

**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:

OWEMANCO MORTGAGE HOLDING CORPORATION

Applicant

- and -

CONCEPT LOFTS LTD. and DONALD DESROCHERS

Respondents

FACTUM OF THE APPLICANT

(Returnable November 7, 2022 at 10:00 AM by Zoom Videoconference)

November 4, 2022

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PART I – OVERVIEW

1. On October 12, 2022, the Applicant, Owemanco Mortgage Holding Corporation, commenced this application to appoint Rosen Goldberg Inc. (“**Rosen Goldberg**”) as receiver and manager of the Respondent Concept Lofts Ltd. (“**CCL**”), including the Dufferin Property (defined below), and the Balmoral Property (defined below) owned by the Respondent, Donald Desrochers (“**Desrochers**”).
2. Before the initial return date, the Applicant discovered that the Dufferin Property was uninsured. Consequently, the Applicant moved urgently for, and obtained, an order appointing Rosen Goldberg as interim receiver of the Dufferin Property to insure it.
3. The Applicant now applies to expand the powers of Rosen Goldberg from interim receiver of the Dufferin Property to full blown receiver and manager of CCL, including the Dufferin Property, and of the Balmoral Property.
4. The Applicant is a secured lender to the respondents in connection with two loans. The loans have been in financial default since September 7, 2022.
5. The Dufferin Property is a condominium project. Construction of the project was substantially completed on June 30, 2021. Little progress has been made since that time. No condominium corporation has been created. An Order under the *Building Code Act, 1992* was registered on September 15, 2022. A construction lien was registered on October 20, 2022. Several buyers recently initiated litigation for declarations that their agreements of purchase and sale have been rescinded by CCL. Several other units are occupied and generating rent notwithstanding that no occupancy certificates have been issued by the City. There are

marshalling issues that exist as between the Dufferin Property and the Balmoral Property insofar as subordinate secured creditors of the Dufferin Property are concerned.

6. In the circumstances, it is just and convenient to appoint Rosen Goldberg Inc. as full blown receiver and manager.

PART II – FACTS

This Application

7. The Applicant applies for an order pursuant to section 243(1) of the BIA and section 101 of the CJA for the appointment of a receiver over (i) all of the assets, undertakings and properties of CCL including the lands and premises at 1183 Dufferin Street, Toronto (the “**Dufferin Property**”), and (ii) the lands and premises owned by Desrochers municipally known as suites 502 and 503, 1 Balmoral Avenue, Toronto (the “**Balmoral Property**” and together with the Dufferin Property, the “**Properties**”).¹

The Applicant’s Loans and Security for the Loans

8. The Applicant is a secured lender to (i) CCL in connection with a loan in the principal amount of \$6.675M, and (ii) CCL and Desrochers in connection with a further loan in the principal amount of \$2.05M (collectively, the “**Loans**”).²

9. The Applicant’s security for the \$6.675M loan consists of, among other things, a first-ranking mortgage against the Dufferin Property and a first ranking general security agreement

¹ Notice of Application, Application Record (“AR”), Caselines Current A1.

² Affidavit of Graham Tobe sworn October 19, 2022 (“Tobe Affidavit”) at para 12, AR, Caselines Current A35.

given by CCL. The loan is also guaranteed by CCL's directors, namely, Desrochers, Sunil Bhardwaj and Sanjay Dubey ("**Dubey**").³

10. The Applicant's security for the \$2.05 million loan consists of, among other things, a charge blanketed in second position against the Dufferin property and in first position against the Balmoral property.⁴

11. Section 33 of the additional provisions in the blanket charges registered against the Dufferin Property and the Balmoral Property contains a cross-default provision whereby a default under any other charge or security between CCL or Desrochers and the Applicant is deemed to be an event of default under all security documents between any of them and the Applicant.⁵

Other Encumbrances

12. Although the Balmoral property is otherwise unencumbered, the Dufferin property is subject to three further subordinate ranking charges in favour of other mortgagees in the principal face amounts of \$1.3M, \$1.162M and \$547.5K, respectively.⁶ It is apparent that Bhardwaj controls the company which holds the \$1.162M and \$547.5K mortgages.⁷

13. The Dufferin Property is also subject to a construction lien registered in favour of SDM Construction Inc. ("**SDM**") on October 20, 2022 in the amount of \$189,739 in respect of site

³ Exhibit E, Tobe Affidavit, AR, Caselines Current A74.

