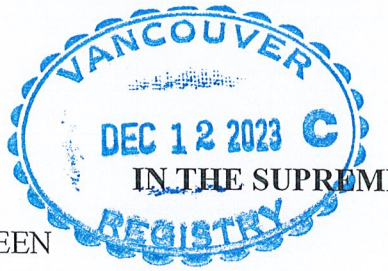

No H230802
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

BANK OF MONTREAL

PETITIONER

AND

HARO-THURLOW STREET PROJECT LIMITED PARTNERSHIP, HARO AND THURLOW GP LTD., HARLOW HOLDINGS LTD., 1104227 B.C. LTD., CLOUDBREAK HOLDINGS LTD., CM (CANADA) ASSET MANAGEMENT CO. LTD., FORSEED HARO HOLDINGS LTD., 1115830 B.C. LTD., TERRAPOINT DEVELOPMENTS LTD., KANG YU ZOU, WEI DONG, WEI ZOU, XIA YU and TREASURE BAY HK LIMITED

RESPONDENTS

RESPONSE TO PETITION

Filed by: Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd., and Harlow Holdings Ltd. (the "petition respondents")

THIS IS A RESPONSE TO the petition filed on October 23, 2023

Part 1: ORDERS CONSENTED TO

The petition respondents consent to the Orders sought in paragraphs 1, 3, 4, 5, 19, 21 and 22.

Part 2: ORDERS OPPOSED

The petition respondents oppose the Orders sought in paragraphs 6, 7, 14 and 20.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The petition respondents take no position on the Orders sought in paragraphs 2, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18 and 23.

Part 4: FACTUAL BASIS

The Parties

1. The petition respondents Haro and Thurlow GP Ltd. ("**HT GP**"), Haro-Thurlow Street Project Limited Partnership ("**HT LP**") and Harlow Holdings Ltd. ("**Harlow Holdings**") are referred to hereafter, collectively, as the "**Borrowers**".

2. The petitioner, the Bank of Montreal, is a Canadian chartered bank.

3. HT LP is a British Columbia limited partnership, which was formed for the purpose of developing the **Harlow Lands**, as that term is defined in the Petition.

4. Harlow Holdings is the legal owner of the Harlow Lands. HT LP is the beneficial owner of the Harlow Lands. HT GP is HT LP's general partner. HT GP and HT LP are referred to, together, as the "**Partnership**".

5. The Partnership, in turn, is beneficially owned by 11044227 B.C. Ltd. ("**1104**"), as to 45%, Forseed Haro Holdings Ltd. ("**Forseed**"), as to 45%, and Terrapoint Developments Ltd. ("**Terrapoint**"), as to 10%. 1104, Forseed and Terrapoint, collectively, are hereafter referred to as the "**Partners**".

6. The respondent 1104 is beneficially owned by the respondent 1115830 B.C. Ltd. ("**1115**") which, in turn, is beneficially owned by the individual respondent Kang Yu Canning Zou ("**Mr. Zou**"). Mr. Zou is a director of HT GP, Harlow Holdings, 1104 and 1115. He is also a director of Cloudbreak Holdings Ltd. ("**Cloudbreak**") and CM (Canada) Asset Management Co. Ltd. ("**CM**"). Mr. Zou, 1104, 1115, Cloudbreak and CM are referred to, collectively, as the "**CM Guarantors**".

7. The individual respondents Wei Dong, Wei Zou and Xia Yu are related to the respondent Mr. Zou by blood or marriage.

The Property

8. This proceeding concerns a development property at the intersections of Haro and Thurlow streets in Vancouver, which is defined in the Petition as the "**Harlow Lands**". The Harlow Lands comprise a rectangular-shaped parcel of land at the intersections of Haro and Thurlow Streets in Vancouver, with a total gross surface area of about 43,250 square feet. The Harlow Lands are currently improved with a seven-story residential strata building and a low-rise commercial building over a common underground parking structure.

9. The Partners, and in particular Terrapoint, which is a company affiliated with Intracorp, a major real estate developer, have carried out extensive pre-application work for a proposed high-rise building or buildings on the Harlow Lands, which would offer a mix of ground-oriented commercial retail units and as many as 423 market residential condominiums with a total development density of 10.42 FSR.

10. The Harlow Lands had an appraised value based on their development potential of $192,000,000 as at July 31, 2023.

11. For property tax purposes, the Harlow Lands are currently assessed at $98,042,300.

Financing

12. The Harlow Lands were acquired by Harlow Holdings, as nominee for the Partnership, in August 2018, for a total cost (including a purchase price of $164,750,000, property transfer taxes, commissions and other expenses) of about $172,750,000 (the "**Acquisition Cost**").

