

FORCE FILED

No. S-1711962  
Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
BY WAY OF ASSIGNMENT OF CERTAIN RIGHTS, and  
4 CORNERS PROPERTIES LTD.

PLAINTIFFS

AND:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
HOMER STREET RESIDENCES LTD.  
BOFFO INVESTMENT CORP.  
BOFFO DEVELOPMENTS (SMITHE) LTD.  
BOFFO DEVELOPMENTS (HORNBY) LTD., and  
BOFFO DEVELOPMENTS (HOMER) LTD.

DEFENDANTS

**NOTICE OF APPLICATION**

**Name of applicant:** The Bowra Group Inc. (“TBG” or the “Applicant”).

**To:** All parties to the proceeding.

TAKE NOTICE that an application will be made by the Applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver, B.C., on June 21, 2021, at 9:45 a.m. by telephone for the orders set out in Part 1, below.

**PART 1: ORDERS SOUGHT**

1. The Applicant seeks an Order pursuant to Section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, as amended (the “LEA”) appointing TBG receiver and manager (in such capacity, the “Receiver”), without security, of all of the assets, undertakings and property

of Homer Street Residences Ltd. ("**Homer Ltd.**") in substantially the form of order attached hereto as Schedule "A" (the "**Homer Receivership Order**").

## **PART 2: FACTUAL BASIS**

### **(A) OVERVIEW**

1. Capitalized terms used and not defined herein shall have the meanings ascribed to them in the Notice of Application filed by the plaintiff 4 Corners Properties Ltd. ("**4 Corners**") in this action on March 26, 2021 (the "**Debtors' Receivership Application**"), a copy of which is attached hereto as Schedule "B".
2. On April 16, 2021, following the hearing of the Debtors' Receivership Application, the Honourable Mr. Justice Giaschi granted an order (the "**Debtors' Receivership Order**") whereby TBG was appointed receiver and manager (in such capacity, the "**Debtors' Receiver**"), without security, of all of the assets, undertakings and property of the defendants Brendan James Schouw and Smithe Residences Ltd. ("**Smithe Ltd.**" and together with Mr. Schouw, the "**Debtors**").
3. TBG in its capacity as the Debtors' Receiver has discovered that Mr. Schouw is the sole shareholder of Homer Ltd.<sup>1</sup> Mr. Schouw was also the sole director of Homer Ltd. from May 10, 2002 until August 17, 2017, when he was replaced by his sister, Tammy Ann Schouw.<sup>2</sup> It is not known what assets Homer Ltd. has, with one exception: along with the Debtors, it is one of the three plaintiffs in Supreme Court of British Columbia Action No. S-180362 (Vancouver Registry) (the "**Related Action**") in which various claims are alleged against the Boffo Defendants (defined below).<sup>3</sup>
4. Given that the Debtors' Receiver has possession of and the sole authority to act in respect of the shares of Homer Ltd., and in order to facilitate the efficient prosecution of the Related

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<sup>1</sup> Affidavit #1 of Doug Chivers, made May 21, 2021 ("**Chivers #1**"), Exhibit "B".

<sup>2</sup> Chivers #1, para. 4, Exhibits "A" and "C".

<sup>3</sup> Chivers #1, Exhibit "D".

Action and administration of the Debtors' estates, the Applicant is seeking an order having itself appointed receiver of the assets, undertaking and property of Homer Ltd.

**(B) BACKGROUND TO THE DEBTORS RECEIVERSHIP ORDER**

5. At all material times, Mr. Schouw was the principal of Smithe Ltd. and Homer Ltd. Mr. Schouw was also the principal of a related company, Hornby Residences Ltd. ("**Hornby Ltd.**"), which is now bankrupt.<sup>4</sup>
6. As of 2011, each of Smithe Ltd., Homer Ltd., and Hornby Ltd., owned portions of the Development Lands (i.e. the Smithe Project, the Homer Project, and the Hornby Project) on which development projects were either underway or completed.
7. Pursuant to the 2010 Sale Agreement among 4 Corners, as purchaser, Smithe Ltd., as vendor, and Mr. Schouw, as covenantor, 4 Corners: (a) agreed to purchase the commercial building to be developed as part of the Smithe Project on the Development Lands owned by Smithe Ltd.; and (b) advanced \$6,675,000 (the "**Loan**") to Smithe Ltd.<sup>5</sup>
8. By the 2011 Joint Venture Agreement among Mr. Schouw, Smithe Ltd., Homer Ltd., Hornby Ltd., and the defendant Boffo Investment Corp., the Development Lands were transferred to the defendants Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd., and Boffo Developments (Homer) Ltd. (together with Boffo Investment Corp., the "**Boffo Defendants**").<sup>6</sup>
9. The 2011 Joint Venture Agreement provided that the Development Lands would be developed by the Boffo Defendants and that the profits from such developments would then be shared between the Boffo Defendants (and their related companies) and the Debtors, Hornby Ltd., and Homer Ltd., based on an agreed formula.<sup>7</sup>

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<sup>4</sup> Debtors Receivership Application, para. 8; Affidavit #2 of Emma Kristensen, made March 26, Exhibit "C"; Affidavit #1 of Brendan James Schouw, made August 1, 2018 in BCSC Action No. S-188491 ("**Schouw #1**"), paras. 2, 3.

<sup>5</sup> Debtors Receivership Application, paras. 10, 11; Schouw #1, para. 18, Exhibits "D" and "S"; 3. Affidavit #1 of William Charles Brandes, made March 5, 2021 ("**Brandes #1**"), Exhibits "A" and "B".

<sup>6</sup> Debtors Receivership Application, para. 12; Schouw #1, Exhibit "A"; Brandes #1, Exhibit "C".

<sup>7</sup> Debtors Receivership Application, para. 13; Schouw #1, para. 5, Exhibit "A", Schedule C.