⁴ Exhibit K, Tobe Affidavit, AR, Caselines Current A120.

⁵ Exhibit K, Tobe Affidavit, AR, Caselines Current A120.

⁶ Exhibit B, Affidavit of Graham Tobe sworn October 20, 2022 ("Second Tobe Affidavit"), Supplementary Application Record ("SAR"), Caselines Current A316; Exhibit C, Second Tobe Affidavit, SAR, Caselines Current A320; Exhibit D, Second Tobe Affidavit, SAR, Caselines Current A323.

⁷ Tobe Affidavit at para 31, AR, Caselines Current A39.

supervision and project management services and materials.⁸ In the face of the lien, no reasonable mortgagee would advance the funds required to complete the Project and create the condominium corporation as any such advance would be subordinated to the lien.

The Dufferin Property

14. The Dufferin Property is a church converted to a residential condominium project (the “**Project**”). It consists of 14 residential units and 11 below grade parking stalls.⁹

15. Although construction of the Project was substantially completed on June 30, 2021, little, if any progress, has been made since then. The condominium corporation has not yet been created, and only four to six residential units are subject to agreements of purchase and sale.¹⁰

16. To compound matters, on September 15, 2022, the City of Toronto caused notice of an Order issued on July 16, 2019 under the *Building Code Act, 1992* to be registered against the Dufferin Property. The Order prohibits footings, foundations, structural framing, ductwork and piping for heating and air conditioning systems from being covered or enclosed.¹¹ Rosen Goldberg reports that notwithstanding the order, all such areas are in fact covered or enclosed.

Demand and Notice of Intention to Enforce Security

17. The Loans have been in financial default since September 7, 2022.¹²

⁸ Exhibit E, Second Tobe Affidavit, SAR, Caselines Current A334.

⁹ Tobe Affidavit at para 8, AR, Caselines Current A35.

¹⁰ Tobe Affidavit at para 9, AR, Caselines Current A35.

¹¹ Exhibit Q, Tobe Affidavit, AR, Caselines Current A188.

¹² Exhibit R, Tobe Affidavit, AR, Caselines Current A191.

18. On September 16, 2022, the Applicant made written demand under the Loans and issued Notices of Intention to Enforce Security pursuant to section 244 of the BIA.¹³

Appointment of Rosen Goldberg as Interim Receiver of the Dufferin Property

19. After commencing this application on October 12, 2022, the Applicant discovered that the Dufferin Property was uninsured.¹⁴ It therefore moved urgently to appoint Rosen Goldberg as interim receiver to take possession of and secure the Dufferin Property and insure it. Justice Cavanagh granted the interim receivership order on October 21, 2022.¹⁵

Activities of Rosen Goldberg as Interim Receiver

20. Since its appointment, Rosen Goldberg has, among other things, caused insurance to be placed on the Project effective as of October 21, 2022.¹⁶

21. Rosen Goldberg has also engaged in discussions with Dubey. In addition to being an officer of CCL, Dubey is the principal of the construction lien claimant, SDM.¹⁷

22. Although two of the units (Units 102 and 108) are occupied, Dubey confirmed that no occupancy certificates have been issued in respect of the Project.¹⁸

23. According to Dubey, Unit 102 is rented by CCL to a tenant for \$4,300/month and Unit 108 is being rented by Desrochers to a tenant for between \$2,600 and \$2,700/month on the basis

¹³ Exhibit R, Tobe Affidavit, AR, Caselines Current A191.

¹⁴ Second Tobe Affidavit at para 17, SAR, Caselines Current A310.

¹⁵ Appendix A, First Report of Interim Receiver dated November 4, 2022 (“First Report”), SAR, Caselines Current A404.

¹⁶ First Report at para 8, SAR, Caselines Current A400.

¹⁷ First Report at para 9, SAR, Caselines Current A401.

