

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

BETWEEN:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

1340182 ONTARIO LIMITED AND KAZEMBE & ASSOCIATES PROFESSIONAL
CORPORATION

Respondent

**FACTUM
(Receivership Appointment)**

June 2, 2023

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**FACTUM
(Receivership Appointment)**

I. OVERVIEW

1. This Factum is filed in support of an Application by Canadian Imperial Bank of Commerce (“**CIBC**”) for an Order (the “**Appointment Order**”) appointing MNP Ltd. (“**MNP**”) as receiver (in such capacity, the “**Receiver**”), over all property, assets and undertaking of 1340182 Ontario Limited (“**Real Estate Co**”), pursuant to section 243 of the *Bankruptcy and Insolvency Act* (Canada)¹ (the “**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario).²

¹ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [“**BIA**”], s **243**

² *Courts of Justice Act*, RSO 1990, c C43 [“**CJA**”], s **101**

II. FACTS

2. The facts with respect to this Application are only briefly recited herein, and are set out in more detail in the Affidavit of Jo-Ann Mitchell sworn April 27, 2023³ (the “**Mitchell Affidavit**”). Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Mitchell Affidavit.

Background

3. Real Estate Co is a private corporation incorporated under the *Business Corporations Act* (Ontario).⁴

4. Real Estate Co is a real estate holding company. Its sole significant asset is the lands and premises municipally known as 1888 Wilson Avenue, Toronto, Ontario (the “**Mortgaged Property**”).⁵

5. The Mortgaged Property is leased to Kazembe & Associates Professional Corporation (“**K&A OpCo**”). On May 11, 2023, MNP was appointed as receiver over all of the property, assets and undertakings of K&A OpCo other than certain excluded property.⁶

6. Mr. Courtney Kazembe (“**Mr. Kazembe**”) is the sole officer, director and shareholder of Real Estate Co and K&A OpCo.⁷

³ Affidavit of Jo-Ann Mitchell sworn April 27, 2023, Application Record of Canadian Imperial Bank of Commerce dated April 27, 2023, Tab 2 [the “**Mitchell Affidavit**”]

⁴ *Business Corporations Act*, RSO 1990, c. B.16; **Mitchell Affidavit**, *supra* note 3, at para 3

⁵ **Mitchell Affidavit**, *supra* note 3, para 5, Application Record, Tab 2

⁶ **Mitchell Affidavit**, *supra* note 3, para 6, Application Record, Tab 2; *Canadian Imperial Bank of Commerce v 1340182 Ontario Limited and Kazembe & Associates Professional Corporation*, Order granted May 11, 2023, Court File No. CV-23-00698539-00CL (ONSC [Commercial List])

⁷ **Mitchell Affidavit**, *supra* note 3, paras 4 and 7, Application Record, Tab 2

7. Mr. Kazembe is a lawyer and holds a licence to practice law in Ontario as a barrister and solicitor from the Law Society of Ontario.⁸

The CIBC Credit Facilities And Security

The Credit Facilities

8. Pursuant to the Real Estate Co Credit Agreement, CIBC agreed to advance the principal amount of \$945,000.00 to Real Estate Co.⁹

9. As of February 10, 2023, Real Estate Co was indebted to CIBC in the approximate amount of \$918,943.91 pursuant to the Real Estate Co Credit Agreement, plus accruing legal fees and disbursements (such amount owing from time to time, the “**Indebtedness**”).¹⁰

The Security

10. As security for the Indebtedness, Real Estate Co provided CIBC with:

- (a) A charge / mortgage in the principal amount of \$945,000.00 against the Mortgaged Property (the “**CIBC Mortgage**”); and
- (b) A general security agreement in respect of all of the personal property of Real Estate Co as embedded in the CIBC Small Business Credit Terms dated July 15, 2019 (the “**Real Estate Co GSA**”).¹¹

11. The CIBC Mortgage is registered as a second ranking charge / mortgage against the Mortgaged Property, despite, as further described herein, CIBC’s instructions to its counsel

⁸ Mitchell Affidavit, *supra* note 3, para 8, Application Record, Tab 2

⁹ Mitchell Affidavit, *supra* note 3, paras 9-10, Application Record, Tab 2

¹⁰ Mitchell Affidavit, *supra* note 3, para 12, Application Record, Tab 2

¹¹ Mitchell Affidavit, *supra* note 3, para 18, Application Record, Tab 2

(K&A OpCo) that CIBC obtain a first ranking charge / mortgage against the Mortgaged Property.¹² Pursuant to the Real Estate Co GSA, CIBC additionally holds a first ranking security interest over all personal property of Real Estate Co.¹³