10. On about April 10, 2015, 4 Corners and the Debtors entered into a series of agreements pursuant to which the Debtors agreed to repay the Loan, which involved, among other things, the granting of the Promissory Note, the GSA and the Standstill Agreement.<sup>8</sup>
11. In or about 2016, the Debtors defaulted under the Standstill Agreement and 4 Corners made demand for repayment of the Indebtedness and provided notice of its intention to enforce its security under the Promissory Note and the GSA.<sup>9</sup>
12. On March 26, 2021, 4 Corners filed the Debtors' Receivership Application.
13. On April 16, 2021, the Debtors' Receivership Order was granted, and the balance of the relief sought by 4 Corners on the Debtors' Receivership Application was granted by Mr. Justice Giaschi under a separate order of even date.

**(C) RELATED PROCEEDINGS**

14. The Development Lands, the 2010 Sale Agreement, and the 2011 Joint Venture Agreement are the subject of two other Supreme Court of British Columbia proceedings, namely: (a) S-188491 (Vancouver Registry) (the "**Schouw Petition**"); and (b) the Related Action.
15. The petitioners in the Schouw Petition are Smithe Ltd. and Mr. Schouw.
16. The plaintiffs in the Related Action are: Smithe Ltd., Mr. Schouw, and Homer Ltd. The relief sought against the Boffo Defendants in the Related Action includes a declaration that all of the profits from the Hornby, Smithe, and Homer Projects are to be allocated as between the Boffo Defendants and the plaintiffs pursuant to, among other agreements, the 2011 Joint Venture Agreement.<sup>10</sup>
17. TBG has been advised by counsel for 4 Corners, which is also a respondent in the Schouw Petition, that no steps have been taken in the Related Action since December 17, 2019, the

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<sup>8</sup> Debtors Receivership Application, para. 19; Schouw #1, Exhibits "O", "P", "R"; Brandes #1, Exhibits "G"- "I".

<sup>9</sup> Debtors Receivership Application, paras. 20-22; Schouw #1, Exhibits "T", "V", "W". "X"; Brandes #1, para. 18-19 Exhibits "M"- "O".

<sup>10</sup> Debtors Receivership Application, para. 28; Chivers #1, Exhibit "D".

date on which Mr. Justice Blok ordered that an application brought by the Boffo Defendants to strike the plaintiffs' claim was adjourned generally.<sup>11</sup>

**(D) HOMER RECEIVERSHIP ORDER**

18. Mr. Schouw is the sole shareholder and was, at all material times, the sole director of Homer Ltd.<sup>12</sup>
19. To the best of TBG's knowledge, Homer Ltd. has no physical assets or ongoing business or operations.<sup>13</sup> The only material asset of which the Applicant is aware is its chose in action against the Boffo Defendants, which is in part the subject of the Related Action.
20. To the best of TBG's knowledge, Homer Ltd. has no liabilities. A search of the court registry shows two judgments granted against Homer Ltd. that are not statute-barred, including in Supreme Court of British Columbia Action No's: (a) VLC-S-H-11070 (Vancouver Registry): in the amount of \$593,524.07, granted August 8, 2011; and (b) S-115431 (Vancouver Registry): in the amount of \$250,000, granted August 7, 2012. However, TBG is not aware of the status of these judgments, including whether they have been satisfied.<sup>14</sup>
21. The Applicant is of the view that practicality dictates that one person have authority to act on behalf of the Debtors and Homer Ltd., including in order to ensure that the Related Action is advanced in the most efficient manner.<sup>15</sup>
22. The Applicant is concerned that Ms. Schouw, the current director of Homer Ltd., will not cause Homer Ltd. to advance its claims in the Related Action, and the Applicant does not know of anyone appropriate that would be willing to replace Ms. Schouw as the director of Homer Ltd.<sup>16</sup>

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<sup>11</sup> Chivers #1, para. 15.

<sup>12</sup> Chivers #1, Exhibits "A" and "C".

<sup>13</sup> Chivers #1, para. 6, Exhibit "E".

<sup>14</sup> Chivers #1, paras. 9-11.

<sup>15</sup> Chivers #1, para. 12.

<sup>16</sup> Chivers #1, paras. 13, 14.

23. TBG is prepared to act as receiver and manager of Homer Ltd. Where TBG is appointed over a group of related entities, it is TBG's standard practice to keep separate records, including accounting records, for the estates of each entity in the group. TBG would do so in this case as well, which would ensure there is no prejudice to the creditors of any of the Debtors and Homer Ltd.<sup>17</sup>

### **PART 3: LEGAL BASIS**

24. The Applicant relies on:
- (a) the LEA;
  - (b) the *Supreme Court Civil Rules*;
  - (c) the inherent and equitable jurisdiction of this Honourable Court; and
  - (d) such further and other legal basis as counsel may advise and this Honourable Court may allow.
25. Section 39 of the LEA reads, in part, as follows:

**Injunction or mandamus may be granted or receiver appointed by interlocutory order**

39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just and convenient that the order should be made.

(2) An order made under subrule (1) may be made either unconditionally or on terms and conditions the court thinks just.

[...]

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<sup>17</sup> Chivers #1, para. 16.

26. In British Columbia, the courts have held that the overarching consideration on an application to appoint a receiver is whether to do so is just and convenient in all of the circumstances.<sup>18</sup>
27. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (“*Maple Trade*”), Mr. Justice Masuhara enumerated certain factors he suggested might figure in the determination of whether it is appropriate to appoint a receiver, including, among others:
- (a) the nature of the property;
  - (b) the preservation and protection of the property pending judicial resolution;
  - (c) whether a court appointment is necessary to enable the receiver to carry on its duties more efficiently; and
  - (d) the goal of facilitating the duties of the receiver.<sup>19</sup>
28. Based on each of the foregoing considerations, and in the circumstances of this case, the appointment of TBG as Receiver is appropriate. In particular:
- (a) Under the Debtors’ Receivership Order, TBG was appointed receiver and manager of all assets, undertakings and property of Smithe Ltd. and Mr. Schouw. Such property includes Mr. Schouw’s shares in Homer Ltd., which are the only issued and outstanding shares of that company.
  - (b) Homer Ltd. has at least one asset being its claim against the Boffo Defendants, which, if successful, will presumably result in a recovery by Homer Ltd. for the benefit of its judgment creditors, other creditors (if any), and shareholders.
  - (c) The Applicant, in its capacity as Debtors’ Receiver, has possession of all of Homer Ltd.’s shares, and the authority to exercise all rights arising in relation thereto. However, the Applicant is unable to identify anyone willing to serve as a director

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<sup>18</sup> *Computershare Trust Company of Canada v. Meadows Development Ltd.*, 2019 BCSC 1945, para. 19; *Bank of Montreal v. Gian’s Business Centre Inc.*, 2016 BCSC 2348, para. 23.