13. The acquisition cost was financed, in part, by the loan from the petitioner which is in issue in this proceeding (the "**Loan**").

14. The face amount of the Loan advanced by the petitioner, pursuant to the terms of the Credit Agreement between the Borrowers and the petitioner, was $94,000,000. Of this amount, after payment of fees and other expenses, the Borrowers received about $92,371,000 on closing.

15. The balance of the Acquisition Cost was funded by the Partners.

16. At the time of closing, the Partners advanced loans totalling $84,438,901 to the Partnership. By January 1, 2023, the Partners had advanced a further $18,061,080, to fund ongoing Partnership Costs. The Partners have made additional contributions in 2023.

17. Since October 2018, the Borrowers have paid the Bank more than $27,000,000 in interest and fees on account of the Loan.

18. As required by the Bank, the Harlow Lands are managed by an arm's length professional property manager, First Services Residential B.C. Ltd. ("**FirstService**").

19. The gross interest cost under the Loan is about $750,000 per month at present, assuming the outstanding balance of the Loan is about $95,000,000, as set out in the petition. Assuming the balance is in fact $80,000,000 (because, as set out below, the petitioner has applied $15,000,000 of cash collateral to the outstanding balance), the gross monthly interest cost should be about $630,000. Net monthly revenue from the Property is about $175,000 per month, resulting in a monthly shortfall of about $450,000.

Termination of Loan

20. The original term of the Loan was to have been for two years, from August 31, 2018, to August 31, 2020.

21. For many reasons, not least of which include challenges in meeting the City of Vancouver's requirements with respect to the preservation of view corridors, the Borrowers, to date, have not yet formally applied for a development permit for the Harlow Lands, although there have been extensive pre-application studies and ongoing discussions with the city regarding the potential development of the Harlow Lands since 2018.

22. Because of these delays, the Borrowers and the petitioner negotiated several extensions of the original "Outside Date" under the Credit Agreement, which was August 31, 2020. On September 30, 2022, the parties negotiated a further extension of the Loan to August 31, 2023.

23. In or about early 2023, the petitioner, which has syndicated half of the Loan to another lender, Laurentian Bank, advised the Borrowers that it would not grant any further extensions of the Loan beyond August 31, 2023.

Purchase Offers

24. In the face of the petitioner's refusal to further extend the Loan, the Borrowers retained CBRE Limited to solicit offers to purchase the Property. In May 2023, the Borrowers received six different offers, ranging in value from $81,500,000 to $100,000,000, with incentives built into some of the offers which might have resulted in higher purchase prices if certain conditions subsequent had been met.

25. None of these offers was accepted by the Borrowers. While they would have generated sufficient proceeds to pay the Loan in full, even with incentives for potential price increases based on favourable development approvals by the City of Vancouver, all of the offers would have resulted in the Partners, collectively, suffering tens of millions of dollars of losses on their investments in the Harlow Lands.

Forbearance Discussions

26. In August and September 2023, the Borrowers engaged in discussions with the petitioner, with a view entering into a forbearance agreement.

27. Ultimately, the parties could not reach agreement on terms of forbearance, and the petitioner commenced these proceedings on October 23, 2023.

Refinancing

28. In late September 2023, at or about the time forbearance negotiations with the petitioner came to an end, the Borrowers retained consultants to assist them in securing take-out financing.

29. These consultants have identified a syndicate of three lenders who have indicated a strong willingness to provide the Borrowers with a loan or loans in amounts sufficient to fully repay the Petitioner's loan.

30. However, the Borrowers' consultants have identified the CPL registered against title to the property in favour of the Respondent Treasure Bay HK Ltd. ("Treasure Bay") as an impediment to the new lenders proceeding to finalize their commitments and provide

funding. Accordingly, Borrowers are proceeding with an application to have the Treasure Bay CPL discharged from title.

31. The Borrowers are confident that they will be able to secure take-out financing by no later than June 30, 2024.

Security and Seizure of Cash Collateral

32. In addition to a first-ranking mortgage charge over the Harlow Lands (the "**Mortgage**"), the Bank has extensive security for the repayment of its Loan, including corporate guarantees of the CM Guarantors, Forseed and Terrapoint, as well as personal guarantees from one of the principals of the CM Guarantors and members of his family.

33. One of those personal guarantees is secured by a $7,000,000 mortgage over a residential property in Vancouver with a tax assessment value of roughly the same amount.

34. In addition, the petitioner has at all times required that the Partners maintain cash collateral of not less than $15,000,000.