Other Registrations Against The Mortgaged Property

12. There are two other mortgages registered against the Mortgaged Property.

13. 923944 Ontario Ltd. ("**923 Ontario**") appears to hold a first ranking charge / mortgage against the Mortgaged Property in the principal amount of \$1,000,000.00 (the "**923 Ontario Mortgage**"), despite CIBC's intention that it be granted a first ranking charge / mortgage.¹⁴

14. As of February 1, 2023, CIBC understands that the 923 Ontario Mortgage is in arrears, and \$1,158,250.00 is owing to 923 Ontario.¹⁵

15. Arthur Bryan ("**Mr. Bryan**") holds a third ranking charge / mortgage against the Mortgaged Property in the principal amount of \$200,000 (the "**Bryan Mortgage**").¹⁶

K&A Opco's Registration Of The CIBC Mortgage And Events Of Default

16. Although the CIBC Mortgage appears to be a second ranking charge / mortgage, the terms of the Real Estate Co Credit Agreement require that Real Estate Co grant CIBC a first ranking charge / mortgage against the Mortgaged Property in the principal amount of \$945,000.¹⁷

¹² Mitchell Affidavit, *supra* note 3, para 21, Application Record, Tab 2

¹³ Mitchell Affidavit, *supra* note 3, para 27, Application Record, Tab 2

¹⁴ Mitchell Affidavit, *supra* note 3, para 22, Application Record, Tab 2

¹⁵ Mitchell Affidavit, *supra* note 3, para 23, Application Record, Tab 2

¹⁶ Mitchell Affidavit, *supra* note 3, para 20, Exhibit N, Application Record, Tab 2

¹⁷ Mitchell Affidavit, *supra* note 3, paras 28-29, Application Record, Tab 2

17. K&A OpCo acted as counsel to both Real Estate Co and CIBC in connection with the CIBC Mortgage.¹⁸

18. Prior to execution of the Real Estate Co Credit Agreement, CIBC sent a Letter of Direction to Ms. Dana Campbell, a solicitor at K&A OpCo, instructing Ms. Cambell to act as CIBC's solicitor/ notary in registering a "1st charge/mortgage" in favour of CIBC against title to the Mortgaged Property.¹⁹ CIBC has since been advised that Ms. Campbell was not employed by K&A OpCo at the time the Letter of Direction was issued.²⁰

19. The instructions in the Letter of Direction were not followed, and, contrary to the requirements of the Real Estate Co Credit Agreement, the CIBC Mortgage was registered by K&A OpCo in second position, ranking behind the 923 Ontario Mortgage (the "**Mortgage EOD**").²¹

20. As of the date hereof, in addition to the Mortgage EOD, certain other materials events of default are existing and continuing under the Real Estate Co Credit Agreement, including payment defaults and the failure to remit taxes when due.²²

Mr. Bryan's Opposition To This Application

21. 923 Ontario, in its capacity as first mortgagee, has advised CIBC that it supports the appointment of the Receiver over all property, assets and undertaking of Real Estate Co.

¹⁸ **Mitchell Affidavit**, *supra* note 3, para 30, Application Record, Tab 2

¹⁹ **Mitchell Affidavit**, *supra* note 3, paras 31-32, Application Record, Tab 2

²⁰ **Mitchell Affidavit**, *supra* note 3, para 34, Application Record, Tab 2

²¹ **Mitchell Affidavit**, *supra* note 3, para 33, Application Record, Tab 2

²² **Mitchell Affidavit**, *supra* note 3, para 36, Application Record, Tab 2

22. Mr. Bryan, through his counsel, has advised CIBC that he is opposed to the appointment of the Receiver.

23. Following the issuance of CIBC's Application Record, Mr. Bryan issued a statement of claim naming each of Real Estate Co, K&A Op Co, Mr. Kazembe and CIBC as defendants.²³ Mr. Bryan's pleadings include the assertion that a pre-existing mortgage registered in favour of Mr. Bryan on August 16, 2018 (prior in time to the registration of both the 923 Ontario Mortgage and the CIBC Mortgage) was improperly or fraudulently discharged by K&A OpCo on February 13, 2019 (the "**Discharged Bryan Mortgage**").²⁴ Mr. Bryan's pleadings seek a declaration that the Bryan Mortgage is a second mortgage, notwithstanding that it is currently registered as a third mortgage (behind CIBC) (the "**Declaration**").²⁵