<sup>19</sup> *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 [“*Maple Trade*”], para. 25.

of Homer Ltd. Accordingly, the only means by which the Applicant would be able to exercise any control over Homer Ltd. is if it were appointed receiver and manager of that company's assets.

- (d) It would be practical and efficient for one party to have the ability to instruct all counsel in relation to any claims by the Debtors and Homer Ltd. against the Boffo Defendants, including in relation to the Related Action.
  - (e) Appointing the Applicant Receiver of Homer Ltd. will ensure that any value that might be obtained for its shareholder (or, more precisely, creditors of its shareholder) will be preserved. There is no apparent alternative which would ensure such a result.
  - (f) There would be no prejudice to anyone if the receivership order sought were granted.
29. Most significantly in relation to the within application, the order sought is effectively the only order that enables the Applicant in its capacity as Debtors' Receiver to best carry out its mandate, including realizing any potential value in Mr. Schouw's shares in Homer Ltd. In the circumstances, the appointment of the Applicant as receiver and manager of Homer Ltd. is just and convenient.

#### **PART 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Doug Chivers, made May 21, 2021;
2. Affidavit #2 of Emma Kristensen, made March 26, 2021;
3. Affidavit #1 of William Charles Brandes, made March 5, 2021;
4. Affidavit #1 of Brendan James Schouw, made August 1, 2018 (S-188491);
5. Notice of Application, filed March 26, 2021;
6. Order Made After Application, granted April 16, 2021 (Debtors' Receivership Order);



- 7. Order Made After Application, granted April 16, 2021;
- 8. Petition to Court, filed August 2, 2018 (S-188491);
- 9. such further and other materials as counsel may advise and this Honourable Court may allow.

The Applicant estimate that the application will take **30 minutes**.

This matter is NOT within the jurisdiction of a master .

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application,

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed Application Response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 09-Jun-2021

*"Kibben Jackson"*

For: Signature of Kibben Jackson  
Lawyer for Applicant

*To be completed by the court only:*

Order made

in the terms requested in paragraphs ..... of Part 1 of this Notice of Application

with the following variations and additional terms:  
.....  
.....  
.....

Date: .....

Signature of  Judge  Master

The Solicitors for the Applicant are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 550 Burrard Street, Suite 2900, Vancouver, BC V6C 0A3 Telephone: +1 604 631 3131 Facsimile: +1 604 631 3232. (Reference: Kibben Jackson/265884.00011)

## APPENDIX

### THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts

**SCHEDULE "A"**  
**HOMER RECEIVERSHIP ORDER**

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
BY WAY OF ASSIGNMENT OF CERTAIN RIGHTS, and  
4 CORNERS PROPERTIES LTD.

PLAINTIFFS

AND:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
HOMER STREET RESIDENCES LTD.  
BOFFO INVESTMENT CORP.  
BOFFO DEVELOPMENTS (SMITHE) LTD.  
BOFFO DEVELOPMENTS (HORNBY) LTD., and  
BOFFO DEVELOPMENTS (HOMER) LTD.

DEFENDANTS

**ORDER MADE AFTER APPLICATION**  
**(Receivership Order)**

BEFORE THE HONOURABLE )  
 )  
 ) June 21, 2021  
 )  
\_\_\_\_ JUSTICE \_\_\_\_\_ )

ON THE APPLICATION of The Bowra Group Inc. (the “**Applicant**”) for an Order pursuant to Section 39 of the *Law and Equity Act*, R.S.B.C. 1996 c. 253, as amended (the “**LEA**”) appointing The Bowra Group Inc. as receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and property of Homer Street Residences Ltd. (the “**Debtor**”) coming on for hearing by telephone this day at Vancouver, British Columbia.

AND ON READING Affidavit #1 of Doug Chivers sworn May 21, 2021, and the consent of The Bowra Group Inc. to act as the Receiver; AND ON HEARING Glen Nesbitt, counsel for the Applicant, and those other counsel listed on Schedule “A” hereto, and no one else appearing, although duly served.

THIS COURT ORDERS AND DECLARES that:

### APPOINTMENT

1. Pursuant to Section 39 of the LEA, The Bowra Group Inc. is appointed receiver and manager, without security, of all of the assets, undertakings and property of the Debtor, including all proceeds (the “**Property**”).

### RECEIVER’S POWERS

2. The Receiver is 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 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 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 changing locks and security codes, relocation of Property, engaging independent security personnel, taking physical inventories and placing insurance coverage;
  - (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 these amounts, including, without limitation, enforcement of 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 undertake environmental or workers’ health and safety assessments of the Property and operations of the Debtor;

- (j) to initiate, manage and direct all legal proceedings now pending or hereafter pending (including appeals or applications for judicial review) in respect of the Debtor, the Property or the Receiver, including initiating, prosecuting, continuing, defending, settling or compromising the proceedings;
- (k) 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 considers appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business:
  - (i) without the approval of this Court in respect of a single transaction for consideration up to \$25,000, provided that the aggregate consideration for all such transactions does not exceed \$75,000; and
  - (ii) with the approval of this Court in respect of any transaction in which the individual or aggregate purchase price exceeds the limits set out in subparagraph (i) above,and in each such case notice under Section 59(10) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 shall not be required;
- (m) 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, free and clear of any liens or encumbrances;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver considers appropriate on all matters relating to the Property and the receivership, and to share information, subject to confidentiality terms as the Receiver considers appropriate;
- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) 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 considered necessary or appropriate by the Receiver, in the name of the Debtor;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limitation, the ability to enter into occupation agreements for any property owned or leased by the Debtor;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have; and
- (s) 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**

3. Each of (i) the Debtor; (ii) all of the Debtor's 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 (collectively, "**Persons**" and each 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 (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.
4. All Persons, other than governmental authorities, 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 (collectively, the "**Records**") in that Person's possession or control. Upon request, governmental authorities shall advise the Receiver of the existence of any Records in that Person's possession or control.
5. Upon request, all Persons shall provide to the Receiver or permit the Receiver to make, retain and take away copies of the Records and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities, provided however that nothing in paragraphs 4, 5 or 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 solicitor client privilege or statutory provisions prohibiting such disclosure.
6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by an 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 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 require including, without limitation, 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. 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. 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 stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of the Proceeding except for service of the initiating documentation on the Debtor and the Receiver.

