street property. Ms. Gabriel merely accepted the lease on the Yonge Street property without verifying that it had been signed by an officer of the corporate tenant. The corporate tenant was incorporated only nine days after the purported lease was supposedly signed.

[203] Although Ms. Gabriel is not a defendant in the action, the plaintiff's theory is that if she knew or ought to have known of a fraud, then her knowledge is imputed to the defendant mortgagees.

[204] Ms. Gabriel filed an expert report prepared by Craig Carter. Mr. Carter has practiced since 1979. His practice focuses on mortgage remedies, mortgage law and standards of practice. In his view, Ms. Gabriel met the requisite standard of practice. Mr. Carter focuses on the fact that Ms. Gabriel acted for the mortgagee. The mortgagee's lawyer is typically entitled to rely on the documentation and opinions received from the mortgagor's lawyer. In his view it would be unduly expensive to require a mortgagee's lawyer to reproduce what the mortgagor's lawyer has already done. He warns against applying the standard of a litigation lawyer who is dissecting the transaction afterwards with a view to establishing fraud as the appropriate standard for the prudent solicitor registering a mortgage.

[205] According to Mr. Carter anomalies in the two by-laws would not constitute a red flag indicative of fraud. In his view, the purpose of a lawyer's review of the by-laws is to ensure that the person executing the security documents has the appropriate delegated authority from the corporation to sign and bind the corporation. The standard of practice does not require the lender's lawyer to review the by-laws of corporate or were looking for inconsistencies or flaws.

[206] According to Mr. Craig, Ms. Gabriel was not required to notice the dissonance between the corporate name and the date of the two by-laws because a lender's solicitor is entitled to rely on the enforceability opinion provided by borrower's counsel. Moreover, it is not unusual for a corporation to be incorporated as a numbered company and then to have its name changed immediately to the name preferred by the client. It is not unusual for that to occur on the date of incorporation.

[207] According to Mr. Craig, many of the issues that Mr. Aaron points to as being red flags are merely indicative of careless errors in corporate organization that occur all the time. In Mr. Craig's view, a change in corporate directors proximate to the lending date is not a red flag here. Corporations change directors all the time. It was several months between the change of directors and registration of the mortgages or advance on the mortgages. To the extent there was urgency in registering the mortgage, that is understandable. There were tax arrears and construction liens on the property. Both security holders were moving to enforce. While covering letters may be ideal, the absence of a covering letter is not a red flag of fraud. The alleged anomalies in the borrowing by-law are not evidence of fraud given that the borrowing by-law is not even necessary for the corporation to borrow. Nor is an anomaly in the appraisal a red flag with respect to Ms. Gabriel. Any requirement for an appraisal would come from the lender. The lender may demand or waive that requirement. It is not for the lender's lawyer to determine whether the appraisal is satisfactory. That is a business decision for the lender.

[208] I accept Mr. Carter's evidence and find that Ms. Gabriel did not fall short of the standard of care.

[209] In concluding on the issue of the mortgagees' liability, I return to the three legal hurdles I set out at the start of this section. The plaintiffs have not overcome any of those hurdles.

[210] The plaintiffs have not demonstrated anything in the relationship between the mortgagees and Midas that would prevent the mortgagees from relying on the indoor management rule.

[211] The plaintiffs have not demonstrated actual knowledge of any issue concerning the mortgage that would deprive them of the ability to rely on its registration.

[212] Even if I accept the plaintiffs' complaints at full face value (which I do not) they do not amount to actual knowledge of any sort of a fraud. At best they amount to circumstances that might have led to further inquiry. The Court of Appeal has made it clear, however, in *Stanbarr* that sufficient information to put someone on inquiry is not enough. Actual knowledge is required.

[213] Finally, the plaintiffs have introduced no evidence to overcome the principles articulated in *Isaacs* to the effect that conditions that a mortgagee may impose on a lending commitment such as appraisals or satisfactory leases are conditions imposed for the benefit of the mortgagee alone. The mortgagees are not required to perform a forensic analysis of such documents to protect Mr. Farrell from the consequences of having allowed Mr. Kavanagh to bind Midas.

VII. The Farrell Mortgage

[214] After Mr. Farrell discovered the mortgage registered on the Yonge Street property, he registered a mortgage of $9,000,000 in his own favour. His stated reason was to prevent other fraudulent mortgages from being registered against the property. Mr. Farrell admits there were no advances made under the mortgage. The mortgagees ask me to declare Mr. Farrell's mortgage to be invalid as a fraudulent conveyance and to discharge it.

[215] While Mr. Farrell is entitled to place security against his property, on the evidence before me, that security should not take priority over any judgment the mortgagees obtain as a result of this proceeding. As a result, any orders arising out of this proceeding will take priority over Mr. Farrell's mortgage.

VIII. Disposition

[216] As a result of the foregoing, I make the following dispositive orders:

(i) The plaintiffs' action is dismissed with costs.

(ii) I declare that the mortgagee's mortgage on the Yonge Street and Eastern Avenue properties are valid.

(iii) All monies paid into court to the credit of this action shall be paid to the mortgagees forthwith.

(iv) The mortgagees shall have judgment against Mr. Kavanagh pursuant to his guarantee in the amount of $8,518,279.40 as of February 3, 2020.

(v) The plaintiffs' claim that Mr. Kavanagh is not a 50% shareholder of Midas is dismissed.

(vi) The third party claims are dismissed

[217] Any party claiming costs as a result of these reasons may do so by January 18, 2021. Responding submissions should be delivered by February 1, 2021 with any reply delivered by February 8, 2021.

Koehnen J.

Released: December 31, 2020

Thomas Farrell at al. v. John Kavanagh et al., 2020 ONSC 8154
Court File No. CV-13-10369-00CL and
CV-13-10369-00CLA1
DATE: 20201231

ONTARIO

SUPERIOR COURT OF JUSTICE

(Commercial List)

BETWEEN:

THOMAS PATRICK FARRELL and THE MIDAS INVESTMENT CORPORATION

Plaintiffs

– and –

JOHN KAVANAGH et al.

Defendants

-and-

ROCCO COMMISSO et al.

Third Parties

REASONS FOR JUDGMENT

Koehnen J.

Released: December 31, 2020

Appendix “C”

CITATION: Thomas Farrell at al. v. John Kavanagh et al.,
COURT FILE NO.: CV-13-10369-00CL and
CV-13-10369-00CLA1
DATE: 20210316

SUPERIOR COURT OF JUSTICE – ONTARIO

(Commercial List)

BETWEEN:	)	
	)	
THOMAS PATRICK FARRELL and THE MIDAS INVESTMENT CORPORATION	)	*Maurice Neirinck, Michael McQuade* for the plaintiffs
Plaintiffs	)	
– and –	)	
JOHN KAVANAGH, COSA NOVA FASHIONS LTD., B & M HANDLEMAN INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDLEMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION, COLINA KING, C & K MORTGAGE SERVICES INC. O/A RESCOM CAPITAL, GARY GRUNEIR, BILL SHIMBASHI, 1888871 ONTARIO INC. and CARLO PARENTELA	)	*Reeva M. Finkel and Brendan Jones* for Cosa Nostra Fashions Ltd., B & M Handleman Investments Limited, Comfort Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handleman, Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust Company and Canada Investment Corporation. *R. Leigh Youd and Peter Smiley* for Colina King
Defendants		
-and-		
ROCCO COMMISSO, 1812340 ONTARIO INC., 2364788 ONTARIO LTD., 2364789 ONTARIO LTD., 1870561 ONTARIO INC., 2364789 ONTARIO INC., 2364798 ONTARIO LTD., PIETER WILLEM		*Mauro Marchioni* for the Third Parties, Rocco Commisso and Maria (Grace) Commisso *Alfred Schorr* for the Third Party, Margaret Pastore.

VROON, GRACE COMMISSO, MARGARET PASTORE, SOLID GENERAL CONTRACTORS INC. and 1864847 ONTARIO LTD. carrying on business as C.I.U.D.A.D. EQUPMENT SALES

Third Parties

HEARD: In writing.

ENDORSEMENT

[1] This is my costs endorsement arising out of reasons that I issued on December 31, 2020 indexed as 2020 ONSC 8154.

[2] The action arises out of a mortgage with a face amount of $5,000,000 which now stands at approximately $9,000,000 when taking prejudgment interest into account. The plaintiffs brought a claim to set the mortgage side on the basis that it was fraudulent and that the defendant mortgagees knew or ought to have known of the fraud.

[3] I found against the plaintiffs at trial. In doing so I found that: there was nothing fraudulent about the mortgage, the plaintiffs knew and approved of it, it was part of a plan to remove the plaintiff, Thomas Farrell, from the face of his Canadian investments to protect him from his Irish creditors and was part of an overall pattern by Mr. Farrell to obtain loans, default on them and then try to manoeuvre the creditor into taking a substantial discount on the loan. The mortgage was one of those manoeuvres and the action should never have been brought.

[4] Without repeating the findings of trial here, numerous paragraphs in the reasons for judgement refer to credibility issues on the part of the plaintiffs that underpin my view that the action should never have been brought in the first place and was nothing but an attempt by Mr. Farrell to get money from a lender and not repay it or repay only a portion of it. Those include paragraphs 6, 20, 21, 39, 43, 90, 96, 124 and 209 – 213.

I. Costs Claim of the Mortgagee Defendants

[5] The mortgagee defendants seek costs of $1,603,576.90 on a substantial indemnity scale including HST and disbursements. Their partial indemnity claim is $1,508,092.40.

a. Scale of costs

[6] Paragraph 22 of the mortgage provides for payment of all legal fees on a solicitor client basis.

[7] It is well-established that where there is a contractual right to recover costs, the costs award ought to reflect that right: *Bosse v. Mastercraft.*[1] Although courts retain a discretion to refuse to enforce the contractual right where there is good reason to do so, I see no such reason here.

[8] In addition to the contractual right to substantial indemnity costs, a higher cost award is also justified by the plaintiffs' conduct. As already noted, this action should never have been brought in the first place. It involved unfounded allegations of fraud. The plaintiffs failed to produce relevant documents, including documents relating to City of Toronto

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[1] 1995 CanLII 931 at para 66 (ONCA).

taxes, correspondence with Mr. Fellin and documents concerning the loan from Peter Vroon which loan the plaintiffs also alleged was fraudulent. When confronted with pretty much indisputable proof that Mr. Farrell was aware of the loan from Mr. Vroon from the get-go and benefited from that loan, he finally conceded at trial that the benefit he obtained from the Vroon loan should be taken into account when rendering judgment.

[9] That sort of misconduct in litigation warrants an elevated scale of costs.

b. Claim against Vroon

[10] The plaintiffs submit that the Mortgagees are not entitled to their costs for the proceeding against Mr. Vroon because that proceeding was ultimately dismissed on grounds of jurisdiction.

[11] In my view, the Mortgagees are entitled to recover their costs of the claim against Mr. Vroon from the plaintiffs.

[12] Mr. Vroon was brought into the action solely because the plaintiffs alleged that the transaction with him was fraudulent. It clearly was not. The plaintiffs' own Irish solicitor was involved in the transaction and helped paper it. When this was demonstrated beyond doubt, the plaintiffs finally conceded that any benefit they received from the $1.5 million Vroon transaction should be taken into account of this action.

[13] In my view, the plaintiffs' conduct with respect to the Vroon loan did not reflect a genuine error but reflected part of their overall conduct of avoiding debts wherever they could and putting their creditors to unnecessary expense as part of the strategy of persuading creditors to compromise their claims.

[14] Had the plaintiffs never brought a third-party claim against Mr. Vroon, they would likely never have discovered the documents that established the loan from him was legitimate and was known to Mr. Farrell.

c. Deductions to the Mortgagees' Costs Claim

[15] The plaintiffs point out that the Mortgagees claim costs for nine motions in respect of which the court made no order as to costs. The plaintiffs submit that in those circumstances it is as though the court ordered no cost with respect to the motions.[2] The plaintiffs submit that $64,324.12 including HST should be deducted on this account.

[16] That general rule applies where the matter was adjudicated and a court decided that no costs should be awarded. It does not apply to consent or unopposed motions where the court did not turn its mind to costs.[3]

[17] Even if the motion was ultimately unopposed or on consent, it was still necessary for the Mortgagees to have brought the motions. Given that the Mortgagees were entirely successful and given the plaintiffs' contractual right to substantial indemnity, that right should be honoured. The contractual right to elevated costs should not be carved back for certain procedural steps the plaintiffs were required to bring when in fact, they should not have been required to bring any procedural steps because the proceeding should never have been initiated against them.

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[2] *Delrina v. Triolet Systems Inc.*, 2002 CarswellOnt 3220 at paragraph 36.
[3] Orkin on the *Law of Costs, Second Edition*, Chapter 4, Costs Of Motions 404. Discretion of Trial Judge; *Klein v. Viscount Mobile Homes Ltd.*, 1999 CarswellOnt 2367 at para. 5; *Ledore Investments Ltd. v. Murray*, 2002 CarswellOnt 1375, 2002 CanLII 49422, at para. 28; *Kordic v. Bernachi*, 2007 CarswellOnt 7320, 2007 CanLII 48648, at para. 5.

[18] A further motion was withdrawn by the mortgagees. The endorsement in that motion indicates that the motion was withdrawn "without costs." Costs should not be claimed for that motion. The issue of costs was adjudicated on. The Mortgagees' costs should be reduced by $29,907.71, including HST, to reflect that motion.

d. Reasonableness of Mortgagees' Costs Claim

[19] The plaintiffs submit that the Mortgagees' costs claim is unreasonable because they claim $1,603,576 in substantial indemnity costs whereas the plaintiffs' substantial indemnity costs were only $966,145. The plaintiffs say this violates the principles of reasonableness set out in *Boucher v. Public Accountants Council*.[4] I disagree.

[20] It is usually more expensive to establish a claim then to defend one. Although the Mortgagees were technically in the position of defendants here, they were the de facto plaintiffs. Their objective was to recover on the debt and enforce the mortgage. Their counterclaim did that. The plaintiffs were plaintiffs in name only. They simply made a bald allegation that the mortgage was fraudulent and left it to the Mortgagees to prove the contrary.

[21] In proving the contrary, the Mortgagees were forced to navigate the Byzantine web of facts that the plaintiffs wove around them and were forced to obtain documentary production from third parties because the plaintiffs defaulted on their obligation to do so. Those two factors made the litigation substantially more expensive that it otherwise would have been.

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[4] 2004 ONCA 1479 at para 26.

[22] It would be completely unjust to allow the plaintiffs to make false allegations of fraud, refuse to produce documents thereby making the action more expensive for the Mortgagees to defend and then reduce the Mortgagees' costs because the plaintiffs claim they are unnecessarily high. If the Mortgagees' costs are unnecessarily high, that is the fault of the plaintiffs.

[23] I also note that the Mortgagees' lawyers were from a larger firm than the plaintiffs' lawyer and would therefore have a higher cost structure to begin with. This would come as no surprise to the plaintiffs' lawyer and should therefore have come as no surprise to the plaintiffs.

II. Costs Claim of the Defendant Colina King

[24] Ms. King claims substantial indemnity costs in the amount of $290,410.64 including HST and disbursements.

[25] Substantial indemnity costs are appropriate where there has been reprehensible, scandalous or outrageous conduct on the part of a party, including allegations of fraud that are not made out a trial.[5]

[26] Conduct that justifies substantial indemnity costs is not limited to conduct in the proceedings themselves but includes the circumstances that give rise to the litigation.[6]

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[5] *Young v. Young*, [1993] 4 S.C.R. 3 at p. 134.
[6] *Mortimer v. Cameron* 94 CanLII 109980 (ONCA) at p. 23; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA at paragraph 30.

[27] The plaintiffs clearly made allegations that attacked the integrity of Ms. King. Ms. King is a lawyer for whom such allegations are extremely damaging. The cross-examination at trial was one that essentially suggested Ms. King was lying on the stand. One of the allegations pursued against Ms. King was that she did whatever she was asked to by Mr. Fellin to perpetrate the fraud. As noted earlier, the plaintiffs were working in close cooperation with Mr. Fellin to organize a scheme whereby Mr. Farrell would be removed from the face of the companies in Canada to protect him from his Irish creditors. Mr. Farrell failed to produce his extensive correspondence with Mr. Fellin which would have helped demonstrate that arrangement. Having entered into a plan with Mr. Fellin and having refused to produce relevant documents, the plaintiffs then attacked Ms. King's credibility at trial and accused her of professional negligence for, among other things, following Mr. Fellin's directions.

[28] That is precisely the sort of reprehensible conduct for which substantial indemnity costs are appropriate.

[29] The plaintiffs have not taken issue with the amount of costs Ms. King claims, although they dispute entitlement to substantial indemnity costs. I award Ms. King her costs in the amount of $209,410.64 as requested.

III. Costs Claim of the Third Parties

[30] The third parties, Grace and Rocco Commisso claim costs of $98,810.30 including HST and disbursements. The third party Margaret Pastore claims costs of $26,632.44 including HST and disbursements. Both claim costs on a partial indemnity scale.

[31] Both sets of third parties claim their costs from the Mortgagees. Both rely on the principle set out in *Milina v. Bartsch*[7] to the effect that a plaintiff who was unsuccessful against a defendant will not usually be responsible for the costs of the third party.

[32] An exception to the principle in *Milina* arises where the proceedings against the third party followed naturally and inevitably from the plaintiff's action in the sense that the defendant had no real alternative but to join the third party.[8] I find that this exception applies here.