24. As an alternative to proceeding with a receivership, Mr. Bryan has also filed a draft order that proposes that Mr. Bryan sell the property effectively as agent for all of the mortgagees with an interest in the Mortgaged Property (the "**Draft Sale Order**").²⁶

25. The Draft Sale Order includes the following terms (the "**Bryan Sale Proposal**"):

- (a) Mr. Bryan will take possession of the Mortgaged Property and effect a sale of the Mortgaged Property;

²³ Affidavit of Arthur Bryan sworn May 3, 2023, Responding Motion Record of Arthur Bryan served May 4, 2023 [the "**Bryan Responding Affidavit**"], Exhibit U, Statement of Claim issued May 4, 2023 in Court File No. CV-23-00699001-0000

²⁴ **Bryan Responding Affidavit**, *supra* note 23, paras 31, 43, Exhibit U, Statement of Claim issued May 4, 2023 in Court File No. CV-23-00699001-0000, at para 48; Responding Factum on behalf of Arthur Bryan dated April 4, 2023 [*sic*] [the "**Bryan Responding Factum**"], at para 31

²⁵ **Bryan Responding Affidavit**, *supra* note 23, para 43, Exhibit U

²⁶ **Bryan Responding Affidavit**, *supra* note 23, para 49, Exhibit X

- (b) The listing price for the sale of the Mortgaged Property will be determined by averaging appraisal values obtained by each of 923 Ontario, CIBC and Mr. Bryan (the “**Listing Price**”); and
 - (c) Counsel to Mr. Bryan will authorize and direct a real estate agent of its choosing to reduce the Listing Price by 10% on a bi-weekly basis, up to 70% of the average of the Listing Price (the “**Reduction Mechanism**”).²⁷
26. There is no indication that Mr. Bryan is a licensed insolvency trustee.

PART III. ISSUES

27. The issues to be determined by the Court in respect of this Application are:
- (a) Whether the Court should grant the Draft Sale Order in respect of the Bryan Sale Proposal?
 - (b) Whether it is just or convenient for the Court to appoint MNP as Receiver?

PART IV. THE LAW

(A) The Court Should Not Grant The Draft Sale Order

28. The sole benefit of the Bryan Sale Proposal appears to be to keep costs down.

29. Liquidating the assets of Real Estate Co in a cost efficient manner is important. However, saving costs should be not a rationale for implementing a flawed process for the sale of the Mortgaged Property that, among other things, (a) is contrary to the BIA; (b) places the fate of creditor recovery in the hands of someone who does not appear to have any discernable experience in selling distressed assets and would give a party attempting to pursue litigation against Real Estate Co. and other creditors control over the realization process;

²⁷ Bryan Responding Affidavit, *supra* note 23, para 43, Exhibit U

(c) on its face will chill offers for the purchase of the Mortgaged Property; (d) is not clear will result in a transaction capable of being closed; and (e) is only supported by a stakeholder who likely has no economic interest in the Mortgaged Property.

The Draft Sale Order Breaches The BIA And Strips Stakeholders Of Important Protections

30. The terms of the Draft Sale Order include granting Mr. Bryan and his counsel the authority to: (i) take possession and exercise control over of the Mortgaged Property, (ii) engage real estate consultants, agents and appraisers with respect to the Mortgaged Property, (iii) execute a listing agreement and sale agreement with respect to the Mortgaged Property, (iv) market and solicit offers in respect of the Mortgaged Property, and ultimately, (v) conduct a sale of the Mortgaged Property.²⁸ These are all powers typically afforded to a receiver under the BIA.²⁹

31. Although not styled as such, in effect, Mr. Bryan and his counsel are seeking to be appointed as “receiver”. This relief directly contravenes sub-section 243(4) of the BIA, which provides that only licenced insolvency trustees may be appointed as a receiver.³⁰ Through the relief being requested, Mr. Bryan and his counsel are asking the Court to ignore the requirements of the BIA.

32. The appointment of Mr. Bryan and his counsel as an effective receiver is highly problematic. In addition to contravening the licensing requirements of sub-section 243(4) of the BIA, it would deny the creditors of Real Estate Co the protections normally afforded to

²⁸ **Bryan Responding Affidavit**, *supra* note 23, para 49, Exhibit X

²⁹ The Ontario Superior Court of Justice (Commercial List) Users’ Committee, Model Order Subcommittee, *Model Receivership Order Form*, available for download at: https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List_Forms_including_Model_Orders

³⁰ **BIA**, *supra* note 1, sub-section **243(4)**;

creditors when the court appoints a licensed insolvency trustee as receiver to effect the sale of assets of a debtor. This includes a fiduciary duty to act as an objective representative of all interested parties (and in general as a court officer),³¹ a duty to deal with the Mortgaged Property in a commercially reasonable manner,³² the obligation to report to all creditors,³³ and court oversight, including through the requirement that court approval be obtained to proceed with any sale.³⁴

33. The Bryan Sale Proposal does not contain any of those protections, to the detriment of Real Estate Co's stakeholders. In effect, Mr. Bryan seeks all of the sale powers of a receiver, without any of the obligations or liabilities.