### **NO EXERCISE OF RIGHTS OR REMEDIES**

9. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this Order shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) affect the rights of any regulatory body as set forth in section 69.6(2) of the BIA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien. This stay and suspension shall not apply in respect of any “eligible financial contract” as defined in the BIA.

### **NO INTERFERENCE WITH THE RECEIVER**

10. 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. Nothing in this Order shall prohibit any party to an eligible financial contract from closing out and terminating such contract in accordance with its terms.

### **CONTINUATION OF SERVICES**

11. 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 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 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. All 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-Receivership Accounts**") and the monies standing to the credit of such Post-Receivership 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. Subject to the employees' right to terminate their employment, 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 of the Debtor, including any successor employer liabilities as referred to in Section 14.06(1.2) of the BIA, other than amounts the Receiver may specifically agree in writing to pay or in respect of obligations imposed specifically on receivers by applicable legislation, including sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47. The Receiver shall be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts relating to any employees that the Receiver may hire in accordance with the terms and conditions of such employment by the Receiver.

### PERSONAL INFORMATION

14. Pursuant to Section 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 or Section 18(1)(o) of the *Personal Information Protection Act*, S.B.C. 2003, c. 63, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such

information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

15. Nothing in this Order 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 relating to the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination (collectively "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation.
16. 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 the Receiver is actually in possession.
17. Notwithstanding anything in federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arises or environmental damage that occurred:
  - (a) before the Receiver's appointment; or,
  - (b) after the Receiver's appointment, unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.
18. Notwithstanding anything in federal or provincial law, but subject to paragraph 17 of this Order, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, if the Receiver complies with the BIA section 14.06(4), the Receiver is not personally liable for the failure to comply with the order and is not personally liable for any costs that are or would be incurred by any Person in carrying out the terms of the order.

### **LIMITATION ON THE RECEIVER'S LIABILITY**

19. 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:
  - (a) any gross negligence or wilful misconduct on its part; or
  - (b) amounts in respect of obligations imposed specifically on receivers by applicable legislation.

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

20. The Receiver and its legal counsel, if any, are granted a charge (the "**Receiver's Charge**") on the Property as security for the payment of their fees and disbursements, in each case at their standard rates, in respect of these proceedings, whether incurred before or after the making of this Order. 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
21. 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 referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.
22. 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.

### ALLOCATION

23. Any interested party may apply to this Court on notice to any other party likely to be affected for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the Property.

### SERVICE AND NOTICE OF MATERIALS

24. The Receiver shall establish and maintain a website in respect of these proceedings at: <http://www.bowragroup.com/engagements> (the "**Website**") and shall post there as soon as practicable:
  - (a) all materials prescribed by statute or regulation to be made publicly available, including pursuant to Rule 10-2 of the *Supreme Court Civil Rules*; and,
  - (b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.
25. Any Person who is served with a copy of this Order and that wishes to be served with any future application or other materials in these proceedings must provide to counsel for each of the Receiver and the Applicant a demand for notice in the form attached as Schedule B (the "**Demand for Notice**"). The Receiver and the Applicant need only provide further notice in respect of these proceedings to Persons that have delivered a

properly completed Demand for Notice. The failure of any Person to provide a properly completed Demand for Notice releases the Receiver and the Applicant from any requirement to provide further notice in respect of these proceedings until such Person delivers a properly completed Demand for Notice.

26. The Receiver shall maintain a service list identifying all parties that have delivered a properly completed Demand for Notice (the "**Service List**"). The Receiver shall post and maintain an up-to-date form of the Service List on the Website.
27. Any interested party, including the Receiver, may serve any court materials in these proceedings by facsimile or by emailing a PDF or other electronic copy of such materials to the numbers or addresses, as applicable, set out on the Service List. Any interested party, including the Receiver, may serve any court materials in these proceedings by mail to any party on the Service List that has not provided a facsimile number or email address, and materials delivered by mail shall be deemed received five (5) days after mailing.
28. Notwithstanding paragraph 27 of this Order, service of the Notice of Application and any affidavits filed in support shall be made on the Federal and British Columbia Crowns in accordance with the *Crown Liability and Proceedings Act*, R.S.C. 1985, c.C-50 and its regulations for the Federal Crown and the *Crown Proceedings Act*, R.S.B.C. 1996 c.89 in respect of the British Columbia Crown.
29. The Receiver and its counsel are authorised to serve or distribute this Order, any other orders and any other materials as may be reasonably required in these proceedings, including any notices or other correspondence, by forwarding copies by facsimile or by email to the Debtor's creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of any legal or juridical obligation and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*.

## GENERAL

30. Any interested party may apply to this Court to vary or amend this Order on not less than seven clear business days' notice to the Service List and to any other party who may be affected by the variation or amendment, or upon such other notice, if any, as this Court may order.
31. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
32. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.
33. This Court requests the aid, recognition and assistance of any court, tribunal, regulatory or administrative body having jurisdiction, wherever located, to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All such courts, tribunals and regulatory and administrative bodies are 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.