[33] The third parties received payments from the allegedly fraudulent mortgage. The true actors in the third party piece were Rocco Commisso and Gino Pastore. Mr. Commisso received approximately $391,993.90 from the impugned mortgage. Mr. Pastore received $202,750. In both cases their wives were included as third parties because they had arranged to have the payments channeled to their wives. There is no dispute that their wives knew nothing about the matter.

[34] Messrs. Commisso and Pastore assert that the fees they received were on account of finders' fees for the mortgage. Neither is a mortgage broker. Neither has produced any agreement entitling them to a finders' fee. There was, however, an arm's length mortgage broker involved who also received a commission and who produced an agreement entitling him to a fee.

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[7] [1985] B.C.J. No. 2789
[8] *Credit Foncier Franco-Can. V. Bennett* (1964), 47 W.W.R. 369.

[35] Neither Mr. Commisso nor Mr. Pastore could demonstrate what they did for the funds other than have several dinners and drinks with Mr. Farrell. The finders' fees were out of all proportion to any evidence of work done to obtain the mortgage.

[36] For the plaintiffs to resist the allegations that the mortgage was fraudulent, they had to join those involved in obtaining the mortgage. Although it does not appear that the Mortgagees obtained material information from Messrs. Commisso or Pastore, they did obtain material information from other third parties who were more deeply involved like Messrs. Vroon and Fellin. The Mortgagees did not, however, have any way of knowing when they commenced the third party claims, from which third party they would obtain helpful information. At the same time, the Mortgagees did not have the luxury of time. Limitation periods were running. The Mortgagees could not wait until discoveries to decide to join third parties. Even had they done so, it would have done them no good because the plaintiffs falsely denied any connection with the third parties and improperly failed to produce documents which demonstrated a connection with them.

[37] Neither of Messrs. Commisso or Pastore produced any invoices or other documentary evidence to substantiate their claims to for a commission. It appears that even if they were required to bear their own costs, they would still have made out quite well given the minimal evidence before me at trial of any work they actually did for their commission.

[38] Although the plaintiffs did not join the third parties as defendants, they nevertheless alleged in paragraph 9 of their reply and defence to the Mortgagees' counterclaim that the third parties were fraudsters. In those circumstances, it was appropriate for the Mortgagees to continue their claims against the third parties.

[39] In the foregoing circumstances I am satisfied that the third party claim arose naturally out of the plaintiffs' claim against the Mortgagees so as to make it appropriate for the Mortgagees to join the third parties. In those circumstances it is appropriate to order the plaintiffs to pay the Mortgagees their costs of pursuing the third parties. It is also appropriate to have the third parties claim their costs from the plaintiffs and not from the Mortgagees.

[40] Although I will award the third parties their costs, their only course of recovery will be from the plaintiffs and not from the Mortgagees.

[41] Given the current face amount of the mortgage and the value of the property, it is also appropriate to provide directions about the priority associated with each party's costs claim. The costs of the Mortgagees should be bundled together with the outstanding amount of the mortgage and be secured against the real estate as is the mortgage itself. Next in rank should be Ms. King. I would rank the third parties behind Ms. King in terms of priority for recovery for costs. I do so because the third parties have already made substantial amounts of money on the transactions at issue without really having demonstrated anything to justify the funds they have received. Even if they have to pay their own costs, they will still have done quite well of the transaction. The third parties will, however, rank ahead of the mortgage that Mr. Farrell placed on the Yonge Street property. I give that direction because Mr. Farrell admitted at trial that he registered a mortgage against the Yonge Street property in his favour not because he advanced funds in connection with the property but because he wanted to prevent further allegedly fraudulent mortgages from being registered on title.

Disposition

[42] For the reasons set out above I order the following:

(a) The plaintiffs shall pay the costs of the Mortgagees on a substantial indemnity scale which I fix at $1,573,669.19.

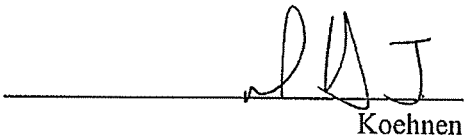
(b) The plaintiffs shall pay the costs of Colina King on a substantial indemnity scale which I fix at $290,410.64.

(c) The plaintiffs shall pay the costs of Grace and Rocco Commisso on a partial indemnity scale which I fix at $98,810.30.

(d) The plaintiffs shall pay the costs of the Margaret Pastore on a partial indemnity scale which I fix at $26,632.44.

All of the foregoing cost awards include HST and disbursement.

[43] The cost awards are collectible according to the priorities set out in paragraph 41 of these reasons.



Koehnen

Date: March 16, 2021

Appendix “D”

COURT OF APPEAL FOR ONTARIO

CITATION: Farrell v. Kavanagh, 2021 ONCA 213
DATE: 20210406
DOCKET: M52272 (C69083)

Paciocco J.A. (Motion Judge)

BETWEEN

Thomas Patrick Farrell and The Midas Investment Corporation

Plaintiffs
(Appellants/Moving Parties)

and

John Kavanagh, Cosa Nova Fashions Ltd., B & M Handleman Investments Limited, Comfort Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handleman, Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust Company and Canada Investment Corporation, Colina King, C & K Mortgage Services Inc. o/a Rescom Capital, Gary Gruneir, Bill Shimbashi, 1888871 Ontario Inc. and Carlo Parentela

Defendants
(Respondents/Responding Parties)

Maurice J. Neirinck, for the moving parties

David P. Preger, David Seifer and Reeva M. Finkel, for the responding parties

Heard: April 1, 2021 by video conference

ENDORSEMENT

OVERVIEW

[1] The moving parties, Thomas Patrick Farrell and The Midas Investment Corporation ("Midas"), appeal the order of Koehnen J., dated December 31, 2020, dismissing their action concerning the validity of two mortgages. Mr. Farrell owns a controlling share of Midas. The dismissed action related to mortgage debt of $5 million secured against two properties Midas owned in the City of Toronto: 205 Yonge Street and 90 Eastern Avenue (the "Properties").

[2] In their action, the moving parties claimed the mortgages were fraudulent. They sought a money judgment against John Kavanagh, a Midas insider and the alleged ringleader in the alleged mortgage fraud. Among other relief, they also sought a declaration that the mortgages were invalid based on what they alleged the responding party mortgagees knew about the supposed fraud.

[3] After over seven years of litigation, the trial judge ruled against the moving parties. Among other dispositions, he declared that the mortgages were valid. In the motion before me, the moving parties seek a stay of that declaration of validity and of the enforcement of the mortgages pending the outcome of the appeal.

[4] For the reasons below, I dismiss the motion.

ANALYSIS

[5] As the parties agree, the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 applies when determining whether to grant a stay pending appeal: *2257573 Ontario Inc. v. Furney*, 2020 ONCA 742, at paras. 19-20. In applying the *RJR-MacDonald* test, the overriding question for the court is whether the interests of justice favour a stay: *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at p. 677.

[6] Applying that test, I am not persuaded that a stay pending appeal is in the interests of justice.

(i) There is a serious issue to be determined on the appeal, but barely

[7] The threshold to establish a serious question on the appeal is low. The court must make a preliminary assessment of the merits of the case and determine whether the issues on appeal are either frivolous or vexatious: *RJR-MacDonald*, at p. 337; *Circuit World Corp.,* at p. 677.

[8] Although, in my view, the grounds of appeal hold out little prospect of success, I cannot say that they are frivolous or vexatious. I therefore accept that there is a serious issue to be determined on appeal.

[9] However, the three considerations identified in *RJR-MacDonald* are not "watertight compartments"; the strength of one may compensate for the weakness of another: *Starkman v. Home Trust Company*, 2015 ONCA 436, at para. 7. I will therefore elaborate on my view that, while the low threshold of a serious issue to be determined on appeal is met, it is barely met.

[10] I agree with the responding parties that the grounds of appeal advanced largely represent an attempt by the moving parties to re-try factual findings and credibility determinations that were for the trial judge to make. I also agree that the moving parties have not identified any palpable and overriding errors in the trial judge's factual findings that raise a realistic prospect of success on appeal. However, I cannot say that all the criticisms of the trial judge's reasoning are frivolous or vexatious. The odds are strongly against these grounds of appeal succeeding, but it cannot be said that they do not raise a serious issue.

[11] A further challenge that the moving parties will have on appeal is that, even if the key credibility findings are called into question on the grounds advanced, the trial judge provided alternative reasons for his decision based on the hypothetical assumption that Mr. Kavanagh did commit the fraud alleged by the moving parties. Those alternative reasons explain why the mortgages would nonetheless be valid. In my view, it is highly unlikely that an appeal panel would accept the moving

parties' core submission – that these alternative reasons are tainted by the trial judge's credibility findings. Nor, in my view, do the few alleged legal errors identified by the moving parties offer much hope for success. Once again, since I cannot say that all of these grounds of appeal are frivolous, they satisfy the first criterion of a serious issue to be determined, but barely so.

(ii) No irreparable harm to the moving parties

[12] Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald*, at p. 341.

[13] I am not persuaded that the moving parties will suffer irreparable harm if the declaration of validity remains and enforcement efforts are permitted to proceed. There is nothing unique about the Properties. Even if the moving parties are successful in the appeal, any loss they incur by the sale of the Properties pending appeal can be compensated with money. There is no suggestion that the responding party mortgagees could not pay a money judgment to recompense the moving parties, if required.

[14] The moving parties' concern that market conditions are currently poor, making a sale improvident, is not borne out on the evidence. The suggestion that market conditions for a sale of the Properties would improve if delayed until the

end of the appeal period is speculative. Moreover, the moving parties' claimed aversion to a sale under current conditions is undermined by their efforts to sell the Yonge Street property, including through the late-breaking acceptance of an offer to purchase that property. The execution of this agreement of purchase and sale also takes the wind out of the sails of the moving parties' claim that a sale now would rob them of the benefit of any potential increase in value of the Properties that might accrue while the appeal plays out.

[15] On the evidence before me, the responding party mortgagees' immediate plan is to seek the appointment of a receiver. I am advised that a hearing to appoint a receiver is set for April 6, 2021. If a receiver is appointed, the receiver will be obliged to consider the moving parties' interests as well as any offers they have procured, including from the anonymous party that signed the late-breaking agreement of purchase and sale. I appreciate that a distress sale, such as a receiver's sale, can suppress values, but I also agree with the responding parties that the purpose underlying court-supervised receivers is to avoid improvident sales. The risk that the Yonge Street property will be sold at less than market value is speculative.

[16] Accordingly, I am not persuaded that denying the requested stay would cause irreparable harm to the moving parties.

(iii) The balance of convenience does not favour granting a stay

[17] Nor am I persuaded that the balance of convenience favours the moving parties. I will first consider the alleged inconvenience to the moving parties of denying the stay.

[18] For the reasons I have given, the harm the moving parties apprehend is compensable with money. Moreover, the moving parties claim that Mr. Farrell has an imposing net worth, and that the value of the mortgaged Properties exceeds the amount the responding party mortgagees claim. If this is so, the moving parties could have ameliorated the risks they apprehend, without acknowledging the mortgage debt they deny, by paying the required amount into court to the credit of the action. They have chosen not to do so. The moving parties therefore bear some responsibility for bringing about the inconveniences they now attempt to invoke.

[19] In their factum, the moving parties also argue that they would be inconvenienced if the mortgages are enforced because, based on the implication of correspondence exchanged between the parties, they expected that enforcement would not be sought until the action is finally disposed of on appeal. I am not persuaded by this submission. There was no clear agreement to this effect and no evident breach by the responding party mortgagees of such an undertaking.

[20] I do accept that there would be inconvenience to the moving parties in having to recover from the 13 responding party mortgagees if the appeal is successful. However, this inconvenience does not outweigh the continued costs to the responding parties, which I will now recount.

[21] The mortgages have been in default since October 2013. It is evident that the moving parties have no intention of making payments on what they continue to maintain is a fraudulent debt. Interest on the mortgages is accumulating at a rate approaching $100,000.00 per month. Based on the long-standing practices of the moving parties, it is probable that unpaid taxes will also continue to accumulate and further encumber the Properties. The moving parties, who bear the onus on this motion, have not presented evidence supporting their position that there is ample equity in the Properties to mitigate the risk to the responding parties if a stay is granted. In my view, on the record before me the balance of inconvenience arising from the risk of financial shortfall favours the responding party mortgagees.

[22] I am also not persuaded that delay is a benefit to the responding parties simply because interest is accruing on the mortgage debt. So far, the responding party mortgagees have seen none of the interest owing under the mortgages. Quite simply, the money the responding parties advanced has been “sunk money” almost from day one. They have enjoyed no benefits from their investment. If

granted, the enforcement delay would only perpetuate this, effectively freezing the responding parties' investment for what the moving parties estimate will be at least another year.

(iv) A stay is not in the interests of justice

[23] Finally, the moving parties urge that the interests of justice require a stay in this case because they contest the validity of the mortgage debt. It therefore cannot be said, as it can in many cases where similar stays are denied, that the moving parties are seeking to stay enforcement measures they had agreed to accept when the mortgage was executed.

[24] I have considered this submission, but it does not sway me towards granting the stay. It is uncontested that Mr. Farrell benefited from a significant portion of the money advanced, which was used to pay other debts he owed, or to increase Midas' equity in the Properties by retiring prior encumbrances. He has enjoyed those benefits since shortly after the mortgage money was advanced yet has paid virtually nothing in return. Moreover, the trial judge found that the mortgage Midas entered into was valid, both in fact and in law. I have already commented on the problems the moving parties face in their efforts to disturb this finding on appeal.

CONCLUSION

[25] Accordingly, the moving parties have not met their burden. In all of the circumstances, it is not in the interests of justice to stay the declaration of validity or the enforcement of mortgage security. The motion is dismissed.

[26] The parties have yet to prepare bills of costs in this motion. The responding party mortgagees are permitted to file written submissions not to exceed 3 pages, supported by a bill of costs, within 10 court days of the release of this decision. The moving parties are likewise permitted to file costs submissions, not to exceed 3 pages, supported by a bill of costs, within 5 working days of the receipt of the responding parties' submissions. A costs order will then be issued.

J.A.

Appendix “E”

Court File No. CV-21-00656398-00CL

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

THE HONOURABLE	)	MONDAY, THE 31st
	)	
JUSTICE DUNPHY	)	DAY OF MAY, 2021

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

ORDER

THIS MOTION, made by Rosen Goldberg Inc. in its capacity as court appointed receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of the Respondent, The Midas Investment Corporation, by Order

dated April 6, 2021 (the "**Appointment Order**") was heard this day by way of judicial videoconference via Zoom due to the COVID-19 crisis, at Toronto, Ontario.

UPON READING the Notice of Motion of the Receiver, the First Report of the Receiver dated May 25, 2021 (the "**First Report**"), and upon hearing submissions of counsel for the Receiver, counsel for the Applicants, counsel for the Respondent, counsel for 2555572 Ontario Limited ("**255**"), counsel for Auto World Imports Network ("**AWIN**") and counsel for John Kavanagh, no one else appearing although properly served, as appears from the Affidavit of Hayley Morgan sworn May 26, 2021, filed,

1. **THIS COURT ORDERS** that the time for service and filing of the Notice of Motion and the Motion Record is hereby abridged and validated so that this motion is properly returnable today.

2. **THIS COURT ORDERS** 255, the tenant of 90 Eastern Avenue, Toronto, Ontario, to produce all "Records", as defined in the Appointment Order, relating to its tenancy at 90 Eastern Avenue, Toronto, Ontario, including, without limitation, the purported Lease extension, the prepayment of rent and any Records subject to any contractual confidentiality provisions.

3. **THIS COURT ORDERS** that the Receiver's proposed marketing and sale process in relation to 90 Eastern Avenue, Toronto, Ontario and 205 Yonge Street, Toronto, Ontario, is hereby approved and authorized.

4. **THIS COURT ORDERS** that the Confidential Appendices contained in the First Report are hereby sealed until the earlier of:

i. Further Order of the Court;

ii. The completion of a sale of the subject properties; or

iii. Six months from May 31, 2021.

5. **THIS COURT ORDERS** that the Receiver shall prepare and circulate to the parties forthwith redacted copies of the listing proposals redacted only to remove information relative to the value of the properties.

B E T W E E N:

COSA NOVA FASHIONS LTD. et al. Applicants	-and-	THE MIDAS INVESTMENT CORPORATION Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Raymond M. Slattery (LSO# 20479L)
Tel: 416-369-4149
rslattery@mindengross.com

Lawyers for the Receiver, Rosen Goldberg Inc.

Appendix “F”

CITATION: Cosa Nova Fashions Ltd. v. The Midas Investment Corporation, 2021 ONSC 3989
COURT FILE NO.: CV-21-00656398-00CL
DATE: 20210602

SUPERIOR COURT OF JUSTICE – ONTARIO
(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

RE: COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION, Applicants

AND:

THE MIDAS INVESTMENT CORPORATION, Respondent

BEFORE: S.F. Dunphy J.

COUNSEL: *David P. Preger*, for the Applicants

Raymond M. Slattery, for the Receiver, Rosen Goldberg Inc.

MAURICE J. NEIRINCK, for the Respondent Midas Investment Corporation

Robert A. (Bob) Klotz, for Auto World Imports

Symon Zucker, for John Kavanagh, guarantor

HEARD at Toronto: May 31, 2021

ENDORSEMENT (Revised)

[1] The Receiver brought this motion seeking (i) a general order approving its activities as set forth in its first report; (ii) an order approving a sales process for the two properties (Yonge Street and Eastern Avenue) that it has been appointed over; and (iii) an order requiring the tenant of the 90 Eastern Avenue property to comply with its obligations under

paragraph 5 of the Receivership Order dated April 6, 2021 by disclosing all documentation in relation to its tenancy to the Receiver.