Mr. Bryan Has No Discernable Experience In Selling Distressed Assets

34. A sale of the Mortgaged Property through a formal receivership as proposed by CIBC would be overseen by a licenced insolvency trustee, who is regularly appointed by this Court to maximize recovery through a court supervised sale of assets and is subject to the obligations and responsibilities noted above.

35. In contrast, the Bryan Sale Proposal seeks to place the fate of creditor recovery in an individual, whose own affidavit evidence indicates no discernible experience in selling real estate (let alone the assets of an insolvent company through a competitive bidding process for the benefit of third party stakeholders). As well, the Bryan Sale Proposal would put the sale of the Mortgaged Property into the hands of a directly interested party, the nature of whose interests are the subject of a dispute, as opposed to an independent court officer.

³¹ *Philip's Manufacturing Ltd., Re.*, [1992] 5 WWR 549, 12 CBR (3d) 149 (BCCA), at **paras 17-18**

³² *BIA*, *supra* note 1, section **247(b)**;

³³ *BIA*, *supra* note 1, section **246**;

³⁴ *Ravelston Corp., Re.*, [2007] OJ No 414, 29 CBR (5th) 1 (ONSC [Commercial List]), at **paras 61-63** [*"Ravelston"*]

The Bryan Sale Proposal Will Not Result In The Most Favourable Price For The Mortgaged Property

36. The fact that Mr. Bryan is ill-equipped to sell the Mortgaged Property is clear on the face of the Bryan Sale Proposal, which by its own terms, will prejudice the recovery of Real Estate Co's creditors by incentivizing purchasers to under-bid for the Mortgage Property.

37. In this respect, as part of the Bryan Sale Proposal, Mr. Bryan has filed the Draft Sale Order (without any sealing provisions), that explicitly and *publicly* provides that the Listing Price determined for the sale of the Mortgaged Property shall be reduced by 10% on a bi-weekly basis.³⁵ The inclusion of the Reduction Mechanism in the Draft Sale Order unproductively and illogically advertises to all potential interested purchasers that, if they hold off on submitting bids, they may be able to acquire the Mortgage Property at a discounted price. In doing so, the Draft Sale Order has irrevocably signaled to the market Mr. Bryan's pricing strategy.

It Is Not Clear The Bryan Sale Proposal Will Result In A Transaction Capable Of Being Closed

38. It has become common place in Canada that a purchaser of assets from an insolvent entity will require the issuance of a vesting order as condition precedent to closing.

39. This Court has repeatedly recognized the explicit authority to issue an approval and vesting order in the context of receivership through the broad powers granted under section

³⁵ **Bryan Responding Affidavit**, *supra* note 23, Exhibit X, paragraph 7

243 of the BIA, and the importance of vesting orders to transactions involving the property of insolvent debtors.³⁶

40. Under the Bryan Sale Proposal, Mr. Bryan and his counsel will not have that power and section 243 of the BIA will not be applicable.

41. This is highly problematic, as in order to sell the Mortgaged Property, an approval and vesting order will in all likelihood be required. In this respect:

- (a) Outside of the context of a receivership, the law is clear that a sale by a mortgagee under the *Mortgages Act* (Ontario),³⁷ cannot extinguish the rights of prior encumbrancers (priority mortgages), unless such claims are paid in full.³⁸ By Mr. Bryan's own evidence, the Mortgaged Property is valued at \$1,600,000.00.³⁹ On this valuation, there will not be sufficient proceeds to payout 932 Ontario and CIBC. Accordingly, unless Mr. Bryan's Declaration is granted (which for the reasons set out below is highly unlikely), Mr. Bryan will not be able to convey title to a purchaser free of CIBC's mortgage without CIBC's consent (for certainty, CIBC will not grant that consent); and
- (b) Given, among other things, the significant public allegations of misconduct and potential fraud on the part of Mr. Kazembe, and the presence of outstanding tax liabilities, potential purchasers may not be willing to acquire the Mortgaged Property without obtaining absolute free and clear title.