34. The Receiver is authorized and empowered to apply to any court, tribunal or regulatory or administrative body, wherever located, for recognition of this Order and for assistance in carrying out the terms of this Order and 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.
35. The Applicant shall have his costs of this motion, up to and including entry and service of this Order, as provided for by the terms of the Applicant's security or, if not so provided by the Applicant's 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.
36. Endorsement of this Order by counsel appearing on this application other than the Applicant is dispensed with.

THE FOLLOWING PARTIES APPROVE OF THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

APPROVED BY:

---

Signature of Glen Nesbitt  
lawyer for the Applicant.

BY THE COURT  
DISTRICT REGISTRAR

**SCHEDULE "A"**

**List of Counsel Appearing**

<b>Party</b>	<b>Counsel</b>

**SCHEDULE "B"**

**Demand for Notice**

**TO: The Bowra Group Inc.**  
c/o Fasken Martineau DuMoulin LLP  
Attention: Kibben Jackson/ Glen Nesbitt/ Suzanne Volkow/ Doug Chivers  
Email: [kjackson@fasken.com](mailto:kjackson@fasken.com), [gnesbitt@fasken.com](mailto:gnesbitt@fasken.com), [svolkow@fasken.com](mailto:svolkow@fasken.com),  
[dchivers@bowragroup.com](mailto:dchivers@bowragroup.com).

**Re: In the matter of the Receivership of Homer Street Residences Ltd.**

I hereby request that notice of all further proceedings in the above Receivership be sent to me in the following manner:

1. By email, at the following address (or addresses):

\_\_\_\_\_

OR

2. By facsimile, at the following facsimile number (or numbers):

\_\_\_\_\_

OR

3. By mail, at the following address:

\_\_\_\_\_

Name of Creditor: \_\_\_\_\_

Name of Counsel (if any): \_\_\_\_\_

Creditor's Contact Address: \_\_\_\_\_

\_\_\_\_\_

Creditor's Contact Phone Number: \_\_\_\_\_

No. S-1711962  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
BY WAY OF ASSIGNMENT OF CERTAIN RIGHTS, and  
4 CORNERS PROPERTIES LTD.

PLAINTIFFS

AND:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
HOMER STREET RESIDENCES LTD.  
BOFFO INVESTMENT CORP.  
BOFFO DEVELOPMENTS (SMITHE) LTD.  
BOFFO DEVELOPMENTS (HORNBY) LTD., and  
BOFFO DEVELOPMENTS (HOMER) LTD.

DEFENDANTS

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**ORDER MADE AFTER APPLICATION  
B.C. MODEL RECEIVERSHIP ORDER VERSION NO. 3 2015**

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**FASKEN MARTINEAU DuMOULIN LLP**  
Barristers and Solicitors  
550 Burrard Street, Suite 2900  
Vancouver, BC, V6C 0A3  
+1 604 631 3131

Counsel: Kibben Jackson  
Matter No: 265884.00011



**SCHEDULE "B"**  
**DEBTORS RECEIVERSHIP APPLICATION**



NO. S1711962  
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
BY WAY OF ASSIGNMENT OF CERTAIN RIGHTS, and  
4 CORNERS PROPERTIES LTD.

PLAINTIFFS

AND:

SMITHE RESIDENCES LTD.  
BRENDAN JAMES SCHOUW  
HOMER STREET RESIDENCES LTD.  
BOFFO INVESTMENT CORP.  
BOFFO DEVELOPMENTS (SMITHE) LTD.  
BOFFO DEVELOPMENTS (HORNBY) LTD. and  
BOFFO DEVELOPMENTS (HOMER) LTD.

DEFENDANTS

NOTICE OF APPLICATION

<b>Name of Applicant:</b>	The plaintiff, 4 Corners Properties Ltd. ("4 Corners")
<b>To:</b>	The defendants Smithe Residences Ltd. and Brendan James Schouw (the "Debtors") and Homer Street Residences Ltd.
<b>And to:</b>	The defendants Boffo Investment Corp., Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd., Boffo Developments (Homer) Ltd., and their solicitors

TAKE NOTICE that an application will be made by the Applicant to the presiding judge at the Courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on Friday, the 16th day of April, 2021 at 9:45am, by telephone, for the orders set out in Part 1 below telephone.

*[Faint signature or stamp]*

**Part 1: ORDERS SOUGHT**

1. A declaration that the defendants Brendan James Schouw and Smithe Residences Ltd. (the "Debtors") are in default of:
  - (a) the Promissory Note dated April 10, 2015 granted by the Debtors to 4 Corners Properties Ltd. (the "Promissory Note"); and
  - (b) the General Security Agreement dated April 10, 2015 granted by the Debtors to 4 Corners Properties Ltd. (the "GSA");
2. Judgment in favour of 4 Corners Properties Ltd against the Debtors, jointly and severally, in the amount of \$6,675,000.00 plus interest thereon from and after June 1, 2010, at the rate set out in the Promissory Note (8% per annum), to the date of payment or judgment;
3. Further or in the alternative, interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79;
4. A declaration that, without limitation to any other right or entitlement under the GSA, 4 Corners Ltd. is entitled to a fixed and specific charge upon all of the present and after acquired property of the Debtors and each of them;
5. An Order appointing a Receiver in the form attached as Schedule "A", with a blacklined copy from the Model Receivership Order attached as Schedule "B", including a term that nothing in the receivership order shall prevent the Boffo Defendants (as defined below) from taking the position that the security interest created by the GSA does not attach to the 2011 Joint Venture Agreement, the Hornby Consulting Agreement, or the Smithe Consulting Agreement, each as defined in the Amended Notice of Civil Claim filed in these proceedings on December 14, 2020; and
6. Costs.

**Part 2: FACTUAL BASIS****Overview**

7. The plaintiff, 4 Corners Properties Ltd. ("4 Corners"), brings this application for judgment against the Debtors pursuant to the summary trial provisions in Rule 9-7 of the

*Supreme Court Civil Rules* (the "Rules"), and seeks an order appointing The Bowra Group Inc. as the Receiver of the Debtors' property pursuant to the terms of the GSA.