[2] I do not think the first order sought is necessary or useful in the context of a receivership although I recognize that many receivers are in the habit of asking for them. A generic approval of actions adverted to in the Receiver's Report is meaningless in the absence of specific issues being raised and decided. I have been asked to approve a sales process and any orders I make in that regard will include all findings necessary to lead to that order. I have no basis to approve on a generic basis the Receiver talking to this or that stakeholder or reading this or that document and I decline to do so. As and when an action – such as the sales process – needs approval, approval or directions can be sought.

[3] I also think that the third item – ordering Mr. Klotz' client to comply with the April 6 Receivership order – ought to have been entirely unnecessary. Mr. Klotz advises that his client is bound to the defendant Midas by certain contractual confidentiality obligations. The Receiver was appointed over all of the debtor Midas' "assets, undertakings and properties" and thus stands clothed with all of the authority Midas had in relation to the property which includes any contractual obligations of the kind adverted to by Mr. Klotz. This is the very nature of the appointment made. Further, paragraph 5 of the appointment order obliged Mr. Klotz' clients to make available for inspection and copying all records in its possession or control excepting only records to which solicitor-client privilege attached or "due to statutory provisions prohibiting such disclosure". Neither exception is applicable here and Mr. Klotz' objection that he needed a direct order naming his client in order to comply or a waiver from the debtor was baseless. The necessity for immediate disclosure is obvious with suggestions being made of unusual and unknown (to the Receiver) transactions involving Mr. Klotz's client allegedly pre-paying several years' worth of rent or possessing an undisclosed agreement to purchase the property. The Receiver shall have the requested order directed at the tenant of Eastern Avenue and that tenant shall comply without delay.

[4] I turn now to the substantive purpose of this attendance i.e. sale process approval. The process proposed is as standard as such processes can be. The Receiver has canvassed potential listing agents and made a reasoned selection. It has obtained indications of value to help inform its conduct of the process and seeks the court's approval to enter into listing agreements for the two properties. The proposed listing agreements do not provide for a fixed listing price nor for commissions to the listing brokers unless a sale takes place. This latter should alleviate Mr. Kavanagh's concerns as guarantor about the consequences of paying up on his guarantee or Midas' concern about discharging the mortgage or taking an assignment of it.

[5] There were requests to adjourn this motion made at the outset. I turned them all down.

[6] Mr. Klotz pleaded lack of time to "seek instructions". He has had four business days to do so at the very least and quite a bit longer given the month and more spent in pursuit of baseless objections to providing the Receiver with the information about the 90

Eastern tenant that is needed. Mr. Klotz was not able to articulate a single interest or even category of interest that his client as tenant might have in permitting the Receiver to start a sales process. His client can discuss what it will with the Receiver after it has disclosed the information that ought to have been disclosed almost two months ago.

[7] Mr. Kavanagh took no position on the motion but as guarantor merely wished to ensure that he would not have to pay commission to sales agents if he exercises his right as guarantor to pay out and receive an assignment of the mortgage he has guaranteed. He was swiftly satisfied on that count.

[8] Midas also suggests that it will imminently be in a position to redeem the security. Once again, it can do so at any time but the mere prospect that it might – a prospect that the parties knowledgeable of the tortured history of this file take with a grain or two of salt – is no reason to delay starting the process.

[9] It is to be devoutly hoped that one or the other of the proposals to pay out this applicant and discharge or take an assignment of the mortgage will be realized. However, this saga has dragged on for years and the magic of compounding is adding more and more to the debt and cementing the fear in the mind of the mortgagee that it will end up suffering a material shortfall. Delay is causing the debt to increase by the day and very possibly the secured creditor's deficit with it. With the summer months rapidly approaching, it is critical to get the sale process underway without further delay. I am satisfied with the reasonableness of the marketing process proposed by the Receiver. That process is adequately described in the Receiver's report. It should begin and begin NOW.

[10] I am approving the sales process described in the Receiver's report and authorizing the Receiver to enter into the listing agreements it has recommended entering into. I do so with these small conditions:

(a) The sealing order requested shall apply to the confidential appendices – containing the listing proposals and the appraisals – but shall not apply to the redacted listing proposals that I am ordering be prepared and circulated to the parties today;

(b) The sealing order shall be until the earlier of (i) further order; (ii) the completion of a sale of the subject properties or (iii) six months from today;

(c) The Receiver shall prepare and circulate to the parties forthwith redacted copies of the listing proposals redacted only to remove information relative to the value of the properties; and

(d) The approval shall of the sales process shall be suspended until Wednesday June 2, 2021 at which point any party with a concrete objection to voice in relation to the approval of the listing proposals will be heard.

[11] I wish to explain or expand upon these conditions.

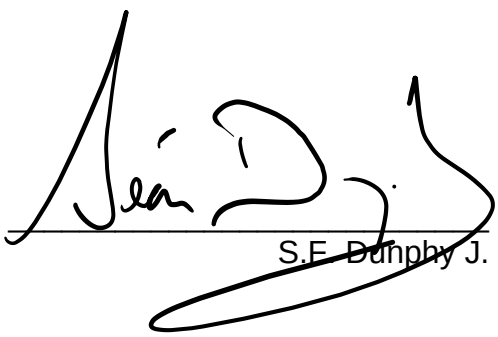
[12] As to the first two, I find a sealing order is plainly reasonable here both given the history of the proceeding and the nature of the information to be sealed. There is a reasonable apprehension that some of the parties' past behaviour may prove to be reliable guides to their future behaviour. Were that to be the case, the potential for mischief to the sales process is obvious. Further, appraisal values are something the receiver needs to evaluate the attractiveness of offers or expressions of interest that may come up as the process unfolds – that same information if made public could impact the way in which prospective buyers evaluate the properties in question. Buyers will perform their own valuations and the third-party valuation data should stay sealed until its revelation cannot reasonably be expected to frustrate or negatively impact the very sales process for which the information was sought.

[13] As regards the third condition, I find that the Receiver has been a bit overcautious in seeking to seal the listing proposals in addition to the appraisals. The only objection to revealing them now that was made was that some of them discuss ranges of potential values which could impact the sales process. That objection – potentially a valid one – is easily dealt with by requiring a redacted set of those documents to be circulated without the offending valuation estimates.

[14] The last condition was inserted to recognize the fact that while the parties have had an adequate opportunity to review the sales process as described in the Monitor's report, but they have not seen the actual documents. They shall have until Wednesday morning to do so. Redacted copies of the listing agreements – redacted only to remove references to opinions regarding value – will enable all of the parties to satisfy themselves that the proposed agreements conform to the description of them given by the Receiver in its Report.

[15] Accordingly, an order shall go in the terms of (b), (c) and (d) of the Notice of Motion. The approval of the marketing and sales process is suspended until Wednesday, June 2, 2021 pending further submissions if any that may be made after reviewing the redacted listing proposals. Unless a further order is made at that time, the approval order is effective as and from May 31, 2021. The sealing order shall be restricted in time in the manner indicated above.

[16] This substance of this endorsement was delivered orally and my orders were effective as of May 31, 2021. This endorsement was released to the parties in writing this day (June 1, 2021) and paragraph 3 hereof was revised in an immaterial respect following the re-attendance of the parties on June 2, 2021.



S.F. Dunphy J.

Date: June 2, 2021

Appendix “G”

Court File No. CV-21-00656398-00CL

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

THE HONOURABLE	)	THURSDAY, THE 5th
	)	
JUSTICE KOEHNEN	)	DAY OF AUGUST, 2021

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

APPROVAL AND VESTING ORDER

THIS MOTION, made by Rosen Goldberg Inc., in its capacity as receiver and manager (in such capacities, the "**Receiver**"), of all of the assets, undertakings and properties of The Midas Investment Corporation (the "**Debtor"**), appointed as

Receiver pursuant to the Order of the Honourable Justice Cavanagh dated April 6, 2021 (the "**Appointment Order**"), for an Order, among other things, approving the sale transaction (the **"Transaction"**) contemplated by an Agreement of Purchase and Sale made as of June 25, 2021 (the **"Sale Agreement"**) and appended to the Second Report of the Receiver dated July 16, 2021 (the **"Second Report"**) between the Receiver, as Vendor, and 1445990 Ontario Limited, as purchaser (the "**Purchaser**"), and vesting in the Purchaser the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "**Purchased Assets**"), was heard this day by way of video conference as a result of the COVID-19 pandemic.

ON READING the Second Report, and on hearing the submissions of counsel for the Receiver, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Hayley Morgan sworn July 22, 2021, filed:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that the Transaction contemplated in the Sale Agreement for the sale of the Eastern Avenue Property is hereby approved, and the execution of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Receiver's Certificate**"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed in Schedule "B" hereto], shall vest absolutely in the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Cavanagh dated April 6, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D" hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule "B" hereto (the "**Real Property**") in fee simple, and is hereby directed to delete and

expunge from title to the Real Property all of the Claims listed in Schedule "C" hereto.

5. **THE COURT HEREBY ORDERS** that the Land Registrar shall vest title as herein provided, free and clear of, and without regard to, any relevant writs of executions that may have been filed with the Sheriff as against each and every registered owner, either before or after the date of this Order.

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. **THIS COURT ORDERS AND DIRECTS** the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

8. **THIS COURT ORDERS** that, notwithstanding:

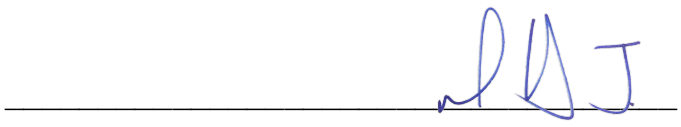
(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.



Schedule "A" – Form of Receiver's Certificate

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Cavanagh of the Ontario Superior Court of Justice, Commercial List, dated April 6, 2021, Rosen Goldberg Inc. was appointed as the receiver and manager (in such capacities, the "**Receiver**") of the undertakings and properties of The Midas Investment Corporation (the "**Debtor**").

B. Pursuant to an Order of the Court dated August 3, 2021, the Court approved the Agreement of Purchase and Sale made as of June 25, 2021 (the "**Sale Agreement**") between the Receiver [Debtor] and 1445990 Ontario Limited (the "**Purchaser**"), and provided for the vesting in the Purchaser of all of the Debtor's right, title, and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions on Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and,

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver by email as a result of the COVID-19 pandemic at _____ [TIME] on _____ [DATE].

ROSEN GOLDBERG INC., in its capacity as Receiver and Manager of the assets, undertakings and properties of The Midas Investment Corporation, and not in its personal capacity

Per: _____

Name: Brahm Rosen

Title: President

Schedule "B" – Purchased Assets

Real Property

PIN 21078 – 0144 (LT)

PT LT 19 N/S SOUTH PARK ST W/S SUMACH ST PL 108 TORONTO; PT LT 20 N/S SOUTH PARK ST W/S SUMACH ST PL 108 TORONTO AS IN ES61367 & CT627853 EXCEPT PT 1 RD162; CITY OF TORONTO

Municipally known as 90 Eastern Avenue, Toronto, Ontario

Schedule "C" – Claims to be deleted and expunged from title to Real Property

	REGISTRATION NUMBER	**DATE**
1.	Instrument No. AT1770086	2008/05/01
2.	Instrument No. AT3248954	2013/03/04
3.	Instrument No. AT3248955	2013/03/04
4.	Instrument No. AT3294572	2013/05/07
5.	Instrument No. AT3563264	2014/04/23
6.	Instrument No. AT3880897	2015/05/12
7.	Instrument No. AT3913858	2015/06/15
8.	Instrument No. AT5008753	2018/11/16
9.	Instrument No. AT5699411	2021/04/07
10.	Execution No. 15-0007478	2015/12/14
11.	Execution No. 17-0007285	2017/11/20

Schedule "D" – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(Unaffected by the Vesting Order)

B E T W E E N

COSA NOVA FASHIONS LTD. et al. Applicants	-and-	THE MIDAS INVESTMENT CORPORATION Respondent

Court File No. CV-21-00656398-00CL

	ONTARIO **SUPERIOR COURT OF JUSTICE** **COMMERCIAL LIST** Proceeding commenced at TORONTO
	APPROVAL AND VESTING ORDER
	MINDEN GROSS LLP Barristers and Solicitors 2200 - 145 King Street West Toronto, ON M5H 4G2 **Raymond M. Slattery** (LSO# 20479L) rslattery@mindengross.com Tel: 416-369-4149 Lawyers for the Receiver, Rosen Goldberg Inc.

Appendix “H”

Court File Number: CV-21-00656398

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

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:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and –

THE MIDAS INVESTMENT CORPORATION

Respondent

Case Management ☐ Yes ☒ No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:

Raymond M. Slattery for the Receiver, Rosen Goldberg Inc. Michael G. McQuade for the Thomas Farrell Symon Zucker and Nancy Tourgis for Midas and John Kavanagh Robert A. Klotz for Auto World Imports David P. Preger for the Applicants		

☒ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

Date Heard: August 3 and 5, 2021

1. The Receiver of The Midas Investment Corporation ("Midas") seeks an order approving the sale of a property at 90 Eastern Avenue in Toronto pursuant to an agreement of purchase and sale with the tenant of that property.

2. Midas opposes the sale and has brought a cross-motion compelling the Receiver to comply with the Order of Justice Dunphy dated May 31, 2021 related to the Receiver's

marketing and sales plan for the Eastern Avenue property as well as another property located at 205 Yonge St.

3. I heard the motions on August 3 and August 5, 2021. At the end of the hearing on August 5, I indicated that I was approving the sale of the Eastern Avenue property as the Receiver requested and was dismissing the motion of Midas in relation to the Eastern Avenue property. I provided a brief oral explanation for the reasons underlying my decision and indicated that written reasons would follow shortly. On August 5, I also signed orders giving effect to the sale.

4. The Receivership arises out of a first mortgage that was placed on the property on March 4, 2013 which secured a debt of $5 million together with interest at 10%. The mortgage has been in default since October 1, 2013.

5. The applicant mortgagees were prevented from enforcing the mortgage by an action brought by Thomas Farrell which claimed the mortgage was void. because it had been fraudulently obtained by his erstwhile business partner and advisor, Thomas Kavanagh. I dismissed that action on December 31, 2020.

6. Mr. Kavanagh was the representative of Midas on the motion to resist the sale of the Eastern Avenue property. He described himself as a principal of Midas. Mr. Farrell also appeared through counsel on the motion. Mr. Farrell now supports the position of Mr. Kavanagh in resisting the sale of the property.

7. Midas objects to the proposed sale for three reasons. First, it submits that the Receiver did not comply with the order of Justice Dunphy who approved a particular

sales process for the Eastern Avenue property which the Receiver did not follow. Second, Midas submits that it has financing in the offing to completely pay out the amount of the mortgage on both the Eastern Avenue property and the Yonge Street property and should be allowed 10 business days to have those funds paid into court. Third, it submits that the sale of the Eastern Avenue property is below market value.

Alleged Noncompliance with the Order of Dunphy J.

8. The order of Justice Dunphy contemplated a process by which the listing agent would market the property, receive bids and then enter into a final round of negotiations with those bidders that the Receiver thought most appropriate. Midas objects that the Receiver did not follow this process and instead, negotiated a sale directly with the tenant at 90 Eastern.

9. Midas submits that a Receiver's failure to follow a court-approved sales process has led courts to reject proposed sales and to disallow the Receiver's fees: HSBC v. Mahvash Lechcier-Kimel 2013 ONSC 6185.

10. It is correct that the Receiver did not follow the sales process that it had proposed to Justice Dunphy and that Justice Dunphy approved. Whether that was improper, however, depends on the reasons for which the Receiver did not follow that process.

11. The tenant at Eastern Avenue entered into a lease in May 2017 for a five-year term with two options to renew for five years each. The first term expires in May 2022.

12. As it turns out, Midas had arranged for the tenant to pay $1,000,000 to Midas on July 30, 2018. That amount purported to prepay monthly rent from August 2018 through to April 2023. In addition, on December 2, 2020, the tenant paid a further $1,000,000 to Mr. Farrell personally pursuant to a direction signed by Farrell on behalf of Midas. The second tranche of $1,000,000 prepaid rent to May 31, 2027.

13. I note that the payments of $2,000,000 were made at a time when the mortgagee had already taken steps to enforce the mortgage which were being thwarted by a lawsuit brought by Mr. Farrell. The second tranche was paid while my judgment about the underlying validity of the mortgage was under reserve. There could be no doubt that the payment of rent until 2027 would make it significantly harder for the mortgagees to enforce their security on the Eastern Avenue property.

14. Midas appeared on these motions with counsel and filed an affidavit of Thomas Kavanagh who described himself as a principal of Midas. Neither Midas nor Mr. Kavanagh took the position that the payment of $1,000,000 by the tenant to Mr. Farrell personally was in any way improper.

15. In addition, Midas had already entered into an agreement of purchase and sale with the tenant on January 17, 2019 for the purchase of the Eastern Avenue property.

16. The Receiver obtained the documentation demonstrating that the tenant had paid $2,000,000 in advance rent and had entered into an agreement of purchase and sale with Midas only after Justice Dunphy issued the sales process order.

17. Before Justice Dunphy approve the sales process, the Receiver had received partial information concerning transactions between the tenant and Midas but did not have

complete information and had no documentation supporting the allegations that the tenant had made. The Receiver noted before Justice Dunphy that it may need to revise the sales process depending on what further information came to light.

18. The Eastern Avenue property is an investment property. All appraisals and brokerage reports on the property value it based on its income flow. The Receiver has now become aware that the tenant, at the instance of Midas, had prepaid rent until May 31, 2027.