³⁶ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, OJ No 3211, at **para 85**

³⁷ *Mortgages Act*, RSO 1990, c. M.40

³⁸ *Land Titles Act*, RSO 1990, c L5 ["LTA"], ss **99(1)** and **99(2)**

³⁹ *Bryan Responding Affidavit*, *supra* note 23, para 49, Exhibit X

The Only Stakeholder Who Supports the Bryan Sale Proposal Likely has no Economic Interest in the Mortgaged Property

42. As noted above, both CIBC and 923 Ontario are opposed to the Bryan Sale Proposal.

43. The only stakeholder who appears to support the Bryan Sale Proposal is Mr. Bryan himself.

44. Importantly, and as noted above, unless his Declaration is granted, Mr. Bryan likely has no economic interest in the Mortgaged Property based on his own valuation of the Mortgaged Property.

45. Mr. Bryan's Action to obtain the Declaration is doomed to fail. Although it is not before the Court in this hearing, the case law is clear that a mortgagee, whose mortgage instrument is inadvertently or fraudulently discharged from title (like Mr. Bryan), loses its priority as against subsequent mortgagees.⁴⁰ Subsequent mortgagees, including in the circumstances, CIBC, are "entitled to rely on both the mirror principle (the register is a perfect mirror of the state of title) and the curtain principle (a purchaser need not investigate the history of past dealings with the land, or search behind title)".⁴¹

46. The CIBC Mortgage is not a "fraudulent instrument" under the *Land Titles Act* (Ontario) (the "LTA").⁴² Real Estate Co was, at the time of registration of the CIBC Mortgage, and remains the registered owner in fee simple of title to the Mortgaged Property.⁴³

Accordingly, per sub-sections 78(4) and 78(4.2) of the LTA, the CIBC Mortgage is "deemed

⁴⁰ *CIBC Mortgages Inc. v Computershare Trust Co. of Canada*, 2016 ONSC 7094, 134 OR (3d) 702, at **para 63** ["*CIBC Mortgages*"]

⁴¹ *CIBC Mortgages*, *supra* note 40, at **para 63**.

⁴² LTA, *supra* note 38, **s 1 "fraudulent instrument"**

⁴³ Mitchell Affidavit, *supra* note 3, Exhibits J and N, Application Record, Tab 2

to be embodied in the register and to be effective according to its nature and intent, and to ...charge...the land or estate or interest therein mentioned in the register”⁴⁴

47. Although CIBC has sympathy for the unfortunate treatment of Mr. Bryan by Mr. Kazembe and the other employees of K&A OpCo, it does not merit a reversal of priorities contrary to the provisions of the LTA and the jurisprudence on this issue.

48. For the reasons set out above, CIBC submits that the Court should decline to grant the Draft Sale Order in respect of the Bryan Sale Proposal.

(B) The Court Should Appoint MNP As Receiver

49. CIBC submits that (a) the technical requirements for the appointment of a receiver under both the BIA and CJA have been met; and (b) the appointment of MNP as receiver is just and convenient in the circumstances.

Technical Requirements To Appoint A Receiver Have Been Met

50. CIBC is a secured creditor of Real Estate Co and is therefore entitled to bring an application under section 243 of the BIA. As required under sub-section 243 (1.1) of the BIA, CIBC issued the NITES. The notice period under the NITES expired on February 25, 2023.⁴⁵

51. MNP is qualified to act as Receiver in accordance with the requirements of sub-section 243(4) of the BIA and has consented to serving as Receiver in these proceedings.⁴⁶

⁴⁴ **LTA**, *supra* note 38, ss **78(4), 78(5)**

⁴⁵ **BIA**, *supra* note 1, sections **243** and **244**; **Mitchell Affidavit**, *supra* note 3, para 43, Application Record, Tab 2

⁴⁶ **BIA**, *supra* note 1, sub-section **243(4)**; **Mitchell Affidavit**, *supra* note 3, para 38, Application Record, Tab 2

It Is Just And Convenient To Appoint The Receiver

52. Pursuant to both sub-section 243(1) of the BIA,⁴⁷ and sub-section 101(1) of the CJA,⁴⁸ the Court may grant an order appointing a receiver when it is “just or convenient” to do so.

53. In *Freure Village*, Justice Blair (as he was then), found that, in deciding if the appointment of a receiver is just or convenient, the Court must have regard to *inter alia* the nature of the property and the rights and interest of all parties in relation thereto, which includes a secured creditor under its security.⁴⁹

54. The appointment of a receiver is appropriate in the circumstances before this Court, where, among other things, a material priority dispute has arisen between secured creditors.