¹⁸ First Report at para 10, SAR, Caselines Current A401.

that Desrochers purports to own Unit 108, notwithstanding that the condominium corporation has not yet been created and units have not yet been conveyed to end buyers.¹⁹

24. Dubey also advised Rosen Goldberg that he understands that between four and six units residential units are subject to agreements of purchase and sale.²⁰

25. On October 27, 2022, Rosen Goldberg learned that buyers of two units in the Project from CCL had initiated legal proceedings for declarations that CCL repudiated their agreements of purchase and sale and for the return of their deposits.²¹

26. On October 26, 2022, Justice Centa, who was unaware of the stay of proceedings imposed under the interim receivership order, scheduled both applications to be heard on January 16, 2023.²²

27. On October 28, 2022, counsel for the buyers delivered copies of their agreements of purchase and sale with CCL to Rosen Goldberg. Rosen Goldberg has not yet reviewed the agreements to purchase and sale or assessed the merits of their repudiation claims.²³

28. As of this date, Rosen Goldberg has not reviewed any other agreements of purchase and sale or had communications with any buyers.²⁴

Desrochers' and Laura Lawrence's Notice of Application

¹⁹ First Report at para 11, SAR, Caselines Current A401.

²⁰ First Report at para 12, SAR, Caselines Current A401.

²¹ First Report at para 13, SAR, Caselines Current A401; Appendices C and D to the First Report, SAR, Caselines Current A426 and A435.

²² Appendix E to the First Report, SAR, Caselines Current A444.

²³ First Report at para 15, SAR, Caselines Current A402.

²⁴ First Report at para 16, SAR, Caselines Current A402.

29. On October 6, 2022, Desrochers and Laura Lawrence, through their counsel, Olubunmi Ogunniyi, issued a notice of application against the Applicant and Ontario Wealth Management Corporation, c.o.b. as OWEMANCO Private Mortgage Financing in Milton, Ontario, which is returnable on December 7, 2022. No affidavit was served in support of the application. The application seeks to stay all enforcement action by the Applicant against the Balmoral Property.²⁵

30. The notice of application was served by regular mail and came to the attention of Graham Tobe (“**Tobe**”), the President of the Applicant, on November 1, 2022.²⁶

31. The record is clear that Desrochers has had ample notice of the impending enforcement action against the Balmoral Property. After receiving the BIA demand and notice, Desrochers enquired of the amount required to put the \$2.05M loan into good standing. The Applicant’s counsel advised Desrochers that it cannot be put into good standing unless the \$6.675M loan is also put into good standing by virtue of the cross-default provision in the blanket mortgages described above.²⁷

PART III – LAW AND ARGUMENT

Just or Convenient Test

32. Pursuant to section 243(1) of the BIA and Section 101 of the CJA, the Court may appoint a receiver where it is “just or convenient” to do so.

²⁵ Exhibit B, Affidavit of David Seifer sworn November 4, 2022 (“Seifer Affidavit”), SAR, Caselines Current A383.

²⁶ Seifer Affidavit at para 3, SAR, Caselines Current A358.

²⁷ Exhibit S, Tobe Affidavit, AR, Caselines Current A199; Affidavit of Service dated October 19, 2022, Caselines Master A300; Seifer Affidavit at para 2 Caselines Current A357.

33. In the facts at bar, it is just and convenient to appoint Rosen Goldberg as receiver over the assets, property and undertakings of CCL and of the Balmoral Property because: (a) the Applicant's security provides for the appointment of a receiver on default; and (b) a court-appointed receiver is the optimal remedy to ensure that the Applicant's interests are preserved and that the rights of all stakeholders are protected.

(a) Just as of Contractual Right

34. Where a debtor has *expressly* agreed to the appointment of a receiver in the event of default, the court should not ordinarily interfere with the contract between the parties.²⁸

35. The significance of a contractual right to privately appoint a receiver was discussed by Justice Blair in *Bank of Nova Scotia v. Freure Village on Clair Creek*:²⁹

It is conceded, in effect, that if the loans are in default... - which they are the Bank is entitled to move under its security and appoint a receiver-manager privately.

...