19. The Receiver considered that fact and concluded that the tenant would be uniquely motivated to protect the financial outlay it had already made on the property. At the same time, for the Receiver to disclaim the lease and the tenant's agreement of purchase and sale would involve costly and time-consuming litigation. As a practical matter it is highly unlikely that an arm's length party would purchase a property that would not be earning any rent until after May 31, 2027 and was subject to a competing agreement of purchase and sale.

20. In those circumstances it would have been silly for the Receiver to mechanistically follow the sales process approved by Justice Dunphy when the sales process would, in all probability, lead to nothing. The Receiver acted prudently and in a businesslike fashion rather than like the mechanical automaton that Midas apparently prefers.

Alleged Midas Financing

21. Midas submits that it now has financing to pay out the entirety of the mortgage amounts owing on both Eastern Avenue and Yonge Street. It says it needs only 10

days to have those funds paid into court. Midas submits that, given its imminent ability to pay off the mortgages in their entirety, I should not approve the sale of the Eastern Avenue property. I cannot accept that position.

22. As noted, the mortgage has been in default since October 2013. Midas has had more than enough time to redeem the mortgages. It has not done so. Instead, it has engaged in complex, lengthy litigation to avoid payment. As noted in my trial decision, Mr. Farrell and Midas have the unfortunate tendency of borrowing money, refusing to pay it back and then engaging in complex litigation in which the identity of the real players is obfuscated all in an effort to exhaust the lender and force it into accepting a compromise on its debts. Their behaviour on these motions continues that pattern.

23. Since May, 2021 the Receiver has received overtures from various individuals claiming to have financing available to pay out the mortgages. Nothing has materialized from those overtures. On this motion, Mr. Kavanagh filed an affidavit in which he states that he now has "a signed agreement with a new lender for a loan of up to $15,000,000 which is more than enough to resolve this matter." That agreement is dated July 19, 2021.

24. On July 30 Mr. Kavanagh swore an affidavit in which he says that he understands "that the lender is currently engaging counsel in Toronto to represent him in this matter." There is no explanation for why the lender was not able to obtain counsel between July 19 and July 30.

25. There is no information about the lender in the affidavit apart from an undated letter from someone purporting to be a Spanish lawyer stating that the lender is an individual

who is a property developer in Spain. It also attaches a screenshot of what purports to be a bank account showing a deposit of €16,000,000. Mr. Kavanagh advised me that the individual lender was present at the virtual hearing on August 5, 2021. There was an individual attending the hearing by that name. Although I made clear that anyone who wanted to make submissions was free to do so and although I invited submissions from any and all on several occasions, the person purporting to be the lender made no submissions.

26. Even if I assume that Midas actually has the ability to pay out the mortgage within 10 days time, something I seriously doubt based on the history of this matter, I would still not be inclined to allow Midas to do so.

27. The issue here goes beyond the interests of the parties before me and goes to the integrity of court ordered receiverships. After six years of default on the mortgage, the mortgagees were finally able to appoint a Receiver. Even that was challenged by Midas. The challenge was dismissed by both the Superior Court and the Court of Appeal. The Receiver proceeded in good faith to exercise its mandate.

28. It examined and undertook sales efforts on the Eastern Avenue property and concluded that negotiating with the tenant was the most viable business option. It also conducted a sales process for the Yonge Street property in respect of which it received offers on July 14, 2021. At the time the Eastern Avenue motion was heard, the Receiver was reviewing offers on the Yonge Street property and sought to schedule a further hearing to approve a sale of the Yonge Street property.

29. The Midas proposal would also prevent the sale of the Yonge Street property and would allow Midas to redeem the mortgage. Arm's-length parties have conducted due diligence on the Yonge Street property and submitted offers. It would be wholly

inappropriate to have arm's-length parties engage in those efforts only to have the opportunity pulled out from underneath them at the last minute because a debtor who has been in default for six years claims he now has the ability to redeem the mortgage.

30. Permitting that to occur would undermine the process of court ordered Receiverships generally and would discourage people from bidding in receiverships. In this case, I would be doing so to assist a party that has persistently refused to honour its debts, has a pattern of obfuscating who was acting for whom, and has deliberately tried to undermine the sale of the Eastern Avenue property by obtaining six years of prepaid rent while mortgage enforcement proceedings were underway.

31. While I am not ruling out the possibility of ever allowing debtors to redeem in the face of agreements of purchase and sale in a court ordered receivership, there must be significant equities in favour of the debtor to prompt a court to do so. Not only are there no equities in favour of Midas here, all of the equities point away from Midas in favour of the mortgagees.

32. After I indicated to the parties what my ruling was on August 5, Mr. Kavanagh made additional submissions personally. First, he stated that he was making the submissions in his capacity as a guarantor and sought to defend his interest in that capacity. I do not find that persuasive. The Receiver's proposed sale of the Eastern Avenue property and the offers that it has received on the Yonge Street property would entirely pay out the mortgage debt plus expenses. As a result, Mr. Kavanagh is not threatened in his capacity as a guarantor.

33. Second, he asked me to allow Midas to redeem only the Eastern Avenue portion of the debt. I am not inclined to do that either for generally the same reasons as set out above. Midas and Mr. Kavanagh have had ample opportunity to pay out the debt,

they have declined to do so. Instead, they have taken steps to undermine the ability of the mortgagees to enforce their debt and have tried to undermine the receivership process by failing to advise the court at any time that rent on the Eastern Avenue property had been prepaid to the end of 2027. That is consistent with the pattern of Midas's behaviour that I observed in the underlying trial reasons. Midas and its principles apply great imagination to various mechanisms of making it extremely difficult for mortgagees to enforce their security. They do so all in an effort to persuade the creditor to compromise its debt. Plainly put, they wish to borrow a dollar but pay something significantly less back. That behaviour deserves no protection or assistance from the court.[1]

Alleged Undervaluation of the Eastern Avenue Property

34. Midas submits that the sale of the Eastern Avenue property is below fair market value. The proposed sales price compares favourably to an appraisal report that the Receiver has obtained and also compares favourably to the listing proposals of several potential brokers.

35. Midas has submitted a Comparative Market Analysis report from Harvey Kalles Ltd. It values the Eastern Avenue property at considerably more than the proposed purchase price.

[1] While there are mechanisms to allow debtors to pay back less than they have borrowed such as those envisaged by the CCAA, or provisions relating to proposals or plans of arrangement; those have no application here and are in any event subject to their own judicial controls (like good faith of the debtor) which are absent here.

36. The Kalles report does not explain the difference between a Comparative Market Analysis and an appraisal. The report does, however, make it quite clear that it is not an appraisal. The "as is where is" portion of the Kalles report is also based on rental income. There is no suggestion in the Kalles report that I was taken to which indicates that Kalles was aware that the property would not earn any rental income until June 2027 or that the property was subject to a competing agreement of purchase and sale between the tenant and Midas.

37. In those circumstances, I am of the view that the appraisal and the and brokerage reports that the Receiver obtained are more reliable than the Kalles report.

38. I am not inclined to prevent the sale that the Receiver proposes. If the value of the Eastern Avenue property is truly what the Kalles report indicates, then Midas should have had no difficulty obtaining financing long before now. It has failed to do so.

39. At the end of the day, the fight here is about who obtains the potential upside in the two properties. The Receiver advises me that the combined sales of the Eastern Avenue property that I have approved and the offers that the Receiver has received on the Yonge Street property are more than enough to pay out the mortgages and all expenses. In those circumstances, Midas is completely protected in that it will not suffer a loss on the property.

40. What Midas loses is what it perceives to be the potential upside on the property. If Midas is in fact losing that, it is entirely the author of its own misfortune. It has had six years to remedy the situation. It has failed to do so entirely. Instead, it has mounted aggressive litigation to avoid the debts.

Sealing Order

41. The Receiver seeks an order sealing certain confidential appendices until the sales of the Eastern Avenue and Yonge Street properties have been completed. The appendices at issue comprise appraisals, brokerage proposals and purchase offers with respect to the subject properties.

42. In Sherman Estate v. Donovan, 2021 SCC 25 the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:

    i. court openness poses a serious risk to an important public interest;

    ii. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

    iii. as a matter of proportionality, the benefits of the order outweigh its negative effects.

43. All 3 factors are satisfied here. The documents the Receiver seeks to seal contain appraisals of the property and the purchase price of the sale. If those are publicly available, they could prejudice any subsequent sale if the proposed sale does not close. There is an important public interest in allowing Receivers to maximize value. Sealing the documents is the only way to protect that interest. The sealing order is

proportionate. The balance of the court file is public. I am satisfied that the benefits of sealing outweigh the limited negative effects on the open courts principle.

Koehnen J.

August 9, 2021

Appendix “I”

Court File No. CV-21-00656398-00CL

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

THE HONOURABLE	)	THURSDAY, THE 12th
	)	
JUSTICE KOEHNEN	)	DAY OF AUGUST, 2021

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

APPROVAL AND VESTING ORDER

THIS MOTION, made by Rosen Goldberg Inc., in its capacity as receiver and manager (in such capacities, the "**Receiver**"), of all of the assets, undertakings and properties of The Midas Investment Corporation (the "**Debtor"**), appointed as

Receiver pursuant to the Order of the Honourable Justice Cavanagh dated April 6, 2021 (the "**Appointment Order**"), for an Order, among other things, approving the sale transaction (the **"Transaction"**) contemplated by an Agreement of Purchase and Sale made as of July 14, 2021 (the **"Sale Agreement"**) and appended to the Third Report of the Receiver dated August 5, 2021 (the **"Third Report"**) between the Receiver, as vendor, and 2434874 Ontario Ltd. (in trust for a company to be incorporated), as purchaser, which has been assigned to 2856809 Ontario Inc. (hereinafter referred to as the "**Purchaser**"), and vesting in the Purchaser the Debtor's right, title and interest in and to the assets described in the Sale Agreement (the "**Purchased Assets**"), was heard this day by way of video conference as a result of the COVID-19 pandemic.

ON READING the Third Report, and on hearing the submissions of counsel for the Receiver, no one appearing for any other person on the service list, although properly served as appears from the affidavit of Hayley Morgan sworn August 9, 2021, filed:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and Motion Record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS AND DECLARES** that the Transaction contemplated in the Sale Agreement for the sale of the Yonge Street Property is hereby approved, and the execution of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Receiver's Certificate**"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed in Schedule "B" hereto], shall vest absolutely in the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Cavanagh dated April 6, 2021; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule "C" hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule "D" hereto) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule "B" hereto (the "**Real Property**") in fee simple, and is hereby directed to delete and

expunge from title to the Real Property all of the Claims listed in Schedule "C" hereto.

5. **THE COURT HEREBY ORDERS** that the Land Registrar shall vest title as herein provided, free and clear of, and without regard to, any relevant writs of executions that may have been filed with the Sheriff as against each and every registered owner, either before or after the date of this Order.

6. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

7. **THIS COURT ORDERS AND DIRECTS** the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

8. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtor;

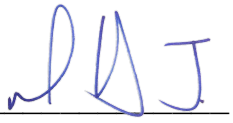
the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

10. **THIS COURT ORDERS** that the Confidential Appendices 1 and 2 contained in the Third Report are hereby sealed until the earlier of:

i. The closing of the Transaction contemplated in the Agreement of Purchase and Sale dated July 14, 2021; or

ii. Further Order of the Court.



Schedule "A" – Form of Receiver's Certificate

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and -

THE MIDAS INVESTMENT CORPORATION

Respondent

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Cavanagh of the Ontario Superior Court of Justice, Commercial List, dated April 6, 2021, Rosen Goldberg Inc. was appointed as the receiver and manager (in such capacities, the "**Receiver**") of the undertakings and properties of The Midas Investment Corporation (the "**Debtor**").

B. Pursuant to an Order of the Court dated August 12, 2021, the Court approved the Agreement of Purchase and Sale made as of July 14, 2021 (the "**Sale Agreement**") between Receiver, as vendor, and 2434874 Ontario Ltd. (in trust for a company to be incorporated), as purchaser, which has been assigned to 2856809 Ontario Inc. (hereinafter referred to as the "**Purchaser**"), and provided for the vesting in the Purchaser of all of the Debtor's right, title, and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions on Closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and,

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver by email as a result of the COVID-19 pandemic at _____ [TIME] on _____ [DATE].

ROSEN GOLDBERG INC., in its capacity as Receiver and Manager of the assets, undertakings and properties of The Midas Investment Corporation, and not in its personal capacity

Per: _____

Name: Brahm Rosen

Title: President

Schedule "B" – Purchased Assets

Real Property

PIN 21098-0085 (LT)

PT PARKLT 8 CON 1 FTB TWP OF YORK PT 5 63R4643 T/W CA797973; CITY OF TORONTO; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 6 & 7 ON PLAN 66R-15815 AS IN AT3757274; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 1, 2 & 8 PLAN 66R-15815 AS IN AT3757274; SUBJECT TO AN EASEMENT OVER PART 5 PLAN 63R-4643 IN FAVOUR OF PARTS 11, 12, 19M 20, 21, 22, 23, 24, 32. 34, 35, 37, 38, 40, 41, 52, 53, 57, 58, 59, 60, 61 & 62 ON PLAN 66R-27069 AS IN AT3757274; CITY OF TORONTO

Municipally known as 205 Yonge Street, Toronto, Ontario

Schedule "C" – Claims to be deleted and expunged from title to Real Property

1. Instrument AT1370731
2. Instrument AT3248954
3. Instrument AT3248955
4. Instrument AT3249002
5. Instrument AT3249193
6. Instrument AT3294572
7. Instrument AT3563263
8. Instrument AT3757275
9. Instrument AT3757276
10. Instrument AT3757277
11. Instrument AT3757278
12. Instrument AT3880897
13. Instrument AT3913858
14. Instrument AT5699411
15. Execution No. 15-0007478
16. Execution No. 17-0007285

Schedule "D" – Permitted Encumbrances, Easements and Restrictive Covenants related to the Real Property

(Unaffected by the Vesting Order)

(i) CT159504

(ii) 63BA1090

(iii) 63R4643

(iv) CA641159

(v) CA797974

(vi) AT1759722

(vii) AT3249002

(viii) AT3757273

(ix) AT3757274

(x) 66R30428

(xi) AT5738912

B E T W E E N

COSA NOVA FASHIONS LTD. Applicants	-and-	THE MIDAS INVESTMENT CORPORATION Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

APPROVAL AND VESTING ORDER

MINDEN GROSS LLP
Barristers and Solicitors
2200 - 145 King Street West
Toronto, ON M5H 4G2

Raymond M. Slattery (LSO# 20479L)
rslattery@mindengross.com
Tel: 416-369-4149

Lawyers for the Receiver, Rosen Goldberg Inc.

Appendix “J”

Court File Number: CV-21-00656398

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

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:

COSA NOVA FASHIONS LTD., B & M HANDELMAN, INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEPHEN HANDELMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADA INVESTMENT CORPORATION

Applicants

- and –

THE MIDAS INVESTMENT CORPORATION

Respondent

Case Management ☐ Yes ☒ No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:

Catherine Francis for the Receiver, Rosen Goldberg Inc. Michael G. McQuade for the Thomas Farrell Kevin Sherkin for Midas and John Kavanagh David P. Preger for the Applicants		

☒ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

Date Heard: August 12, 2021

Corrigendum: After releasing the original form of this endorsement, counsel advised me that paragraph 1 of my endorsement referred to an earlier endorsement of mine dated "April 9, 2021." The reference should have been to my earlier endorsement of August 9, 2021. This version of the endorsement corrects that error. The earlier version of the endorsement is withdrawn and replaced with this one. There are no other changes to the first version of the endorsement.

1. This endorsement should be read together with my endorsement of August 9, 2021. Much of the background to the motion is contained in that endorsement which I will not repeat here.

2. On this motion, the Receiver of The Midas Investment Corporation ("Midas") seeks an order approving the sale of a property at 205 Yonge St. in Toronto. I approved the sale at the end of the hearing on August 12 and indicated that reasons would follow today.

3. Mr. Kevin Sherkin and appeared on behalf of Mr. Kavanagh. Mr. Sherkin indicated that he had just been retained on the day of the motion and sought an adjournment to file materials. He also indicated that he expected funds to arrive in his trust account within a day or two which would allow Midas to entirely pay out the mortgage on the Yonge Street property and on the Eastern Avenue property.

4. I declined the adjournment. I had indicated on August 6, 2021 that the motion would be proceeding on August 12. The motion is not complex. The issue is whether the Receiver complied with the principles in *Soundair* so as to lead the court to approve the sale of the 205 Yonge St. property.

5. Although Mr. Kavanagh's earlier lawyer, Mr. Zuker indicated that he could not appear on August 12 because he was hoping to take a few days off, Mr. Zuker was accompanied by Nancy Tourgis, an experienced commercial litigator who was more than qualified to argue the motion on Mr. Kavanagh's behalf. In the email correspondence surrounding the scheduling of the motion, I was given no reason for which Ms. Tourgis could not argue the motion.

6. Mr. Kavanagh resisted the sale of the Eastern Avenue property at the hearings on August 3 and August 5 on the basis that the sale did not comply with the sales approval order of Justice Dunphy. No such argument is advanced with respect to the Yonge

Street property. On August 3 and 5 Mr. Kavanagh noted that there was no evidence about what the Receiver did to market the Yonge St. property. That was correct but there was no motion in respect of Yonge St at that time. The Receiver has since delivered a motion record for the Yonge St. sale.

7. In *Royal Bank of Canada v. Soundair Corp*., 1991 CanLII 2727 the Ontario Court of Appeal set out the duties of a court when deciding whether a receiver who has sold a property acted properly:

    i. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

    ii. It should consider the interests of all parties.

    iii. It should consider the efficacy and integrity of the process by which offers are obtained.

    iv. It should consider whether there has been unfairness in the working out of the process.