55. The Receiver, as an independent court officer with a fiduciary duty to all creditors,⁵⁰ would be obligated to act in the best interest of all creditors, keep all creditors informed of the sale process and to seek Court approval of any transaction with respect to the Mortgaged Property.⁵¹ In contrast, proceeding in accordance with the Bryan Sale Proposal would entitle Mr. Bryan, a mortgagee and a party to this priority dispute, to sell the Mortgaged Property without any obligations to, or consultation with, CIBC, 923 Ontario or any other stakeholder.

56. Given the priority dispute that has emerged, the appointment of a Receiver is additionally appropriate as it will assist the Court in assessing the validity of the parties’ respective security. In this regard, in considering whether it is just and convenient to appoint a

⁴⁷ **BIA**, *supra* note 1, section **243**

⁴⁸ **CJA**, *supra* note 2, sub-section **101(1)**

⁴⁹ ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List)), **paras 10-12** [“*Freure Village*”]; ***Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited***, 2022 ONSC 6186 [“*Hypoint*”], **para 23**

⁵⁰ ***Ravelston***, *supra* note 34, at **paras 61-63**

⁵¹ ***Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.***, 2013 ONSC 6809, 234 A C W S (3d) 268, at **para 21** [“*River Rock Financial*”]

receiver, this Court has held that "...a court-appointed receiver, being a neutral third party, can provide the court with an unbiased and impartial opinion on the validity, enforceability, and priority of [competing creditors] respective security".⁵²

57. The appointment of a receiver will also consolidate the sale of the Mortgaged Property with the priority dispute, avoiding a multiplicity of proceedings.

58. In *River Rock Financial*⁵³ the Court rejected the argument of certain mortgagees that real property owned by the subject debtors be carved out of the appointment order being sought by a secured creditor. There, the Court noted the avoidance of a multiplicity of proceedings as a relevant factor in considering whether the proposed appointment order was appropriate in the circumstances:

22 Moreover, with four outstanding mortgages and a demand loan in default, a multiplicity of proceedings would be inevitable. [...] **It is far more convenient, in my view, for one party, with no personal interest in the business or the property, to act as receiver manager for the benefit of the collective. That receiver, a court appointed officer, acting under a fiduciary duty to all, will have the right to take immediate possession of the property. This is clearly in the best interest of all of the creditors [...]**⁵⁴ [Emphasis added]

59. The appointment of the Receiver is further appropriate in this case given the significant allegations of misappropriation of funds and wrongdoing on the part of Real Estate Co. In addition to selling the Mortgaged Property, the Receiver, if appointed, will be able to look into such allegations and determine whether there are additional funds that can be recovered by the estate. This could provide significant benefit to Real Property Co's creditors, beyond what can be obtained through the Bryan Sale Proposal.

⁵² *Halex Capital Inc. v Natural Energy Systems Inc.*, 2020 ONSC 7910, 85 CBR (6th) 256, at **para 27**

⁵³ *River Rock Financial*, *supra* note 51, at **para 22**

⁵⁴ *River Rock Financial*, *supra* note 51, at **para 22**

60. Mr. Bryan relies on the decisions in *Anderson*,⁵⁵ 132479⁵⁶ and *Chongsim*⁵⁷ for the authority that the appointment of a receiver is an extraordinary remedy and accordingly, submits that the Receiver should not be appointed in this case.⁵⁸ However, Mr. Bryan’s responding materials completely ignore the foundational insolvency principal that when a secured creditor is seeking the appointment of a receiver and its credit documents specifically afford it the right to appoint a receiver, the appointment of a receiver is not an “extraordinary remedy”. The rationale for this relaxed standard is that, in such circumstances, as Justice Morawetz (as he then was), remarked in *Sherco*: “the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties”.⁵⁹

61. In *Atlas Healthcare*, this Court held that where a secured creditor has bargained for the contractual right to have a receiver appointed, there must be a good reason to deprive the creditor of that contractual right.⁶⁰ No such reason exists here.

62. CIBC’s credit documents with Real Estate Co explicitly provide for the appointment of a receiver. To this effect, such a right is specifically included in the standard charge terms applicable to the CIBC Mortgage and the Real Estate Co GSA, each of which were agreed to by Real Estate Co.⁶¹

63. Furthermore, the three decisions cited by Mr. Bryan are clearly distinguishable in the circumstances:

⁵⁵ *Anderson v Hunking*, 2010 ONSC 4008 [“*Anderson*”]

⁵⁶ *1324789 Ontario Inc. v Marshall*, 2019 ONSC 517 [“*1324789*”]

⁵⁷ *Royal Bank of Canada v Chongsim Investments Ltd.*, [1997] 32 OR (3d) 565, [1997] OJ No. 1391 [“*Chongsim*”]