### **The Debtors**

8. At all material times, the defendant Brendan James Schouw ("Schouw") was the principal of the defendants Smithe Residences Ltd. ("Smithe Ltd.") and Homer Street Residences Ltd. ("Homer Ltd."). Schouw was also the principal of a company known as Hornby Residences Ltd. ("Hornby Ltd."), which is now bankrupt.

Affidavit #2 of Emma Kristensen, made on March 26, 2021 ("Kristensen #2"), Exhibit "C"  
Affidavit of Brendan James Schouw, made on August 1, 2018 in British Columbia Supreme  
Court Action No. S-188491 ("Schouw #1"), paras. 2 and 3

9. As of 2011, each of Smithe Ltd., Homer Ltd., and Hornby Ltd. owned certain lands and premises (collectively, the "Development Lands") on which development projects were either underway or contemplated (respectively, the "Smithe Project", the "Homer Project" and the "Hornby Project").

### **The 2010 Sale Agreement**

10. Pursuant to a Purchase and Sale Agreement dated for reference February 1, 2010 (the "2010 Sale Agreement") between 4 Corners, as the purchaser, Smithe Ltd., as the vendor, and Schouw, as covenantor, 4 Corners agreed to purchase the commercial building to be developed as part of the Smithe Project on the Development Lands owned by Smithe Ltd.

Schouw #1, Exhibit "D"  
Affidavit #1 of William Charles Brandes, made on  
March 5, 2021 ("Brandes #1"), Exhibit "A"

11. 4 Corners advanced \$6,675,000 to Smithe Ltd. pursuant to the 2010 Sale Agreement.

Schouw #1, para 18, Exhibit "S"  
Brandes #1, Exhibit "B"

## 2011 Joint Venture Agreement and Consulting Agreements

12. In breach of the 2010 Sale Agreement, Schouw, Smithe Ltd., Homer Ltd. and Hornby Ltd. (collectively, the "Schouw Group") entered into a joint venture agreement dated August 5, 2011 with the defendant Boffo Investment Corp. (the "2011 Joint Venture Agreement"), pursuant to which the Development Lands were transferred to the defendants Boffo Developments (Smithe) Ltd., Boffo Developments (Hornby) Ltd. and Boffo Developments (Homer) Ltd., respectively (together with Boffo Investment Corp., the "Boffo Defendants").

Schouw #1, Exhibit "A"  
Brandes #1, Exhibit "C"

13. The 2011 Joint Venture Agreement provided that the Development Lands would be developed by the Boffo Defendants and that the profits from such developments would then be shared between the Boffo Defendants (and their related companies) and the Schouw Group, based on an agreed formula.

Schouw #1, para 5, Exhibit "A", Schedule C

14. The profit sharing formula in the 2011 Joint Venture Agreement relating to the Smithe Project and the Hornby Project was subsequently restated in two consulting agreements, each dated March 19, 2012, between Boffo Developments (Hornby) Ltd. and Hornby Ltd. (the "Hornby Consulting Agreement"), and Boffo Developments (Smithe) Ltd. and Smithe Ltd. (the "Smithe Consulting Agreement"). There was no subsequent agreement in respect of the Homer Project.

Brandes #1, Exhibits "D" and "E"  
Schouw #1, Exhibit "B"

15. The Boffo Defendants have completed or nearly completed construction of the Smithe Project and the sale of units is underway. The Hornby Project has been completed and sold. No development has taken place on the Homer Project.

Brandes #1, para. 8

### The 2013 Action

16. By Notice of Civil Claim filed on June 20, 2013 under court file number VLC-S-S-134610, 4 Corners and various other investors commenced an action against the Schouw Group, the Boffo Defendants and others alleging breach of the 2010 Sale Agreement, among other things (the "2013 Action"). The breaches alleged included the impairment of certain security granted by Smithe Ltd. to 4 Corners under the 2010 Sale Agreement to secure the Debtors' obligations to 4 Corners pursuant to the same. In the 2013 Action, 4 Corners sought declarations with respect to its alleged interest in the Development Lands and damages against Schouw and Smithe Ltd., among other things.

Schouw #1, Exhibit "C"  
Brandes #1, Exhibit "F"

17. The Schouw Group filed a Response to Civil Claim on July 15, 2013, opposing the relief sought by 4 Corners in the 2013 Action, and on February 3, 2014, Schouw, in his personal capacity only, filed an Amended Response to Civil Claim alleging, inter alia "[a]ll of the actions of the Schouw Group complained of in the notice of civil claim were commercially necessary to preserve anything of the plaintiffs' investment".

Schouw #1, Exhibits "H" and "J"

18. The 2013 Action was dismissed as against the Boffo Defendants on October 18, 2013.

Schouw #1, Exhibit "I"

### 2015 Arrangements between Schouw and 4 Corners

19. On or about April 10, 2015, 4 Corners the Debtors entered into a series of agreements pursuant to which the Debtors agreed to repay 4 Corners the amounts advanced under the 2010 Sale Agreement. These agreements included the following:

(a) Promissory Note

A Promissory Note in the principal amount of \$6,675,000.00 from Smithe Ltd. and Schouw in favor of 4 Corners, payable on demand, with interest accruing at

the rate of 8% per annum from June 1, 2010 until the date that the principal amount and accrued interest are repaid in full (the "Promissory Note");

Schouw #1, Exhibit "O"  
Brandes #1, Exhibit "G"

(b) General Security Agreement

A General Security Agreement pursuant to which Schouw and Smithe Ltd. granted to 4 Corners a security interest in all of their respective presently owned and after-acquired personal and real property, including but not limited to all of the benefits and entitlements of Schouw and Smithe Ltd. in respect of the Smithe Consulting Agreement and the remaining provisions of the 2011 Joint Venture Agreement as they relate to the Homer Project (the "GSA").

Section 1.1(c)(i) of the GSA provides that an "Event of Default" includes any failure by Schouw and/or Smithe Ltd. to make "payment when due of any indebtedness or liability" to 4 Corners.

Section 4.1 of the GSA provides that 4 Corners is entitled to enforce its security interest upon any continuing Event of Default under any promissory note(s) or the GSA, and section 4.2 of the GSA gives 4 Corners the right to appoint a receiver, manager or receiver and manager in these circumstances.