8. Since then, these factors have been broadly accepted as the benchmarks to consider when approving a proposed sale by a court ordered receiver.

9. I am satisfied when considering these factors that the proposed sale should be approved.

i. Sufficient Effort to Get the Best Price

10. I am satisfied that the Receiver made sufficient efforts to obtain the best price for the property. Those steps include the following:

i. It obtained an appraisal from Avison Young on May 25, 2021.

ii. It retained Institutional Property Advisors ("IPA) to market and sell the property.

iii. IPA listed the property on MLS.

iv. IPA obtained and compiled due diligence information and created a virtual data room.

v. IPA prepared an investment summary for distribution to prospective investors.

vi. IPA initiated an electronic marketing campaign which included a broad email blast to over 2000 potential investors from its own distribution list, and marketed the property through its own broker network.

vii. IPA advertised the property in the Globe and Mail on July 6 and July 8.

viii. IPA made targeted calls to key investors.

11. As a result of those efforts, 17 investors expressed interest, 7 toured the property. Four investors made offers on July 14, 2021. The Receiver invited two of the four to participate in a second round of bidding and to resubmit improved offers by July 20, 2021.

12. The offer that the Receiver proposes compares favourably with the appraisal it received and is the highest of the offers received.

13. The combined payments from the Eastern Avenue and Young Street properties are sufficient to pay out all encumbrances on both properties.

14. In addition, the Receiver does not believe that further marketing would result in a superior realization on the Yonge Street property. It is a property that has fallen into serious disrepair and was sold on an as is where is basis.

15. In my view, the foregoing steps demonstrate that the Receiver has acted reasonably in making efforts to get the best price for the property and has not acted improvidently.

ii. The Interests of the Parties

16. The offer that is being proposed is in the interests of all parties. The payouts on both the Eastern Avenue and Yonge Street properties are sufficient to pay off encumbrances (assuming the sales are able to close quickly and payouts can be made quickly). That means mortgagees will be fully paid after years of waiting. It also means that Mr. Kavanagh will be absolved of the risk of further liability on his guarantee.

17. Although Midas and Mr. Kavanagh may not enjoy the upside of any potential additional value on the two properties, in my view they are not entitled to that upside for the reasons set out in paragraphs 39 and 40 of my endorsement dated August 9, 2021.

iii. Efficacy and Integrity

18. The receiver has run and efficient process. Efficiency and timing are of benefit to the parties. The mortgage bears a relatively high rate of interest. The faster a sale can be achieved, the more likely it is that the mortgagees will be paid out fully and the less likely it is that the guarantors will be exposed to personal liability.

19. There is no suggestion that the Receiver did not act with integrity.

iv. Fairness in the Process

20. I am satisfied that the process has been fair to the parties.

21. Midas and Mr. Kavanagh no doubt feel that it is unfair that they have been deprived of the opportunity to redeem the mortgages. I have addressed that issue in my reasons of August 9, 2021 and will not repeat those here except to underscore that the issues with respect to the Yonge Street property involve the integrity of the judicial process and the process of court supervised receivership sales. Midas and Mr. Kavanagh have had ample time to redeem the mortgage. If debtors are permitted to redeem after a receiver has gone through the effort of running a sales process and after arm's length parties have committed energy and potentially set aside capital to complete the transaction on which they are bidding, court supervised receivership sales run the risk of obtaining lower prices because of the uncertainty associated with them.

22. When balancing the potential unfairness to Midas and Mr. Kavanagh of being deprived of the chance to redeem the mortgage at this late stage against the unfairness to the mortgagees of still not actually having funds for redemption available and the threat to receiverships as a whole, there is, in my mind, no contest. Any perceived unfairness to which Midas and Mr. Kavanagh are subject is entirely of their own making.

Sealing Order

23. The receiver also seeks a sealing order with respect to confidential appendices to its report. The appendices consist of the Avison Young appraisal, a marketing summary prepared by the receiver and the offer for which approval is sought.

24. The test and analysis with respect to sealing orders is contained in my reasons of August 9 in paragraphs 41 – 43. I grant the sealing order for the reasons contained in those paragraphs.

25. I would, however, make one revision to the scope of the sealing order here. The marketing summary contains a great deal of information that is public and does not reveal any views about the value of the property. On my reading, the only page of the marketing summary that contains confidential information is the page headed "Offers Summary and Final Result" which is page 127 of the motion record. I advised the Receiver during the hearing that it will be required to file a public version of the

marketing summary which redacts that page. I have since been advised that this has been done.

Distribution Order

26. At the conclusion of the hearing, Mr. Preger for the applicants asked that I also issue a distribution order to authorize the Receiver to pay out funds received on the sale. I declined to do so on the record before me.

27. That relief was not sought in the Notice of Motion for this hearing. I have no material that indicates how much the Receiver proposes to distribute to which parties or on what basis.

28. A distribution also raises potential issues with respect to an appeal of my underlying judgment. As a general rule, orders for the payment of money are stayed pending appeal while others are not. Although Paciocco J.A. dismissed Midas' motion to stay the sale of the properties pending appeal, I was not prepared to issue a distribution order on the spur of the moment without having at least the opportunity to review his reasons to determine whether they also allow the distribution of any funds generated on the sale of the properties. It strikes me that a payment out might be subject to a different analysis than the sale of the properties. At a minimum, I and the respondents should have the opportunity to think that issue through on a proper record.

Koehnen J.

August 13, 2021

Appendix “K”

COURT OF APPEAL FOR ONTARIO

CITATION:
DATE: 20210823
DOCKET: M52741 (C69767)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Cosa Nova Fashions Ltd., B & M Handelman, Investments Limited, Comfort Capital Inc., 693651 Ontario Ltd., E. Manson Investments Limited, Natme Holdings Ltd., Francie Storm, Barsky Investments Ltd., Stephen Handelman, Rosewill Investment Corporation, Thomas Bock, The Bank of Nova Scotia Trust Company and Canada Investment Corporation

Applicants

and

The Midas Investment Corporation

Respondent

Catherine Francis, for the moving party, Rosen Goldberg Inc.

Kevin Sherkin, for the responding party, John Kavanagh

David P. Preger, for the applicants

Michael G. McQuade, for the respondent

Robert A. Klotz and Timothy Danson, for Auto World Imports

Heard: August 20, 2021 by video conference

REASONS FOR DECISION

A. OVERVIEW

[1] Rosen Goldberg Inc. (the "Receiver") brings this urgent motion. John Kavanagh, a non-party in the proceeding, is the responding party on the motion. Both made written and oral submissions on the motion.

[2] In addition, the parties to the proceeding – the applicant mortgagees and the respondent Midas Investment Corporation ("Midas") – made oral submissions on the motion. Auto World Imports, the tenant of the "Eastern Avenue property", which is described below, also made oral submissions before me.

[3] This urgent motion arises from two orders made by Koehnen J. (the "Motion Judge") related to the sale of two properties.

[4] The applicants hold a mortgage over the "Eastern Avenue property" and the "Yonge Street property".[1] The mortgage has been in default since October 1, 2013, shortly after it was registered on March 4, 2013. This resulted in the court-appointed Receiver becoming involved in the sale of the properties.

[5] The Motion Judge granted two approval and vesting orders: (i) the August 5, 2021 order (reasons dated August 9, 2021) for the Eastern Avenue property; and (ii) the August 12, 2021 order (reasons dated August 13, 2021, revised on

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[1] While there were initially two mortgages, one for each property, the second mortgage was used to pay out the first mortgage, thereby consolidating the two into a single, large mortgage registered on March 4, 2013: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at paras. 1-2.

August 15, 2021) for the Yonge Street property. The sale of the Yonge Street property is scheduled to close on Monday, August 23, 2021. The sale of the Eastern Avenue property is scheduled to close on Thursday, September 2, 2021.

[6] Mr. Kavanagh has filed two notices of appeal, intending to appeal both approval and vesting orders. The Receiver, concerned that these attempted appeals could derail the imminent closing of the Yonge Street property and the shortly forthcoming closing of the Eastern Avenue property, brought an urgent motion seeking declaratory relief, which I heard on Friday, August 20, 2021. While the Receiver has raised a number of issues, in light of how I am deciding this matter, the only issues I need to address are: (i) whether Mr. Kavanagh has a right to appeal the approval and vesting orders under s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("*BIA*"); and, if not, (ii) whether he should be granted leave to appeal those orders under s. 193(e) of the *BIA*.

[7] The answer to both of these questions is no.

B. BACKGROUND

[8] Midas was the owner of both the Yonge Street and the Eastern Avenue properties. It appears that Mr. Kavanagh worked for Midas as an in-house accountant: *Thomas Farrell v. John Kavanagh*, 2020 ONSC 8154, at para. 13. He was involved in arranging the mortgages on the Yonge Street and Eastern Avenue

properties. In the materials he filed on this motion, Mr. Kavanagh describes himself as a “shareholder and guarantor” of Midas and its properties.

[9] Midas defaulted on the mortgages. Eventually, Midas and Midas’ President, Thomas Farrell, started an action, alleging that the mortgages taken out on the two properties were unauthorized and the result of fraudulent activity by Mr. Kavanagh. After over seven years of litigation, which saw Midas and Mr. Farrell seeking judgment against Mr. Kavanagh, the Motion Judge (who was also the trial judge on the action) determined that the mortgage was valid and dismissed the action: *Farrell*, at para. 124. Midas and Mr. Farrell unsuccessfully sought a stay of the decision: *Farrell v. Kavanagh*, 2021 ONCA 213.

[10] Following the completion of the trial in *Farrell*, the applicants made a demand on Midas for payment of the sum of $11,045,858.94 and, when the demand was not met, applied for the appointment of a receiver. By order dated April 6, 2021, the Receiver was appointed over the assets, undertakings, and properties of Midas, including the Yonge Street and Eastern Avenue properties, which are the subject of this motion.

[11] By order dated May 31, 2021, the marketing and sale process for the properties was approved, and Auto World Imports, the tenant at the Eastern Avenue property, was directed to produce documents showing how much rent they

had prepaid on the property.[2] Subsequently, the Receiver came to learn that: (i) the tenant had paid $2 million in advance rent, half of which was paid while the decision in *Farrell* was under reserve; and (ii) Midas had agreed to sell the Eastern Avenue Property to a company affiliated with the tenant.

[12] Given these newly discovered facts, the Receiver entered into negotiations with the tenant at the Eastern Avenue property and they ultimately entered into an agreement of purchase and sale. Equally, the Receiver entered into a separate agreement of purchase and sale for the Yonge Street property.

[13] After the agreements had been reached in relation to both properties, the Receiver sought and obtained approval and vesting orders. Notably, the combined proceeds to be realized from the sale of the properties will be sufficient to pay out all encumbrances against the properties, although the Receiver acknowledges that it is possible that there could be a shortfall in respect of accrued interest depending on when distributions are authorized.

[14] Mr. Kavanagh has now filed two notices of appeal, one for each of the approval and vesting orders. He maintains that he has a right to appeal the orders under s. 193(c) of the *BIA*.

---

[2] It had come to light that the tenant had prepaid some rent, but that a confidentiality order precluded disclosure of any details of the arrangement that had been made.

[15] In the event he is wrong about that, Mr. Kavanagh has also filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property, pursuant to s. 193(e) of the *BIA*. Counsel for Mr. Kavanagh informs the court that he also filed a motion seeking leave to appeal the August 12, 2021 approval and vesting order relating to the sale of the Yonge Street property, pursuant to s. 193(e) of the *BIA*. If that motion has been filed, it has not yet been located in the court's records. In any event, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the missing leave motion has been properly filed.

C. ANALYSIS

[16] Section 195 of the *BIA* says that "all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of" (emphasis added). The provision goes on to say that a single judge of this court may do any number of things, including cancel the stay for any reason deemed proper.

[17] As I understand it, what has triggered this last-minute motion for declaratory relief is that the Receiver is concerned about the potential operation of s. 195 of the *BIA*. That concern rests on the fact that Mr. Kavanagh has filed two notices of appeal and a leave motion, all arising from the approval and vesting orders made pursuant to the *BIA*. The Receiver wants to foreclose any possible suggestion that the approval and vesting orders – which are required to close the sales of the

Yonge Street property on Monday, August 23, 2021 and the Eastern Avenue property on Thursday, September 2, 2021 – will be the subject of automatic stays pursuant to s. 195 of the *BIA*. If the automatic stays apply, then the Receiver asks that they be cancelled.

[18] The Receiver's concerns are well placed given that Mr. Kavanagh has responded to this motion, suggesting that he has a right to appeal under s. 193(c) of the *BIA* and, therefore, s. 195 operates to automatically stay the approval and vesting orders. He says the stay should not be cancelled. He also argues that, if he is wrong about the right to appeal, then I should grant him leave to appeal and impose stays on that basis.

[19] I have concerns about whether Mr. Kavanagh even has standing to appeal the approval and vesting orders. The Receiver submits that he has no standing as a non-party with no personal stake in the proceeding. In the end, though, as will become clear in these reasons, it is unnecessary for me to settle on the question of standing. For the purposes of these reasons, I proceed on the assumption, but without deciding, that Mr. Kavanagh has standing to challenge the approval and vesting orders.

(1) Is There an Automatic Right of Appeal Under s. 193(c) of the *BIA*?

[20] Mr. Kavanagh's first position is that he has an automatic right of appeal under s. 193(c) of the *BIA*, which reads as follows:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> …
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

[21] The Receiver argues that, in this case, there is no such right of appeal. I agree.

[22] This court has been clear that, given the "broad nature of the stay imposed by s. 195 of the *BIA*", the right to appeal under s. 193(c) must be narrowly construed: *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 15, citing *Enroute Imports Inc., Re.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. As noted by Brown J.A., the narrow construction of s. 193(c) accords with the "needs of modern, 'real-time' insolvency litigation": *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at para. 53. Therefore, Brown J.A. affirmed that s. 193(c) does not provide for an appeal as of right to matters involving: "(i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss": *Bending Lake*, at para. 53.

[23] The operation of any one of these principles is fatal to an applicant's automatic right of appeal pursuant to s. 193(c) of the *BIA:* see, for example,

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611, 49 C.B.R. (6th) 173. The first and third principles are operative in this case.

(a) Is the Order Procedural in Nature?

[24] Section 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, "including orders concerning the methods by which receivers or trustees realize an estate's assets": *Bending Lake*, at para. 54. At least in relation to the appeal from the order relating to the Eastern Avenue property, that is precisely what Mr. Kavanagh is seeking to appeal as of right: the method used by the Receiver to arrive at the agreement of purchase and sale of the Eastern Avenue property.

[25] Mr. Kavanagh's chief complaint is that the Receiver, as he puts it, "sought and obtained the Sale Process order and then abandoned that process and negotiated directly with one party based on new facts." What he is referring to is the fact that, after receiving the May 31, 2021 court order setting out a marketing and sale process that the Receiver would follow for the Eastern Avenue property, the Receiver did not follow that process, but rather negotiated the sale with the current tenant at that property.

[26] As the Motion Judge detailed in his reasons, the Receiver acted reasonably in the circumstances. The Receiver had very good reason to negotiate with the tenant before embarking upon the marketing and sale process that had been

approved in the May 31, 2021 order. That reason rested on the fact that it was only after the May 31, 2021 order was issued that the Receiver came to learn that the tenant at the Eastern Avenue property had prepaid $2 million in rent to Midas and Mr. Farrell, representing rents paid until May 31, 2027, and had actually entered into an agreement of purchase and sale for the property. In light of that state of affairs, the Receiver recognized the obvious: unlike an ordinary buyer, the tenant would be highly motivated to protect its financial outlay, and allowing the tenant to do so would avoid potentially lengthy and costly litigation.

[27] While the Receiver did not seek an order varying the marketing and sale process set out in the May 31, 2021 order on the basis of the new information that had come to light, I am not satisfied that the Motion Judge erred in concluding that the Receiver acted appropriately in the circumstances. Importantly, there is no evidence that the manner in which the Receiver proceeded resulted in any loss.

[28] While Mr. Kavanagh is not pleased with the Receiver's decision to negotiate with the tenant, in my view, his complaint in relation to the Eastern Avenue property is entirely procedural in nature. At its core, his complaint is that the Receiver should have followed a different process for selling the Eastern Avenue property. Section 193(c) does not permit an appeal as of right for this type of procedural complaint.

(b) Does the Order Result in a Loss?

[29] In any event, there is another reason that s. 193(c) does not afford Mr. Kavanagh an appeal as of right in relation to either approval and vesting order.

[30] Section 193(c) grants a right of appeal where "the property involved in the appeal exceeds in value ten thousand dollars". Determining the "value" of the "property involved" is subject to significant constraints because any other approach would lead to an automatic right of appeal in virtually all *BIA* matters: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17.

[31] As Brown J.A. explained in *Bending Lake*, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. The court does not look to the total value of the property involved in the dispute, but to the value of the actual loss (or gain) resulting from the impugned order: *Bending Lake*, at paras. 61-64. The loss (or gain) must be squarely rooted in the evidentiary record. As Brown J.A. stated in *Bending Lake*, at paras. 64 and 69:

> The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald

> allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.
>
> …
>
> … I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[32] Similarly, I am not persuaded that there is anything in the factual record here that supports Mr. Kavanagh's suggestion that he has suffered or will suffer a loss greater than $10,000. The factual record does not even suggest that he has suffered or will suffer any loss at all. Recall that he describes himself, for the purposes of this motion, as the guarantor of the subject mortgage. It is worth emphasizing a point made earlier: it is anticipated that the mortgage will be paid out as a result of the sales of the properties, should those sales move efficiently. Therefore, as a guarantor, Mr. Kavanagh should not lose on the approved sales.