⁵⁸ Bryan Responding Factum, *supra* note 24, at para 58

⁵⁹ *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (Commercial List) [“*Sherco*”], at **para 42**

⁶⁰ *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al.*, 2018 ONSC 7382 (Commercial List) [“*Atlas Healthcare*”], at para 100

⁶¹ *Mitchell Affidavit*, *supra* note 3, Exhibit J, CIBC Mortgage, Application Record, Tab 2J; *Mitchell Affidavit*, *supra* note 3, Exhibit K, Real Estate Co GSA, section 9(b)(i), Application Record, Tab 2K;

- (a) *Anderson*.⁶² involved an application pursuant to section 101 of the CJA by a disgruntled party with respect to various joint venture land developments who had a falling out with their joint venture partner. The plaintiff was not a secured creditor of the defendant, nor did it make any allegation that the development projects were insolvent or at risk of insolvency.
- (b) *132479*.⁶³ involved an application pursuant to section 101 of the CJA by a group of plaintiffs claiming to be victims of fraud, conspiracy and unjust enrichment perpetrated by the defendant partners. Unlike the present circumstances, the plaintiffs sought an interim receivership order, were not secured creditors of the defendants, and were effectively seeking execution before any right to payment was established.
- (c) *Chongsim*.⁶⁴ involved a secured creditor attempting to enforce its contractual right to appoint a receiver pursuant to section 101 of the CJA. The plaintiff bank had agreed not to enforce on the loan absent default by the debtor. The Court found that the bank had acted in bad faith by effectively causing the debtor to default, and accordingly, the Court held that it was not equitable in the circumstances to grant the relief sought.

64. The circumstances in these proceedings are much more analogous to the facts in *Carnival*,⁶⁵ where a secured creditor sought to enforce its security pursuant to its contractual right to do so. Notably, the Court in *Carnival* specifically distinguished both *Anderson* and

⁶² *Anderson*, *supra* note 55.

⁶³ *1324789*, *supra* note 56.

⁶⁴ *Chongsim*, *supra* note 57.

⁶⁵ *Bank of Montreal v Carnival National Leasing Ltd.*, 2011 ONSC 1007, [2011] OJ No 671 [“*Carnival*”]

Chongsim in its reasons, finding neither decision was applicable to the analysis on whether it was just and convenient to appoint a receiver.⁶⁶

65. CIBC accordingly submits that it is just and convenient to appoint MNP as Receiver as:

- (a) The appointment of the Receiver over Real Estate Co will create a transparent marketing process for the sale of the Mortgaged Property and the realization of the personal property assets of Real Estate Co at the highest possible value, and will provide a clear way forward for the repayment of amounts owed to secured creditors of Real Estate Co;⁶⁷
- (b) The appointment of the Receiver will allow the Mortgaged Property to be preserved and placed under the stewardship of a Court-appointed officer while the priority dispute is advanced. In this respect, it will avoid a multiplicity of proceedings and streamline recovery for Real Estate Co's creditors;
- (c) CIBC's credit documents specifically provide CIBC with the right to seek the appointment of the Receiver and CIBC should not be deprived of this contractual right;⁶⁸ and
- (d) There has been a fundamental breakdown in the relationship between CIBC and Real Estate Co.

PART V.

CONCLUSION AND RELIEF SOUGHT

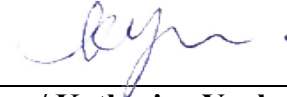
66. For the reasons set out above, CIBC requests that the Court decline to grant the Draft Sale Order and grant the Appointment Order in the form sought by CIBC.

⁶⁶ *Carnival*, *supra* note 65, at **paras 26** and **30**

⁶⁷ *Mitchell Affidavit*, *supra* note 3, para 42, Application Record, Tab 2

⁶⁸ *Mitchell Affidavit*, *supra* note 3, paras 18-19, Exhibits J, K, L, M, Application Record, Tab 2

RESPECTFULLY SUBMITTED this 2nd day of June, 2023.