Schouw #1, Exhibit "P"  
Brandes #1, Exhibit "H"

(c) Standstill Agreement

A Priority and Standstill Agreement pursuant to which 4 Corners agreed, among other things, not to demand payment under the Promissory Note until the occurrence of certain events relating to the development of the Smithe Project, provided there was no uncured "Material Default" under that agreement (the "Standstill Agreement").

Section 6 of the Standstill Agreement provides a "Material Default" includes any action taken by Schouw or Smithe Ltd. which, in the reasonable opinion of 4 Corners:

- (i) impairs or jeopardizes the security granted by the GSA; or
- (ii) impugns the relationship of Schouw or Smithe Ltd. with the Boffo Defendants;

Schouw #1, Exhibit "R", ss. 5 and 6  
Brandes #1, Exhibit "I"

(d) Direction to Pay

Direction and Authority to Pay to counsel for 4 Corners, as trustee and agent for the same, any monies owing to Smithe Ltd. or Schouw, executed by Schouw on his behalf and on behalf of Smithe Ltd.; and

Schouw #1, Exhibit "Q"  
Brandes #1, Exhibit "J"

(e) Statutory Declaration

A Statutory Declaration made by Schouw confirming that Schouw and Smithe Ltd. received \$6,675,000 from 4 Corners pursuant to the 2010 Sale Agreement and were indebted to 4 Corners for this amount with interest thereon at 8% per annum from June 1, 2010.

Schouw #1, Exhibit "S"  
Brandes #1, Exhibit "K"

**Default under the Standstill Agreement and GSA**

20. By letter dated January 11, 2016, the Boffo Defendants advised the Schouw Group that Boffo was about to commence legal proceedings to seek "a declaration and order that



both the [2011 Joint Venture Agreement] and the Smithe Consulting Agreement are now frustrated and void as a consequence of your personal affairs and conduct, and the publicity related thereto." Alternatively, the Boffo Group offered to execute the necessary documents to terminate both agreements (the "Boffo Letter").

Schouw #1, Exhibit "T"  
Brandes #1, Exhibit "M"

21. The threat of legal action by the Boffo Group in the Boffo Letter constituted a Material Default of the Standstill Agreement on the part of the Debtors. By letter dated April 15, 2016, 4 Corners, through its solicitors, advised counsel for the Debtors of the same and that the failure to remedy that Material Default prior to April 26, 2016 could result in 4 Corners taking further action under the Promissory Note and the GSA.

Schouw #1, Exhibit "V"  
Brandes #1, Exhibit "N"

22. The Debtors failed to cure the Material Default within the time provided under the Standstill Agreement or at all. Accordingly, by letter dated April 26, 2016, 4 Corners made a demand upon the Debtors for payment of:

- (a) the principal and interest accrued pursuant to the Promissory Note, which as at April 25, 2016 totalled \$9,827,331;
- (b) interest accruing after April 25, 2016 up to and including the date of payment, at the rate set out in the Promissory Note (8% per annum);
- (c) legal costs payable pursuant to the GSA, estimated in the amount of \$1,5000;  
(the "Indebtedness")

4 Corners' also provided the Debtors with notice of its intention to enforce its security under the Promissory Note and GSA in accordance with s. 244 of the *Bankruptcy and Insolvency Act*.

Schouw #1, Exhibit "W"  
Brandes #1, paras 18-19, Exhibit "O"

23. By letter dated May 6, 2016 addressed to counsel for Smithe Ltd. and Schouw, counsel for the Boffo Group alleged Smithe Ltd. had, by its own conduct and by the conduct of

its principal Schouw, repudiated the Smithe Consulting Agreement by making it "impossible for [Boffo Developments (Smithe) Ltd.] to request or avail itself of any of the development services to be provided by or through Smith [Ltd.]" under the Smithe Consulting Agreement. The Boffo Group purported to accept Smithe Ltd.'s alleged repudiation of the Smithe Consulting Agreement and to treat the agreement as at an end (the "Tomy'n Letter").

Schouw #1, Exhibit "U"  
Brandes #1, Exhibit "P"

24. The repudiation alleged in the Tomy'n Letter constituted a further Material Default by Schouw and Smithe Ltd. under the Standstill Agreement.

25. Despite demand, Schouw and Smithe Ltd. have refused or neglected to pay the amount of the Indebtedness.

Brandes #1, para. 21

26. 4 Corners delivered further notice of its intention to enforce its security under the GSA in accordance with s. 244 of the *Bankruptcy and Insolvency Act* to Schouw and Smithe Ltd. on March 5, 2021. The Bowra Group Inc. has agreed to act as Receiver Manager in this matter.

Kristensen #2, Exhibits "A" and "F"

27. On March 23, 2021, the Debtors filed a Response to Civil Claim opposing the relief sought against them in this action on the singular basis that "the plaintiffs have failed to act in good faith respecting the agreements they allege, by their on again off-again approach to this development".

#### **Claims Against Boffo Defendants**

28. In the action herein, 4 Corners claims against the Boffo Defendants in the name of and as the assignee of certain rights from the Debtors under the GSA. The relief sought against the Boffo Defendants in the action includes a declaration that all of the profits from the Hornby, Smithe and Homer Projects are to be allocated as between the Boffo Defendants and the Schouw Group as provided for in the 2011 Joint Venture Agreement, Smithe Consulting Agreement and Homer Consulting Agreement, and an accounting and of all profits to date in respect of these Projects.

29. In response to the claims against them in this action, the Boffo Defendants have pleaded that the Debtors breached and repudiated the Joint Venture Agreement and Smithe Consulting Agreement and that they are not obligated to pay any amounts to the Debtors in respect of these agreements.

### Part 3: LEGAL BASIS

#### Rule 9-7: Summary Trial

30. Rule 9-7(2) provides that a party may apply to the court for judgment under this rule, either on an issue or generally, in an action in which a response to civil claim has been filed.