[33] Mr. Kavanagh also points to what he describes as appraisals that have been done by a reputable broker, which value the properties at more than the ultimate purchase price. He further shares his view that this appraisal is at "the low end" of what could be obtained for the properties through a bidding process. As noted by the Motion Judge, the "report" makes clear that it is not an appraisal. The report also does not reference the critical fact that rent had already been prepaid on the property until May 31, 2027, meaning that even if the property could be sold to

someone else, it would not earn rental income for a very long time. As a commercial investment property, this would undoubtedly affect the value received through a bidding process. Moreover, having reviewed the report, it appears that the author of the report was told that the landlord had indicated that the tenant was willing to vacate the property and reoccupy only after the property had been redeveloped. Therefore, few of the underlying premises upon which the report rested accord with reality.

[34] At the very most, as a guarantor, someone in Mr. Kavanagh's position may have a statutory right to redeem the mortgage. Counsel for Mr. Kavanagh stated in oral argument that this is Mr. Kavanagh's primary concern. Mr. Kavanagh asserts he has that right, but has not clearly identified from which statute that right would arise. Others on the motion say he does not have that right in the current circumstances. Others were unsure, identifying various statutes from which that right might arise. In any event, Mr. Kavanagh has not clearly asserted the basis for his purported right of redemption, has not attempted to redeem the mortgage over the past eight years during which it has been in default, and has not proffered any evidence of the value of his loss.

[35] Therefore, I have arrived at the conclusion that there is no evidence in the record to support the suggestion that the value of the property involved in Mr. Kavanagh's appeals exceeds $10,000. Accordingly, I conclude that Mr. Kavanagh does not have a right to appeal either approval and vesting order under s.193(c)

of the *BIA*. This means that there is no automatic stay of the approval and vesting orders pursuant to s. 195 of the *BIA*.

(2) Should Leave to Appeal be Granted Pursuant to s. 193(e) of the *BIA*?

[36] If he does not have a right to appeal under s. 193(c) of the *BIA*, Mr. Kavanagh asks that leave to appeal be granted pursuant to s. 193(e) of the *BIA*. He has filed a motion seeking leave to appeal the August 5, 2021 approval and vesting order relating to the sale of the Eastern Avenue property. Pursuant to s. 193(e), I have jurisdiction to determine this issue as a single judge of this court.

[37] Granting leave to appeal is a discretionary decision. In exercising that discretion, the court must take into account whether the issue: "(1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of bankruptcy/insolvency proceedings": *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 12, referring to *Pine Tree Resorts*, at para. 29; *McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

[38] Applying this test, I would dismiss the motion for leave to appeal.

[39] I see no issue of importance to bankruptcy and insolvency practice. This case is really about mortgages that fell into arrears a very long time ago and obstacles put in the way of the ability of the applicant mortgagees to recover on

their losses. While it is true that the Receiver did not comply with the process as spelled out in the original order of May 31, 2021, the Motion Judge's reasons aptly explain why the Receiver's actions made perfect sense in the unusual circumstances of this case.

[40] In the end, the proposed appeal really come down to Mr. Kavanagh's complaint that the Motion Judge should not have approved the Receiver's decision to deal directly with the tenant at Eastern Avenue. In my view, the Motion Judge's reasons are clear, concise, and directly responsive to the issue at hand. There is no issue of general importance involved.

[41] Nor is the issue one that is *prima facie* meritorious. While Mr. Kavanagh perhaps wishes that the Motion Judge's order were different, it was an order that was available to him to make.

[42] Finally, to grant leave to appeal would undoubtedly hinder the progress of the proceeding by interfering with the sale of the Eastern Avenue property.

[43] For these reasons, I dismiss the leave motion in relation to the Eastern Avenue property.

[44] As indicated above, I am prepared to take Mr. Kavanagh's position at its highest and proceed on the assumption that the leave motion in relation to the Yonge Street property has been filed. However, in my view the proposed appeal raises no issues of importance to the practice, it is not *prima facie* meritorious, and

it would hinder the progress of the proceeding by interfering with the sale of the Yonge Street property.

[45] Given that I have refused to grant leave to appeal under s. 193(e) of the *BIA*, and given that s. 193(c) does not apply, s. 195 is inapplicable and no stay of either of the approval and vesting orders is imposed.

D. CONCLUSION

[46] The Receiver's motion is granted. Mr. Kavanagh's notices of appeal in respect of the August 5, 2021 approval and vesting order and the August 12, 2021 approval and vesting order are quashed. His motion for leave to appeal in respect of the August 5, 2021 approval and vesting order is denied. Proceeding on the assumption that the motion for leave to appeal in respect of the August 12, 2021 approval and vesting order has been filed, it is also dismissed.

[47] I note that there was a time-limited sealing order imposed by the Motion Judge so as to protect the pending sales. Therefore, the Receiver is directed to communicate with the Registrar of this court to identify whether there are any documents that have been filed in this matter that fall within the parameters of the Motion Judge's sealing order or that should otherwise be sealed for a short time pending the completion of the sales.

[48] Costs submissions of no more than three pages may be provided by the moving party and those supporting the moving party no later than August 25, 2021. Mr. Kavanagh may respond with no more than three pages by August 27, 2021.

Faith ACJO

Appendix “L”

Hayley Morgan

From: Koehnen, Mr. Justice Markus (SCJ) <Markus.Koehnen@scj-csj.ca>
Sent: Friday, September 10, 2021 12:04 PM
To: Raymond M. Slattery; JUS-G-MAG-CSD-Toronto-SCJ Commercial List; David Preger - Dickinson Wright LLP (dpreger@dickinson-wright.com); 'mmcquade@mjnlaw.ca'; David Z. Seifer; 'Brahm Rosen'; 'ksherkin@millerthomson.com'; mjn@mjnlaw.ca; Diane.Winters@justice.gc.ca; Crawford, Leslie A. (MOF); Unit, Insolvency (MOF); 'bobklotz@klotzassociates.com'; 'danson@drlitigators.com'; 'rfinkel@blaney.com'; 'jross@rosengoldberg.com'
Subject: RE: Cosa Nova Fashions Ltd. et al. v. The Midas Investment Corporation - Court File No. CV-21-00656398-00CL -

Email Endorsement

I do not appear to have an email for Mr. Bunting. Can I ask Mr. Slattery to ensure he receives a copy of this endorsement.

Issues have arisen with respect to the payout of the mortgages on the Eastern Avenue and Yonge St. properties. They will be dealt with as follows:

$9.5 million or such larger amounts as Mr. Peger's, Mr. Sherkin's and Mr. McQuade's clients can agree upon can be paid out immediately. The remaining issues will be resolved according to the following timetable:

Sept. 14: Mr. McQuade will advise if his client agrees that the principal amount of the mortgage is $4.8 million or $5 million.

Sept. 15: Mr. Sherkin will deliver a statement of objections that sets out the payouts to which he objects together with a short statement setting out the basis of the objection.

Sept. 17. If there is a dispute about whether the mortgage principal is $4.8 million or $5 million, the parties will exchange evidence on that issue. Mr. Bunting will also deliver motion materials to support his client's request for a holdback.

Sept. 17: Mr. Preger will provide back up documentation for any disbursements, the calculation of interest and the calculation of mortgage extension fees.

Sept. 28: Messrs. Slattery, Preger and Bunting will deliver factums

October 5: responding factums delivered.

October 13: reply factums delivered.

October 18: a hearing will occur at 8 AM

Justice Markus Koehnen

Ontario Superior Court of Justice
361 University Ave.
Toronto, Ont.
M5G 1T3
416-327-5284

Appendix “M”

Hayley Morgan

From: John Tracy <jtracy@fct.ca>
Sent: Friday, September 17, 2021 3:20 PM
To: brosen@rosengoldberg.com; Raymond M. Slattery
Cc: Suzana Perik; Brendan Jones; Reeva M. Finkel; David P. Preger; Gary Gruneir (ggruneir@rescomcapital.com) (ggruneir@rescomcapital.com); JNairne@dickinson-wright.com
Subject: RE: COSA NOVA FASHIONS LTD. et al. and THE MIDAS INVESTMENT CORPORATION - Court File No. CV-21-00656398CL - Motion for Distribution re Fund

Hello Messrs. Rosen & Slattery – I am the representative at the title insurance company dealing with the mortgagees claim under their title insurance policy. After discussing the issue of the distribution of funds with David Preger, we both agreed it best that I write you directly concerning the title insurer's position on the distribution of the funds for the judgment costs award.

As you are aware, the validity of the mortgage in question was challenged by way of a legal action commenced against the mortgagees by Thomas Farrell and Midas Investment Corporation. As a result of this legal action, the mortgagees submitted a claim to First American Title Insurance Company ("FATIC") under their title insurance policy. FATIC confirmed coverage for the costs of defending the action and retained Reeva Finkel on behalf of the mortgagees who ended up successfully defending the action and obtaining a judgment declaring that the mortgage was valid. Costs were awarded against Thomas Farrell and Midas Investment Corporation in the amount of $1,573,669.19. Under the subrogation provisions of the policy FATIC is entitled to payment of the costs award. Ms. Finkel has produced an interest calculation showing the amount outstanding on the costs award as of September 16, 2021 with straight line interest from December 31, 2020 at 10% is $1,685,766.17.

On a motion to be heard on October 19 2021, the court will make a determination in respect of the amounts owing under the mortgage. In light of the outstanding issues concerning the amount owing under the mortgage, FCT is of the view that the receiver should continue to hold that portion of the sale proceeds earmarked for the payment of the judgment costs award pending the determination of the court. Costs were also awarded to Colina King, Grace and Rocco Commisso and Margaret Pastore but in lesser priority to the costs awarded to the mortgagees so any funds earmarked to pay these costs awards will also have to be held pending the determination by the court of the amounts outstanding under the mortgage.

John Tracy
Legal Counsel, Legal Services | **FCT**
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Hi Reeva – Further to our discussion, I had a discussion with David Preger and below is the text of an email I am proposing to send to the receiver and its counsel. I am not seeking your advice on the position but merely a request to let me know if you see anything glaring in the email that might compromise FCT's position after the court makes the determination on the amount outstanding on the mortgage.

John Tracy

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Appendix “N”

MINDEN GROSS LLP
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FILE NUMBER 4123367

November 19, 2021

BY ELECTRONIC MAIL

Mr. John Tracy
FCT
2235 Sheridan Garden Dr.
Oakville, ON L6J 7Y5

Dear Mr. Tracy:

Re: Cosa Nova Fashions Ltd. et al. v. The Midas Investment Corporation
Court File No. CV-21-00656398-00CL

We are lawyers for Rosen Goldberg Inc. in its capacity as court appointed Receiver of The Midas Investment Corporation.

As you are aware, on September 10, 2021 Justice Koehnen made an order directing the Receiver to make distributions of at least $9.5 million dollars which included the costs awarded to the mortgagees (and by implication the title insurer).

On September 17, 2021 you requested that those amounts not be paid pending further discussions.

The Receiver has withheld the payment at your request in spite of the clear direction from Justice Koehnen. The judgment provides for payment of interest on the amounts outstanding under the mortgage, including this costs award at 10% per annum.

It is the Receiver's position that it is not fair to the other stakeholders that your claim for payment of costs continues to bear interest at the rate of 10% per annum. In the circumstances, we confirm that the Receiver will not recognize a continued entitlement to interest from October 19, 2021 being the date of the hearing before Justice Cavanagh to determine the amounts owing under the mortgage.

MINDEN GROSS LLP

We trust the foregoing is self-explanatory. Please do not hesitate to contact the undersigned should you have any questions or comments in respect of this position.

Yours truly,

MINDEN GROSS LLP

Raymond M. Slattery
(computer generated signature)

Raymond M. Slattery*
RMS:hm

cc: Brahm Rosen
David P. Preger

*Partner through Professional Corporation

Appendix “O”

Court File Number: CV-21-656398-00CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

IN THE MATTER OF SECTION 243 (1) OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT RSO 1990 C. C.43, AS AMENDED

COSA NOVA FASHIONS LTD., B & M HANDLEMAN INVESTMENTS LIMITED, COMFORT CAPITAL INC., 693651 ONTARIO LTD., E. MANSON INVESTMENTS LIMITED, NATME HOLDINGS LTD., FRANCIE STORM, BARSKY INVESTMENTS LTD., STEVEN HANDLEMAN, ROSEWILL INVESTMENT CORPORATION, THOMAS BOCK, THE BANK OF NOVA SCOTIA TRUST COMPANY AND CANADIAN INVESTMENT CORPORATION

Applicants

AND

THE MIDAS INVESTMENT CORPORATION

Respondent

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Email/Facsimile No:
David P. Preger and David Seifer for Applicants		
Kevin Sherkin and Asim Iqbal for Respondent and John Kavanagh		
Raymond Slattery for Receiver, Rosen Goldberg Inc.		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**

☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

Date of Hearing:

October 19, 2021

ENDORSEMENT

Introduction

[1] Rosen Goldberg Inc., the Court-appointed Receiver (the "Receiver") of The Midas Investment Corporation ("Midas"), moves for an order approving and authorizing the Receiver to the distribute funds from the proceeds from the sale of properties at 205 Yonge Street and 90 Eastern Avenue over which the Applicants hold a first mortgage (the "Mortgage") in accordance with the recommendation set out in the Fifth Report of the Receiver dated September 8, 2021.

[2] Midas and John Kavanagh, a guarantor (together, the "Responding Parties"), dispute the distribution recommended by the Receiver on several grounds. In particular, they dispute distribution of (a) $156,375 plus HST on account of a "manager's fee", (b) $278,413.70 on account of mortgage extension fees; (c) $125,000.01 on account of three months' interest bonus; (d) $358,897.67 on account of protective disbursements; (e) the calculation of interest with compounding.

[3] I address the objections of the Responding Parties below.

Analysis

Are the Applicants entitled to a distribution that includes the management fee?

[4] The Responding Parties object to distribution of money in reimbursement of management fees plus HST in the amount of $176,703.75 charged to the Applicants by C & K Mortgage Services Inc., a mortgage broker that operates as Rescom Capital ("Rescom").

[5] The Mortgage provides, at paragraph 15 of Schedule "A":

> **15. Manager's Fee**
>
> In the event of default herein, C & K Mortgage Services Inc. will be appointed as the Chargee's Manager at the Chargee's discretion and will be entitled to a fee of $250.00 per hour for its services and such fee will be charged to the Chargor's account, and added to the amount owing under this Charge.

[6] The Responding Parties submit that payment of the management fee is not permitted because it is not a legitimate cost of enforcing payment of the mortgage debt, rather, in essence, the charge for

management fee is an attempt by the Applicants to, after default, begin to charge Midas for their own administrative expenses. The Responding Parties submit that Rescom was managing the Mortgage when it was not in default without charging its time for administration. They submit that the charge for management fees penalizes Midas and has the effect of imposing a fee on the borrower upon a default in a manner that is contrary to s. 8 of the *Interest Act*.

[7] In support of this submission, the Responding Parties rely on *P.A.R.C.E.L. Inc. v. Acquaiviva*, 2015 ONCA 331. In that case, the mortgage provided that the mortgagees were entitled to a late charge in the event of their late receipt of monthly payments due under the mortgage. The mortgage also provided for payment of a missed payment fee if payments under the mortgage were missed or late or returned for payment. The Court of Appeal, at para. 95, noted that the respondents on appeal pointed to no evidence in the record demonstrating that they incurred any actual losses as a result of late or missed payments under the mortgage, apart from the amount of the nonpayment itself. There was no evidence the non-payments gave rise to administrative costs. The Court of Appeal concluded, at para. 96, that in the absence of evidence that the charges in question reflect real costs legitimately incurred for the recovery of the debt, in the form of actual administrative costs or otherwise, the only reason for the charges was to impose an additional penalty or fine, apart from the interest otherwise payable under the mortgage, thereby increasing the burden on the mortgagors beyond the rate of interest agreed upon in the mortgage. The Court of Appeal held that the late payment charges and default fees constituted fines or penalties prohibited under s. 8 of the *Interest Act*.

[8] The Responding Parties also rely on *BMMB Investments Limited v. Naimian*, 2020 ONSC 7999 (CanLII). In *BMMB*, Myers J. addressed whether disbursements that the mortgagee allegedly incurred in enforcing the mortgage were recoverable as part of the mortgage debt. Myers J. observed that none of the alleged disbursements was proven by an invoice and the concluded that there was no basis in the evidence to determine that the costs were incurred at the amount claimed let alone to assess the reasonableness of the alleged expenditures. Myers J. held, at para. 28, "[i]t does no injustice to any plaintiff to require it to adduce evidence to support disbursements for which it claims reimbursement. As no evidence is adduced by the plaintiff to support any of the costs for which it claims reimbursement, none is allowed".

[9] In response to these submissions, the Applicants rely on the evidence given by Rescom's President, Gary Gruneir. Mr. Gruneir's evidence is not challenged by other evidence and he was not cross-examined.

[10] Mr. Gruneir's evidence is that Rescom's revenue model is to earn lender's fees for originating and extending mortgage loans and, to a much lesser extent, administration fees for distributing monthly payments to its investors. It has a staff of six mortgage agents, who originate loans, one accounting person, and three administrative/clerical staff. Unlike an institutional lender, as a broker, Rescom does not have an in-house workout group. Mr. Gruneir's evidence is that managing workouts of non-performing loans is a distraction and the time associated with managing workouts is time that could otherwise be spent originating loans and earning lender's and extension fees.