Thomas Gertner/ Katherine Yurkovich

Lawyers for Canadian Imperial Bank of
Commerce

SCHEDULE “A”

LIST OF AUTHORITIES

Jurisprudence

1. *1324789 Ontario Inc. v Marshall*, 2019 ONSC 517
2. *Anderson v Hunking*, 2010 ONSC 4008
3. *Bank of Montreal v Carnival National Leasing Ltd.*, 2011 ONSC 1007, [2011] OJ No 671
4. *Bank of Montreal v Sherco Properties Inc.*, 2013 ONSC 7023 (Commercial List)
5. *Bank of Nova Scotia v Freure Village on Clair Creek et al*, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List))
6. *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809, 234 ACWS (3d) 268
7. *Canadian Equipment Finance and Leasing Inc. v The Hypoint Company Limited*, 2022 ONSC 6186
8. *CIBC Mortgages Inc. v Computershare Trust Co. of Canada*, 2016 ONSC 7094, 134 OR (3d) 702
9. *Halex Capital Inc. v Natural Energy Systems Inc.*, 2020 ONSC 7910, 85 CBR (6th) 256
10. *Philip's Manufacturing Ltd., Re*, [1992] 5 WWR 549, 12 CBR (3d) 149 (BCCA)
11. *Ravelston Corp., Re*, [2007] OJ No 414, 29 CBR (5th) 1 (ONSC [Commercial List])
12. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd. et al*, 2018 ONSC 7382 (Commercial List)

13. ***Royal Bank of Canada v Chongsim Investments Ltd.***, [1997] 32 OR (3d) 565, [1997] OJ No. 1391
14. ***Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.***, 2019 ONCA 508, OJ No 3211

Secondary Sources

15. The Ontario Superior Court of Justice (Commercial List) Users' Committee, Model Order Subcommittee, *Model Receivership Order Form*, available for download at:
https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List_Forms_including_Model_Orders

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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.

Restriction on appointment of receiver

243 (1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

243 (2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

243 (3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

243 (4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

243 (5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

243 (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

243 (7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

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

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

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

Period of notice

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

No advance consent

244 (2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

244 (3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

244 (4) This section does not apply where there is a receiver in respect of the insolvent person.

[...]

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

246 (2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

246 (3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

[...]

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Courts of Justice Act, RSO 1990, c C43

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.

Terms

101 (2) An order under subsection (1) may include such terms as are considered just.

Land Titles Act, RSO 1990, c L5

Definitions

1 In this Act,

[...]

“fraudulent instrument” means an instrument,

- (a) under which a fraudulent person purports to receive or transfer an estate or interest in land,
- (b) that is given under the purported authority of a power of attorney that is forged,
- (c) that is a transfer of a charge where the charge is given by a fraudulent person, or
- (d) that perpetrates a fraud as prescribed with respect to the estate or interest in land affected by the instrument; (“acte frauduleux”)

“fraudulent person” means a person who executes or purports to execute an instrument if,

- (a) the person forged the instrument,
- (b) the person is a fictitious person, or
- (c) the person holds oneself out in the instrument to be, but knows that the person is not, the registered owner of the estate or interest in land affected by the instrument; (“fraudeur”)

Registration

[...]

Effect of registration

78 (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.

Exception

78 (4.1) Subsection (4) does not apply to a fraudulent instrument that is registered on or after October 19, 2006.

Non-fraudulent instruments

78 (4.2) Nothing in subsection (4.1) invalidates the effect of a registered instrument that is not a fraudulent instrument described in that subsection, including instruments registered subsequent to such a fraudulent instrument

Priorities

78(5) Subject to any entry to the contrary in the register and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, despite any express, implied or constructive notice, are entitled to priority according to the time of registration.

[...]

Remedy of owner of charge with power of sale

99 (1) Subject to the *Mortgages Act* the registered owner of a registered charge that contains a power of sale, upon registering the evidence specified by the Director of Titles, may sell and transfer the interest in the land or any part thereof that is the subject of the charge in accordance with the terms of the power in the same manner as if the registered owner of the registered charge were the registered owner of the land to the extent of such interest therein.

Compliance with *Mortgages Act*

99 (1.1) The evidence specified by the Director of Titles under subsection (1) is conclusive evidence of compliance with Part III of the *Mortgages Act* and, where applicable, with Part II of that Act and, upon registration of a transfer under that subsection, is sufficient to give a good title to the purchaser.

Effect of sale by chargee

99 (2) Upon the registration of a transfer under subsection (1) and upon satisfactory evidence being produced, the land registrar may delete from the register the entry of an instrument or writ

appearing to rank subsequent to the charge under which the land is sold, and thereupon the interest of every person claiming under such subsequent instrument or writ ceases to affect the land.

CANADIAN IMPERIAL BANK OF COMMERCE

Court File No. CV-23-00698539-00CL
1340182 ONTARIO LIMITED AND KAZEMBE &
- and - ASSOCIATES PROFESSIONAL CORPORATION

Applicant

Respondents

APPLICATION UNDER 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

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

PROCEEDING COMMENCED AT TORONTO

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