31. Rule 9-7(15) provides that, on the hearing of a summary trial application, the court may grant judgment in favour of any party, either on an issue or generally, unless: (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law; or (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

32. In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

*Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*,  
1989 CanLII 229 (BCCA), para. 49

#### Suitability for Summary Trial

33. The complete factual record necessary to decide 4 Corners' claims against the Debtors is available on this application. All of the material facts and documents establishing 4 Corners' entitlement to judgment against the Debtors are set out in Brandes #1. These same facts and documents are affirmed by Schouw in an affidavit he swore and filed in 2018 in an ultimately unsuccessful petition by the Debtors to discharge the security interest created by the GSA pursuant to the terms of the *Limitation Act*, S.B.C. 2012, c. 13. In any event, credibility is not a critical factor in determining 4 Corners' claims against the Debtors, which turn on the

express terms of the Promissory Note, the GSA, and other agreements entered into between 4 Corners and the Debtors in 2015. It would not be unjust to decide 4 Corners' clear cut claims against the Debtors on this application.

### **Debtors' Default**

34. The allegations in the Boffo and Tomy Letters constitute uncured Material Defaults by Schouw and Smithe Ltd. under the Standstill Agreement, entitling 4 Corners to make demand on the Promissory Note.

35. 4 Corners made demand on the Promissory Note and the Debtors have and continue to fail or refuse to pay the Indebtedness or any part thereof.

36. The default in payment of the Promissory Note constitutes an Event of Default under Article 1.1(c)(i) of the GSA. Pursuant to Articles 4.1 and 4.2 of the GSA, 4 Corners is entitled to enforce its security under the GSA, including by the appointment of a receiver.

### **Judgment for Indebtedness**

37. The Promissory Note requires the Debtors to pay to 4 Corners, on demand, the principal amount of \$6,675,000.00 plus interest thereon calculated at the rate of 8% per annum from June 1, 2010 until the date that the principal amount and accrued interest are repaid in full. To March 26, 2021, the date of filing of this application, the principal and interest owing by the Debtors to 4 Corners pursuant to the Promissory Note totals \$12,452,441.00.

38. The Promissory Note, the GSA, the Standstill Agreement, and the other documents executed by the Debtors in April of 2015 represent the agreement of commercially sophisticated parties to deal with the claims advanced in 2013 Action. As part of this arrangement, the Debtors expressly agreed that interest would accrue on the amounts owing by the Debtors to 4 Corners at the rate of 8% per annum to the date the Indebtedness was fully repaid. 4 Corners has been deprived of the use of a significant sum for over eleven years, and there is nothing to suggest that this rate is illegal or unduly harsh.

39. In these circumstances, it is appropriate that interest should continue to accrue on the Indebtedness at the rate of 8% per annum, as opposed to at the post-judgment rate set out in

the *Court Order Interest Act*, and section 8 of the *Court Order Interest Act* specifically gives the Court the discretion to make that order.

*Radiant Global Logistics Inc. v. Border Express Services Ltd.*, 2018 BCSC 1817

### Appointment of Receiver

40. 4 Corners is specifically entitled under the terms of the GSA to the appointment of a Receiver in order to enforce its security and realize the amount due and owing to it.

41. The court appointment of a receiver and manager is just and convenient in this case, given the extant dispute (which is the subject of the claims against the Boffo Defendants herein) regarding the Debtors' entitlement to proceeds under the Joint Venture and Smithe Consulting Agreement. A court appointment is necessary to ensure that the receiver has sufficient standing and power in the context of the prosecution of this claim for the benefit of all stakeholders.

*Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477

42. The GSA expressly provides 4 Corners with a right to appoint a receiver on default. A secured creditor is entitled to the court appointment of a receiver and manager as a matter of course in circumstances where it may appoint a receiver under the terms of its security. The Court should exercise its discretion not to make such an appointment only in those rare occasions where the debtor can show compelling commercial or other reasons why such an order ought not to be made.

*United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640  
*Canadian Imperial Bank of Commerce v. Can-Pacific Farms Inc.*, 2012 BCSC 437.

43. 4 Corners pleads and relies on Rules 9-7, and 10-2 of the *Supreme Court Civil Rules*, s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, as amended, ss. 63 and 66 of the *Personal Property Security Act*, and s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, or in the alternative, s. 47 of the *Bankruptcy and Insolvency Act*.

**Part 4: MATERIAL TO BE RELIED ON**

44. Affidavit #1 of William Charles Brandes, made on March 5, 2021;
45. Affidavit # 2 of Emma Kristensen, made on March 26, 2021;
46. The pleadings and process in the action herein; and
47. Such further and other material as counsel may advise and the Court may allow.

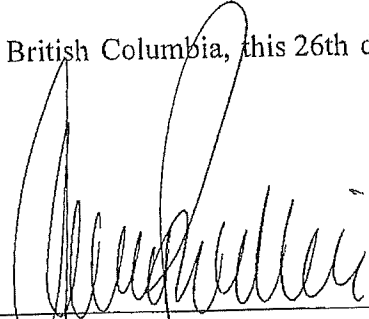
The Applicant estimates that the application will take 1 hour and be heard by telephone.

- This matter is within the jurisdiction of a Master. *ICU*
- This matter is not within the jurisdiction of a Master.

**TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION:** If you wish to respond to this Notice of Application, you must, within 5 business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within 8 business days after service of this Notice of Application.

- (a) file an Application Response in Form 33,
- (b) file the original of every affidavit, and every other document, that
- (i) you intend to refer to at the hearing of this application, and
- (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
- (i) a copy of the filed Application Response;
- (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
- (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated at the City of Vancouver, in the Province of British Columbia, this 26th day of March, 2021.



Lawson Lundell LLP  
Solicitors for the plaintiff 4 Corners  
Properties Ltd.

This Notice of Application is filed by Craig A.B. Ferris, Q.C. (cferris@lawsonlundell.com) and Anna Paczkowski (apaczkowski@lawsonlundell.com), of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2.

*To be completed by the court only:*

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this Notice of Application

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge  Master

**APPENDIX**

The following information is provided for data collection purposes only and is of no legal effect.

**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above