[11] Mr. Gruneir's evidence is that the private mortgage loans that Rescom originates are syndicated among investors, whereby investors hold proportionate interests in the loan. Because these mortgages are held by a syndicate of investors, in order to facilitate administration upon default, the mortgages, including the Mortgage, include a provision for a management fee to be charged by Rescom to the

mortgagor's account and added to the amount owing under the charge, upon default. Rescom was appointed by the Applicants to manage the recovery of the Mortgage when default occurred in 2013.

[12] Mr. Gruneir's evidence is that this contractual provision enabled the Applicants to have Rescom as a single point of contact with respect to efforts to collect and enforce on the loan and to obtain reporting regarding those efforts. This facilitated and simplified the process of instructing counsel, and receiving advice from counsel in connection with defending the action by Midas and Thomas Farrell challenging the validity of the mortgage and pursuing recovery in the receivership proceedings. Mr. Gruneir's evidence is that this process alleviated the need for counsel to obtain instructions from and give advice to each individual Applicant, which would have been administratively cumbersome, time-consuming and very expensive.

[13] Mr. Gruneir appends to one of his affidavits a copy of Rescom's time records over the past eight years in relation to the Mortgage following default. During the period identified in the time records, Rescom spent a total of 625.5 hours in managing the Mortgage on behalf of the Applicants.

[14] The Applicants rely on *7084421 Canada Ltd. v. Vinczer*, 2020 ONSC 217 in support of their submission that the management fee does not offend s. 8 of the *Interest Act*. In *Vinczer*, the mortgagors moved to set aside a default judgment. The motion judge concluded that the mortgagee was entitled to judgment on the mortgage, and considered whether the mortgagee was entitled to management fees charged. The management fee was charged based on a provision in the mortgage for a management fee based on 5% of the mortgage principal which the borrower acknowledged is a reasonable estimate of the fees to be incurred. The motion judge held, at para. 77, that the management fee was connected to a rational purpose and that the mortgagee would undoubtedly incur costs associated with enforcing the mortgage through internal time and expenses. The motion judge noted that although he could speculate that the amount of actual costs incurred was less than the management fee calculated as a percentage of the principal amount, there was no evidence that would allow a comparison to be made. The motion judge concluded that the management fee must be enforced.

[15] I am satisfied based on Mr. Gruneir's evidence that the Applicants incurred real costs that were legitimately incurred through charges by Rescom of management fees for services provided to collect the Mortgage debt and enforce the Mortgage. Mr. Gruneir provided detailed time dockets of the time spent for which Rescom charged fees at the hourly rate specified in the Mortgage. Although Rescom administered the Mortgage before default without charging a fee, I accept that the nature of the services needed to manage a mortgage loan that is in default would differ from services needed to administer a mortgage loan in good standing. I do not accept that Rescom is simply seeking to recover overhead expenses through the management fees. The time spent for which management fees were charged, supported by the time dockets, extended over a number of years while Midas challenged the validity of the Mortgage.

[16] The management fee does not constitute fines or penalties that are prohibited by the *Interest Act*. I do not allow this objection.

Are the Applicants entitled to a distribution that includes the extension fee charged by Rescom?

[17] The commitment that Rescom issued in connection with the Mortgage (the "Commitment") provides, in paragraph 20:

> Notwithstanding paragraph 19, in the event the loan is not repaid at maturity or the lender and borrower have not come to agreeable renewal terms, a fee equal to one twelfth of one per cent of the principal amount of the loan will be added to the account for each month that the loan has gone past maturity. At no time will payment of this amount be considered a renewal of the mortgage.

[18] The proposed distribution includes $278,413 in mortgage extension fees.

[19] The Responding Parties oppose distribution of the amount representing extension fees. They submit that payment of extension fees would have the effect of allowing the Applicants to charge a higher rate of interest on money in arrears than that charged on principal money not in arrears and, therefore, such payment is prohibited because it would offend s. 8(1) of the *Interest Act*.

[20] The Responding Parties rely on *P.A.R.C.E.L.*, at para. 96:

> In the absence of evidence that the charges in question reflect real costs legitimately incurred by the respondents for the recovery of the debt, in the form of actual administrative costs or otherwise, the only reason for the charges was to impose an additional penalty or fine, apart from the interest otherwise payable under the Mortgage, thereby increasing the burden on the appellants beyond the rate of interest agreed upon in the Mortgage. The courts have not hesitated to disallow similar charges on the basis that they offend s. 8 of the *Interest Act*: [citations omitted].

[21] The Applicants rely on evidence from Mr. Gruneir that Rescom and its investors typically charge borrowers an origination fee of 2-4% of the principal amount of a mortgage loan. When private mortgages are extended, they typically charge an extension fee of 1-2% of principal. When private mortgages cease to perform and enforcement becomes protracted, Rescom and its investors are prevented from re-investing their sunken funds in the market and suffer the loss of opportunity associated with earning lender's fees and extension fees on the sunken funds. His evidence is that, for this reason, the payout statement includes a charge for mortgage extension fees. Mr. Gruneir's evidence is that in the circumstances, in which Midas actively sought to avoid repaying the Mortgage by challenging its validity over a period of eight years and, in the process, prevented Rescom and the Applicants from earning lender's and extension fees on the principal money advance, the extension fees charged are reasonable.

[22] The extension fees do not represent charges for work done by Rescom to enforce the Mortgage and recover payment of the mortgage debt. In this respect, the extension fees differ from the management fees.

[23] As noted by Cronk J.A. in *P.A.R.C.E.L.*, at paras. 53-56, there are several prerequisites to the application of s. 8 of the *Interest Act*. The first is that there must be a finding that the covenant in question imposes a "fine", "penalty", or "rate of interest". Second, the "fine", "penalty" or "rate of interest" must relate to "any arrears of principal or interest secured by mortgage on real property". The arrears may arise on default occurring before or after maturity of the relevant debt instrument. Third, the covenant must also have the prohibited effect of "increasing the charge on the arrears beyond the rate of interest payable

on principal money not in arrears". Finally, the arrears of principal or interest must be "secured by mortgage on real property".

[24] The rational for charging the extension fee may have been, as Mr. Gruneir explained, because the Rescom and the Applicants were prevented from reinvesting their sunken funds and, as a result, they were deprived of lender's fees and extension fees on new loans. Nevertheless, there is no evidence that the charge of extension fees reflect real costs legitimately incurred by the Applicants or Rescom for the recovery of the mortgage debt. The extension fees only applies on default and the charge of such extension fees imposed an additional penalty or fine, apart from interest otherwise payable, thereby increasing the burden on Midas beyond the agreed upon rate of interest in the Mortgage. See *P.A.R.C.E.L.*, at para. 96.

[25] The extension fees in the amount of $278,413.70 contravene the *Interest Act*. The extension fees are disallowed.

Are the Applicants entitled to a distribution of amounts that include an interest bonus?

[26] The Responding Parties object to payment of three months' interest bonus under the Mortgage.

[27] The Mortgage provides in paragraph 14 of the Additional Provisions:

> 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 receiving three (3) months interest bonus in advance payment of the principal monies.

[28] The Responding Parties submit that the interest bonus is a penalty that is imposed on default and has the effect of increasing the interest on arrears to a cost that is higher than what is included in the Mortgage. The Responding Parties submit that the interest bonus contravenes s. 8 of the *Interest Act* and is unenforceable.

[29] The Responding Parties rely on the decision of Myers J. in *BMMB*. In that case, Myers J. heard a motion for summary judgment to enforce a mortgage. One issue was whether the lender's charge of three months' interest was unenforceable because the payment violates s. 8 of the *Interest Act*. The relevant provision in the mortgage in *BMMB* reads:

> If the Indebtedness and any of the of the other sums which may be due hereunder or under the Security Documents are not repaid on or before the Balance Due Date, then the Chargor agrees to pay the Chargee in addition to the amounts required to obtain a discharge, three months interest at the rate of interest chargeable hereunder on the principal amount outstanding on the Balance Due Date.

.

[30] Myers J. disallowed the charge of three months' interest on the basis that the provision in the mortgage requiring the mortgagor, after default, to pay an additional three months' interest is a clear violation of s. 8 of the *Interest Act*. Myers J. noted that the application of the provision arose on the mortgagee enforcing the mortgage. It was not a prepayment or a voluntary payment by the mortgagor. Myers J. held that this provision is a clear violation of s. 8 of the *Interest Act*.

[31] Myers J. relied on the decision of the Court of Appeal in *Mastercraft Properties Ltd. v. El Ef Investments Inc.*, 1993 CanLII 8545 (On CA). In *Mastercraft*, a covenant in a mortgage required the borrower, following default under the mortgage, to give three months' notice of payment or pay a bonus in lieu thereof. The prepayment provision in *Mastercraft* reads:

> And the said Mortgagor covenants with the Mortgagee that in the event of non-payment of the said principal moneys at the time or times above provided, he shall not require the Mortgagee to accept payment of the said principal moneys without first giving three months' previous notice in writing, or paying a bonus equal to three months' interest in advance on the said principal moneys.

[32] This provision is the like the prepayment provision in the Mortgage in that it provides that, after default, the mortgagee is not required to accept payment of principal without first receiving three months' notice in writing or receiving three months' interest bonus.

[33] The Court of Appeal in *Mastercraft* held that the "bonus" stipulated for is not an amount paid in punishment for a breach of the mortgage contract, but is a payment required for the privilege of paying arrears without the necessity of giving the three months' notice contracted for. The Court of Appeal held, accordingly, that the "bonus" was not a "fine" or "penalty". The Court of Appeal went on to consider whether the "bonus" constitutes a "rate of interest" charged on "arrears of principal or interest" and held that it does not. The Court of Appeal noted that in circumstances where the mortgagor did not wish to give the notice contracted for, the extraction of the bonus could have the effect referred to in s. 8 of the *Interest Act*, but, "the effect is irrelevant if the payment stipulated for does not fall within the categories of 'fine', 'penalty' or 'rate of interest'".

[34] The Court of Appeal in *Mastercraft* addressed other lines of cases in which covenants to pay additional interest on default were held to be invalid, and held that the cases cited fall into different factual categories. The Court of Appeal drew a distinction between the prepayment provision in the mortgage before it and the provision in another case, *Tomell Investments Ltd. v. East Marstock Lands Ltd*., 1977 CanLII 33 (SCC), where the covenant provided that on default, the mortgagee shall be entitled to require payment of a bonus equal to three months' interest. The Court of Appeal held that such a provision would be in clear contravention of s. 8 of the *Interest Act*. The Court of Appeal held that the prepayment provision in the Mastercraft mortgage on the appeal did not offend s. 8 of the *Interest Act*.

[35] In *BMMB*, the provision in the mortgage for payment of three months' interest did not provide for the borrower to give three months' notice or to pay three months' interest. As Myers J. held, at para. 58, the provision "adds an obligation to pay three months' interest if the mortgagor fails to repay the mortgage debt in full on the due date". The required payment "is not a payment in lieu of notice". Myers J. held that the prepayment clause created an unenforceable penalty that contravened s. 8 of the *Interest Act*.

[36] In support of their submission, the Responding Parties also rely on *Vinczer*. In *Vinczer*, the mortgage contained a provision that, after default, the lender will not be required to accept payment of principal monies without first receiving three additional months' notice in writing or receiving three months' interest bonus. This provision is like paragraph 14 of the Mortgage.

[37] The motion judge in *Vinczer*, Boswell J., referred to s. 17(1) of the *Mortgages Act* which provides that on default in payment of principal money secured by a mortgage a mortgagor may make such

payment upon payment of three months interest, or the mortgagor 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, upon making such payment, the mortgagor is entitled to make the payment of principal without further payment of interest except to the date of payment. Boswell J. held that the rationale behind s. 17 ceases to make sense when a mortgage goes into default after maturity.

[38] In support of his decision in *Vinczer*, Boswell J. cited his decision in *Lee v. He*, 2018 ONSC 5932. In *Lee*, Boswell J. held that a mortgagee was not entitled to charge a bonus of three months' interest under s. 17 of the *Mortgages Act* where the mortgage was not paid in full at the end of the one year term and, at paras. 24-27, he explained his reasoning:

> [24] Section 17 is incorporated into every mortgage in Ontario. Its purpose was discussed by the Court of Appeal in *Mastercraft Properties Ltd. v. EL EF Investments Inc.*, 1993 CarswellOnt 614. There, McKinley J.A. said as follows, at paragraph 21:
>
> > ... 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 mine [Boswell J.])
>
> [25] Mortgages are secured loans. Loans are contractual arrangements. Pursuant to the loan agreement, the borrower is entitled to the use of the lender's capital for some stipulated period of time. The lender, in return, is entitled to a stream of interest income, in addition to the ultimate repayment of its capital. When a borrower goes into default, the lender is theoretically entitled not only to repayment of its capital, but also to the present value of the lost income it would have received by way of interest had the breach not occurred. The lender's damages are, of course, subject to the requirement that it take steps to reasonably mitigate its losses through the reinvestment of its capital.
>
> [26] Providing that a mortgagor in default may redeem the mortgage on the payment of three months interest, or on the provision of three months notice, serves to cap the damages payable for the mortgagee's lost income stream, while concurrently fixing the mortgagee's responsibility to mitigate its losses. In effect, it is afforded three months to reinvest its capital.
>
> [27] The rationale behind s. 17 ceases to make sense when a mortgage goes into default after maturity. In that circumstance, the lender has already received (or is entitled to receive) the whole of the income stream contracted for. The three months bonus interest would, in such circumstances, be nothing more than a penalty, something it was not intended to be: see *Mastercraft Properties* at para. 4.

[39] I agree with the distinction made by Boswell J. in *Lee* between a mortgagee's charge for three months' interest under a prepayment clause in a mortgage where the default occurs and the payment of principal is to be made before maturity and such a charge where the default occurs at maturity, and the payment of principal is to be made at or after maturity. Where default in repayment of principal and accrued interest occurs at maturity, the mortgagee does not lose the contractually negotiated benefit of the stream of interest payments for the balance of the term of the mortgage. In this circumstance, the reasoning in *Mastercraft* would not apply. The bonus payment would not be "for the privilege of paying arrears without the necessity of giving the three months' notice contracted for". In this circumstance, there would be no prepayment and the three months' bonus interest would be a penalty.

[40] The Applicants cite the decision of Lauwers J. (as he then was) in *Piesok v. Johnson*, 2010 ONSC 1284. In *Piesok* the provision in question was like the relevant provision in *BMMB* in that it did not require the borrower to give three months' notice of payment of principal or pay three months' interest. In *Piesok*, Lauwers J. held that the provision in question did not contravene s. 8 of the *Interest Act*. Lauwers J. relied on the decision of the Divisional Court in *O'Shanter Development Co. v. Gentra Canada Investments Inc.*, (1995) 25 O.R. (3d) 188 (Div. Ct.) where, in respect of a similar provision, the Divisional Court held that the mortgagor was required to pay the three months' interest as a condition of redemption. It appears that in *Piesok*, the three month interest charge was made after default but before maturity of the mortgage: *Piesok*, at para. 21. In this circumstance, the reasoning of the Court of Appeal in *Mastercraft* would apply. This fact distinguishes *Piesok* from the decisions of Boswell J. in *Vinczer* and *Lee*.

[41] I adopt the reasoning of Boswell J. in *Vinczer* and *Lee* and conclude that the charge of $125,000.01 for three months' interest under paragraph 14 of the Additional Provisions of the Mortgage is unenforceable because it contravenes s. 8(1) of the *Interest Act*.

Are the Applicants entitled to a distribution that includes the protective disbursements?

[42] The Responding Parties object to distribution of an amount that includes $358,897.67 (inclusive of compound interest) of protective disbursements primarily relating to legal fees incurred in connection with the receivership proceedings, as well as an interpleader action, solicitor's negligence action, and a lien action, as well as some other expenses.

[43] Mr. Gruneir gave evidence that as a result of the action by Mr. Farrell and Midas (the "Midas Action") in which they claimed for, among other things, declaration that the Mortgage is null, void and unenforceable, the law firm who represented the Applicants in connection with the Mortgage transaction, the title insurer of the Mortgage, Rescom, and Mr. Gruneir were sued by two investors in the Mortgage, Thomas Bock and Rosewill Investment Corporation (the "Bock Action"). Rescom and Mr. Gruneir retained the law firm Levine Sherkin Boussidan to represent them in the Bock Action. Rescom incurred legal expenses in connection with the Bock Action in the amount of $3,168.52. The Applicants claim reimbursement of this amount together with compound interest at the rate provided in the Mortgage in a total amount of $4,857.23.

[44] Mr. Gruneir also gave evidence of other protective disbursements that were incurred but not yet paid.

[45] Mr. Gruneir has given evidence that after default under the Mortgage on October 1, 2013, the Applicants delivered a notice and direction to the tenant of the Eastern Avenue property pursuant to the assignment of rents they obtain from Midas on the closing of the Mortgage. The tenant, 2281616 Ontario Inc. ("228") was subsequently contacted by Mr. Farrell on behalf of Midas, and instructed not to comply

with the notice and direction because Mr. Farrell alleged that the Mortgage was fraudulently registered. As a result, 228 applied to interplead the rent payable under its lease into Court (the "Interpleader Application").

[46] Mr. Gruneir has given evidence that as a result of the Midas Action and the allegations in the Bock Action against the lawyers who represented the Applicants, the Applicants commenced a solicitor's negligence action against the lawyers (the "Solicitor's Negligence Action"). The Solicitor's Negligence Action was subsequently placed on hold upon the agreement of LAWPRO, pending the outcome of the Midas Action.