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

36. This principle has been extended in instances where a secured creditor applies to court for the appointment of a receiver notwithstanding that its security instrument provides only for the appointment of a private receiver.³⁰

²⁸ [United Savings Credit Union v. F & R Brokers Inc., 2003 BCSC 640 at para. 16.](#)

²⁹ [Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CanLII 8258 \(ON SC\) at paras. 9 and 12.](#)

³⁰ [Romspen Investment Corp. v. 1514904 Ontario Ltd., 2010 ONSC 1339 at paras. 23 to 26.](#)

37. The Applicant submits that there is nothing in the facts at bar that should cause the Court to interfere with the parties' private contractual ordering or to consider the appointment of a receiver, which was explicitly contemplated by that contractual ordering, as an extraordinary remedy.

38. There is no basis to ignore the cross-default provision, which entitles the Applicant to appoint a receiver over each of the Properties. The issues between CCL and Desrochers on the Balmoral Property fall to the law of marshalling and are issues between them. As Justice Myers wrote in *Sebastiano v. Brunello Imports Inc.*, the mortgagee is entitled to "recover against the lowest hanging fruit as he chooses."³¹

(b) The Appointment of a Receiver is the Optimal Remedy

39. It is well established that a court-appointed receiver is an officer of the court, acting in a fiduciary capacity to all parties having an interest in the subject matter of the receivership:³²

A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable

40. A secured creditor need not demonstrate that other remedies are ineffective before applying for the appointment of a court-appointed receiver.³³

41. A court-appointed receivership is the most effective and fair remedy and will allow for the utmost flexibility in responding to various contingencies because it facilitates the orderly and efficient realization of assets, judicial determination of creditor claims and priorities, and the fair

³¹ [Sebastiano v. Brunello Imports Inc., 2022 ONSC 5664 at para 15.](#)

³² [Regal Constellation Hotel Ltd., Re, 2004 CanLII 206 \(ON CA\) at para. 26.](#)

³³ [Bank of Nova Scotia v. D.G. Jewelry Inc., 2002 CanLII 12477 \(ON SC\) at para. 3.](#)

distribution of proceeds to creditors by reference to their legal rights. Furthermore, a stay of proceedings will prevent any precipitous creditor action that may undermine the realization process.³⁴

42. Given the ongoing defaults under the Loans, the potential marshalling concerns which the subordinate-ranking mortgagees of the Dufferin Property may have in relation to the Balmoral Property, the interests of purchasers of residential units in the Dufferin Property, CCL's ongoing failure to resolve the Order issued by the City of Toronto in July of 2019 and create the condominium corporation, it is just and convenient that a Receiver be appointed by this Honourable Court without delay to determine how best to realize on the Property for the benefit of all stakeholders.

PART V – ORDER REQUESTED

43. The Applicant seeks an Order appointing Rosen Goldberg as receiver of the assets, undertakings and properties of CCL, including the Dufferin Property, and the Balmoral Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2022.



DAVID P. PREGER / DAVID Z. SEIFER

³⁴ [Pope & Talbot Ltd., Re, 2009 BCSC 1552 at para. 131](#); [Canada \(Attorney General\) v. Reliance Insurance Co., 2007 CanLII 41899 \(ON SC\) at para. 26.](#)

SCHEDULE “A”

LIST OF AUTHORITIES

1. [United Savings Credit Union v. F & R Brokers Inc.](#), 2003 BCSC 640
2. [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ON SC)
3. [Romspen Investment Corp. v. 1514904 Ontario Ltd.](#), 2010 ONSC 1339
4. [Regal Constellation Hotel Ltd., Re](#), 2004 CanLII 206 (ON CA)
5. [Bank of Nova Scotia v. D.G. Jewelry Inc.](#), 2002 CanLII 12477 (ON SC)
6. [Pope & Talbot Ltd., Re](#), 2009 BCSC 1552
7. [Canada \(Attorney General\) v. Reliance Insurance Co.](#), 2007 CanLII 41899 (ON SC)

SCHEDULE “B”

RELEVANT STATUTES

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

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

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

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

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Respondents

Court File No. CV-22-00688570-00CL

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