[47] The title insurer moved for summary judgment dismissing the Midas Action. On this motion, Mr. Gruneir swore three affidavits on behalf of the Applicants, in respect of which he was cross-examined by counsel for Midas. The lawyer who represented the Applicants (who was a defendant) also swore two affidavits on behalf of the Applicants, in respect of which she was cross-examined by counsel for Midas. The motion for summary judgment was dismissed by Brown J, (as he then was) and costs were ordered payable in the cause.

[48] The Applicants were sued together with Midas as defendants in a construction lien action by an architectural firm for priority over the Mortgage (the "Lien Action"). The Lien Action was eventually dismissed by order dated October 6, 2017, after it was discontinued against the Applicants.

[49] In connection with these matters, the Applicants claim expenses incurred in relation to the Mortgage with the law firm representing them and other expenses that have been incurred but not yet been paid. These expenses total $286,218. This amount is comprised of charges payable to Dickenson Wright LLP, the lawyers for the Applicants, of $238,461.68 and other expenses (evidenced by three invoices in the amounts of $1,576.35, $9,957, and $3,045.35).

[50] The Responding Parties submit that the protective disbursements should be disallowed because (a) certain of the protective disbursements do not fit within the terms of the indemnity granted by Midas under the Standard Charge Terms; and (b) the quantum of the protective disbursements is unreasonable.

[51] The Responding Parties submit that Midas is not under any contractual obligation (under the Commitment Letter or the Mortgage) to indemnify the Applicants for legal fees or disbursements in connection with the interpleader application, the solicitor's negligence action or the lien action.

[52] The Standard Charge Terms provide in section 8 that "all costs, charges, legal fees (as between solicitor and client) and expenses which may be incurred ... generally in any other proceedings taken in connection with or to realize upon the security given in the Charge ... shall be, with interest at the rate provided for in the Charge, a charge upon the land in favour of the Chargee pursuant to the terms of the Charge ...".

[53] The Applicants are entitled to add to the amount secured by the Mortgage all costs and expenses reasonably and properly incurred in ascertaining, asserting, or defending their rights or in recovering the mortgage debt: *Nelson v. Nelson*, 1903 CarswellOnt 649, at para. 1, cited in *Marriott and Dunn: Practice in Mortgage Remedies in Ontario, 5th Edition*, at §20.8.

[54] With respect to the Bock Action, I accept the evidence of Mr. Gruneir that this action was brought because of the position advanced by Midas that the Mortgage was null, void, and unenforceable. This assertion was without merit but, nevertheless, the Applicants were required to incur expenses to defend

the Bock Action. The expenses to defend the Bock Action were incurred in proceedings taken in connection with the security given in the Mortgage. The expenses are reasonable.

[55] With respect to the Solicitor's Negligence Action, I accept Mr. Gruneir's evidence that this action was commenced as a result of the action by Midas and the allegations in the Bock Action against the Applicants' lawyers. I am satisfied that the expenses incurred in respect of the Solicitor's Negligence Action qualify as expenses incurred in connection with the security given in the Mortgage. These expenses would not have been incurred had Midas not challenged the enforceability of the Mortgage.

[56] With respect to the Midas action, the responding parties object to charges by Dickenson Wright in respect of this action where another law firm represented them in this action and where costs were ordered by Justice Koehnen. The responding parties submit that the charges by Dickenson Wright should be disallowed. I do not accept this submission. The Applicants are contractually entitled to charge legal fees incurred in proceedings taken in connection with the security given in the Mortgage. Midas chose to challenge the enforceability of the Mortgage and the charges for legal services provided by Dickenson Wright qualify as charges that are recoverable under the Mortgage.

[57] With respect to the charges by Dickenson Wright LLP, the responding parties point to a docket entry dated May 19, 2021 for a charge of $4,991.50 where the description of the service reads "97463". This is obviously a clerical error but, in the absence of a description of the services, I do not allow recovery of this amount.

[58] The responding parties also point to the time dockets which show time spent on May 20, 2021 and on other days by the Applicants' lawyers to review and revise the receiver's reports. They submit that these time entries are evidence that there was double charging by the Applicants' lawyers for services provided by the receiver's lawyers. I do not accept this submission. I do not regard it to be unusual for an appointing creditor to provide comments and input on a receiver's draft report in circumstances where the appointing creditors may have more information. I do not regard the charges to represent duplication of work.

[59] I am satisfied by the evidence of Mr. Gruneir that the protective disbursements were incurred as a result of the challenges made by Midas to enforcement of the Mortgage. The Applicants have tendered evidence through Mr. Gruneir of the amount of the protective disbursements. The expenses were incurred in proceedings taken in connection with the security given in the Mortgage, and I am satisfied that the connection is sufficiently close that, with the exception of $4,991.50 (where the service is not described), the protective disbursements were reasonably and properly incurred and should not be disallowed.

Are the Applicants entitled to a distribution of amounts that include compound interest?

[60] The Applicants seek distribution of an amount that includes payment of compound interest.

[61] The Responding Parties oppose distribution of an amount that includes compound interest. They submit that only simple interest is payable under the Mortgage.

[62] The Responding Parties rely on the Commitment which, with respect to interest, reads:

> We are pleased to issue our commitment to arrange blanket mortgage financing on the above referenced properties on the following terms and conditions.
>
> ...
>
> **Interest Rate**: 10.0 percent per annum calculated and payable interest only monthly, not in advance.

[63] The Mortgage, in Schedule "A" - Additional Provisions to the Mortgage includes, in paragraph 1, the following statement:

> **1. <u>Letter of Commitment</u>**
>
> Any reference in this Charge to the Commitment Letter or Letter Commitment (the "Commitment Letter" or "Letter of Commitment") shall mean the Commitment Letter referable to this transaction dated December 17th, 2012 (and any amendments thereto, if applicable).
>
> This Charge shall secure any and all amounts owing by the Chargor to the Chargee pursuant to the Letter of Commitment.
>
> All provisions of the Letter of Commitment are hereby incorporated into this Charge.
>
> Any default by the Mortgage or with regard to any provision of the Letter of Commitment shall constitute a default under this Charge.

[64] The Mortgage, in paragraph 2 of Schedule "A", expressly provides for compound interest:

> **2. <u>Interest Rate</u>**
>
> The mortgage shall bear interest at the rate of 10.0% per annum, compounded and payable monthly, not in advance. Interest at the aforesaid rate on the amount advanced from time to time shall be payable Interest only on the first day of each and every month. The parties hereto acknowledge and agree that the Chargee shall not be deemed to reinvest any monthly or other payments received by it hereunder.
>
> In case default shall be made in payment of any sum to become due for interest at any time appointed for payment in this Charge, compound interest shall be payable and the sum in arrears for interest from time to time, as well after as before maturity and judgment, shall bear interest at the rate provided for in this Charge. In case the interest and compound interest are not paid in one month from the time of default, a rest shall be made, and compound interest at the rate provided for in this Charge shall be payable on the

> aggregate amount then due, as well after as before maturity and judgment, and so on from time to time, and all such interest and compound interest shall be a charge upon the Charged Property.

[65] The Responding Parties submit that the Commitment provides only for simple interest calculated at 10% per annum and payable monthly. They submit that a plain reading of the Mortgage together with the Commitment demonstrates the intention that the terms of the Commitment shall govern in the case of any ambiguity or conflict. The Responding Parties submit that if I were to find there to be an ambiguity in the agreement between the parties, the doctrine of *contra proferentum* applies and I should construe the ambiguity against the drafting parties, the Applicants.

[66] In support of these submissions, the Responding Parties rely on *P.A.R.C.E.L.*.

[67] In *P.A.R.C.E.L.*, the Court of Appeal for Ontario decided an appeal from a summary judgment on a promissory note and mortgage. Both the note and the mortgage stipulated the same repayment terms while there was no default. Under the note, the interest rate, before default, was 0.75% per annum. The mortgage provided for the same monthly payments and the same interest rate. The note provided for escalation of the applicable interest rate from 0.75% to 10% per annum "after demand, default and pre- and post judgment". The mortgage contained no interest escalation provision. The mortgage provided for a late payment charge of $10 per day and a missed payment fee of $300 for each missed or late installment. The mortgagee obtained summary judgment for the outstanding principal plus interest at the rate of 10 per cent plus late payment charges and default fees. The defendants appealed. The main issue was whether the claims for interest at the higher rate upon default and for late payment charges and missed payment fees offend s. 8 of the *Interest Act*.

[68] The Court of Appeal, at para. 68, held that repayment of the loan was secured by a promise to pay set out in the promissory note and that note was secured, in turn, by a mortgage on real property in the same amount. The Court of Appeal, at para. 71, held that in these circumstances, the terms of the note determined the post-default rate of interest payable on the one debt between the parties. The Court of Appeal, at paras. 72-73, rejected the submission that the enforceable post-default interest rates applicable under the note and the mortgage may differ in respect of the same loan. The Court of Appeal held that, given that the note was secured by a mortgage on real property, both instruments fall within the ambit of section 8 of the *Interest Act*. The Court of Appeal held, at para.76, that the interest escalation provision in the note conflicts with s. 8 of the *Interest Act* and cannot be given effect. The Court of Appeal also set aside the awards for late payment charges and default fees as offending s. 8 of the *Interest Act*.

[69] The Responding Parties submit that here, like in *P.A.R.C.E.L.*, there are two conflicting provisions for payment of interest and the court must determine which obligation must be met. They submit that the Commitment, like the note in *P.A.R.C.E.L.*, is the primary contractual source of the debt obligation and that the interest provision in the Commitment, that does not provide for compound interest, prevails over the conflicting provision in the Mortgage that provides for compound interest.

[70] The Applicants rely on the decision of Krever J., as he then was, in *Re A.J.F. Investments Ltd. and Vellco Investments Ltd.*, 1985 CanLII 2255 (O.N.S.C.). In *Vellco* a mortgage provided for payment of interest on the mortgage loan and that principal and interest shall become due and payable at the end of the term of the loan. The mortgage provided that interest was chargeable at a specified rate per annum "calculated half-yearly not in advance". The question before the court was whether, on a fair reading of the language used by the parties to express their agreement, the mortgagor undertook to pay compound interest in

the period during which no amount was payable. Krever J. considered the language used by the parties and held: "[t]o calculate the interest half-yearly not in advance and, then, to ignore the calculation is to put the parties, or at least the mortgagee, to a useless exercise. In the circumstances of this case, I conclude that the word 'calculated' in the provision of the mortgage I have quoted has the same meaning as 'compounded'". The Applicants submit that the same reasoning applies to the language used in the Commitment and the Mortgage and, insofar as the Commitment provides for interest of 10.0% per annum, calculated and payable interest only monthly, not in advance, compound interest is payable under the Mortgage.

[71] The facts in *Vellco* differ from those on the motion before me because in *Vellco* no interest was payable monthly whereas, under the Mortgage, interest was payable monthly, so the calculation of monthly interest cannot be said to have been a "useless exercise". I agree, however, with the approach taken in *Vellco* in which the court considered the language used by the parties in the mortgage to give effect to their intention with respect to payment of interest under the mortgage.

[72] I do not agree that the language in the Commitment with respect to interest conflicts with the provisions of the Mortgage. The Commitment, although stating that interest is to be paid at the rate of 10.0 per cent per annum calculated and payable monthly, does not expressly address whether, on default in payment of monthly interest under the Mortgage, interest is to be paid on interest in arrears. The Mortgage expressly addresses this circumstance and provides for payment of compound interest. At the time of the loan transaction, an Acknowledgement and Direction attaching the draft Mortgage was signed by Mr. Kavanagh on behalf of Midas and the Mortgage has the same terms. Section 6 of the Standard Charge Terms also provides for compound interest and Mr. Kavanagh signed an Acknowledgement that Midas received the set of Standard Charge Terms included in the Mortgage before signing the Acknowledgement and Direction.

[73] I interpret the provisions in the Commitment and in the Mortgage with respect to interest by reading the two documents as being part of a single mortgage loan transaction. I consider the Commitment and the Mortgage in the context of the surrounding circumstances where Mr. Kavanagh, on behalf of Midas, acknowledged receipt of the draft mortgage expressly providing for compound interest and of standard charge terms that also so provide, without objection. The provision for compound interest upon default was not expressly addressed in the Commitment but was required by the Applicants as a condition of the Mortgage. Midas accepted this term. When it did so, the parties agreed, as part of a single mortgage loan transaction, that compound interest is payable under the Mortgage at the rate specified therein.

[74] The Responding Parties also submit that the provision in the Mortgage for compound interest after default violates s. 8(1) of the *Interest Act* and, therefore, is not enforceable.

[75] Section 8(2) of the *Interest Act* provides:

> (2) Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

[76] Section 8(2) is clear that a provision in a mortgage for payment of compound interest after default does not offend the *Interest Act*. The rate of interest on which interest is payable on interest in arrears,

10.0 per cent per annum, is not greater than the rate payable on principal money not in arrears. Section 8(2) of the *Interest Act* applies.

[77] The Mortgage, insofar as it provides for payment of compound interest, is valid and enforceable and does not offend the *Interest Act.*

Disposition

[78] For these reasons:

a. The Mortgage extension fees of $278,413.70 are not approved and are disallowed;

b. The three months' interest bonus in the amount of $125,000.01 is not approved and is disallowed; and

c. The charge in the amount of $4,991.50 for the docket entry on May 19, 2021 is not approved and is disallowed.

d. The Responding Parties' other objections to the proposed discharge statement are dismissed.

[79] The Receiver is authorized to distribute funds from the proceeds of sale of the Eastern Avenue property and the Yonge Street property in accordance with the Discharge Statement dated September 3, 2021 as modified to reflect this endorsement.

[80] I ask counsel to provide me with an approved form of order to give effect to my endorsement.

[81] If the parties are unable to resolve costs, I may be spoken to in order to approve an agreed timetable for written submissions.

Cavanagh J.

January 17, 2022

Appendix “P”

The Midas Investment Corporation
Statement of Receipts and Disbursements
For the period April 6, 2021 to June 30, 2022

Receipts

Proceeds on sale of real properties	14,818,000
Funds received from Accountant of Superior Court of Ontario	448,588
Receiver's borrowings	100,000
Cash in bank	17,883
Rental Income	3,295
Interest	693
	15,388,459

Disbursements

Real estate commission	285,540
Receiver's fees	210,000
Legal fees	173,229
Repayment of receiver's borrowings	100,000
HST paid	96,313
Repairs and maintenance	53,038
Appraisal costs	15,750
Accounting fees	13,650
Interest on receiver's borrowings	3,161
Lender's fee	2,000
Realty taxes	1,799
Filing fee	73
	954,553
Excess of receipts over disbursements before the undernoted	14,433,906
Payment to first mortgagee	10,095,736
Payment to FCT	1,699,562
Payment of third party costs awards	423,186
	12,218,484
Cash on hand	2,215,422

The schedule has been prepared on the cash basis and does not include the obligations of the Receiver.

Appendix “Q”

The Midas Investment Corporation

Financial Statements

November 30, 2021

(Unaudited - see Notice to Reader)

Notice To Reader

On the basis of information provided by management, we have compiled the balance sheet of The Midas Investment Corporation as at November 30, 2021 and the statement of loss and deficit for the year then ended. We have not performed an audit or a review engagement in respect of these financial statements and, accordingly, we express no assurance thereon. Readers are cautioned that these statements may not be appropriate for their purposes.

Mississauga, Ontario

Chartered Professional Accountants

Licensed Public Accountants

The Midas Investment Corporation

Balance Sheet

As at November 30, 2021
(Unaudited - see Notice to Reader)

	2021	*2020*
Assets		
Cash	**-**	16,607
Accounts receivable	**39,049**	39,049
Due from shareholder	**2,104,628**	1,428,705
Receiver's cash on hand	**1,829,955**	-
Land, buildings and equipment	**-**	4,015,531
	3,973,632	5,499,892
Liabilities		
Accounts payable and accruals	**8,002**	8,003
HST payable	**51,308**	41,603
Customer deposits	**-**	510,000
Mortgage payable	**-**	8,768,153
	59,310	9,327,759
Shareholder's equity (deficit)		
Capital stock	**100**	100
Retained earnings (deficit)	**3,914,222**	(3,827,967)
	3,914,322	(3,827,867)
	3,973,632	5,499,892

The Midas Investment Corporation
Statement of Earnings (Loss) and Retained Earnings (Deficit)
For the year ended November 30, 2021
(Unaudited - see Notice to Reader)

	2021	*2020*
Revenue		
Rental	**1,357,319**	244,167
Gain on sale of land and buildings	**10,188,650**	-
Interest	**693**	-
Insurance proceeds	**-**	2,766,897
Legal settlement	**-**	941,479
	11,546,662	3,952,543
Operating expenses		
Professional fees	**2,483,194**	141,270
Mortgage interest	**798,854**	4,959,632
Realty taxes	**302,265**	229,500
Property management fees	**156,374**	-
Repairs and maintenance	**58,198**	4,439
Bank charges and interest	**5,120**	170,673
Utilities	**19**	-
Insurance	**-**	259,040
Travel	**-**	10,443
Amortization	**449**	99,101
	3,804,473	5,874,098
Net earnings (loss)	**7,742,189**	(1,921,555)
Deficit, beginning of year	**(3,827,967)**	(1,906,412)
Retained earnings (deficit), end of year	**3,914,222**	(3,827,967)

B E T W E E N:

COSA NOVA FASHIONS LTD. et al.
Applicants

-and-

THE MIDAS INVESTMENT CORPORATION
Respondent

Court File No. CV-21-00656398-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

MOTION RECORD OF THE RECEIVER, ROSEN GOLDBERG INC.
(Returnable July 11, 2022)

MINDEN GROSS LLP
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