35. Indeed, at the time these proceedings were commenced, the petitioner had on deposit a total of $23,600,000 of pledged funds as cash collateral, including:

    a. $13,625,000 pledged by Forseed;

    b. $4,365,000 pledged by 1104; and

    c. $5,600,000 pledged by a company called CM Grouse Mountain (LP) Ltd., which is a company related to the CM Guarantors.

36. The petitioner, either before or after the commencement of these proceedings, seized the sum of $15,000,000 from Forseed's and 1104's accounts, and has applied that amount to the outstanding Loan balance.

37. The remaining pledged funds, totalling $8,600,000, have been frozen by the petitioner.

38. FirstService continues to collect rent from tenants of the Harlow Lands. This revenue is deposited to an account of the Partnership with the petitioner Bank of Montreal. The petitioner regularly withdraws money from the Partnership's account and applies it to accruing interest.

39. The Borrowers undertake to the court to instruct First Service to continue to deposit net rent revenue (after payment of taxes, maintenance and other essential expenses relating to the Harlow Lands) during any redemption period granted by the court.

Part 5: LEGAL BASIS

Rules 2-1 and 21-7

1. Rule 2-1(1) of the Supreme Court Civil Rules [B.C. Reg. 168/2009, as amended] (the "**Rules**") provides that "...[u]nless an enactment or these ... Rules otherwise provide, *every proceeding must be started by the filing of a notice of civil claim under Part 3*." [Emphasis added]

2. Rule 2-1(2), in turn, proscribes those proceedings which may be started, not by notice of civil claim, but by petition:

> **Commencing proceedings by petition or requisition**
>
> (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
>
> (a) the person starting the proceeding is the only person who is interested in the relief claimed, or there is no person against whom relief is sought;
>
> (b) *the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court*;
>
> (c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document;
>
> (d) the relief, advice or direction sought relates to a question arising in the execution of a trust, or the performance of an act by a person in the person's capacity as trustee, or the determination of the persons entitled as creditors or otherwise to the trust property;
>
> (e) the relief, advice or direction sought relates to the maintenance, guardianship or property of infants or other persons under disability;
>
> (f) the relief sought is for payment of funds into or out of court;
>
> (g) *the relief sought relates to land and is for*
>
> (i) *a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge,*
>
> (ii) *a declaration that settles the priority between interests or charges*,
>
> (iii) an order that cancels a certificate of title or making a title subject to an interest or charge, or
>
> (iv) an order of partition or sale;
>
> (h) the relief, advice or direction sought relates to the determination of a claim of solicitor and client privilege.

[Emphasis added]

3. The petitioner has elected to commence this proceeding by petition. Presumably, it claims entitlement to do so pursuant to sub-rules 2-1(2)(b) (proceedings "brought in respect of an application that is authorized by an enactment to be made to the court" – here., the appointment of a receiver), and 2-1(2)(g) (proceedings where the relief relates to land and is for "a declaration of a beneficial interest in or a charge on land and of the character and extent of the interest or charge" or "a declaration that settles the priority between interests or charges" – in other words, a foreclosure proceeding).

4. However, the petitioner does not seek the relief typically sought in a foreclosure petition, including foreclosure of the Borrowers' equitable right to redeem mortgaged property. Instead, the petitioner attempts to do an end run around the usual foreclosure practice, by cherry-picking the relief that it seeks (declarations of entitlement with respect the Harlow Lands and the Mortgage, judgement against the Borrowers and the guarantors on their personal covenants, and an order for sale in the guise of the appointment of a receiver), without seeking an order of foreclosure (whether *Nisi* or absolute). The court should not countenance this.

5. If the petitioner wishes to foreclose the Borrowers' equity of redemption, it should be required to follow the practice proscribed by Rule 21-7 (Foreclosure and Cancellation) and not by way of a hybrid process invoking the court's equitable jurisdiction to appoint receivers with powers of sale.

Foreclosure Practice

Order Nisi

6. In his seminal article on foreclosure practice ["On Foreclosure Practice", 41 Advocate (Vancouver) 583 (1983)], former Chief Justice McEachern described "the usual Order Nisi of foreclosure". He wrote (at pp. 584-585):

> On such an application, assuming a default, and personal and proper substituted service upon the mortgagors and guarantors, and upon every other interest sought to be foreclosed, the usual Order Nisi of foreclosure includes only:
>
> > 1. A declaration that a mortgage is registered against described property. This must be established by filing a certificate of the state of title from the Land Title Office. The Court does not declare that the mortgage is a "first" or "second" mortgage as priorities are not established at this stage.
> >
> > 2. A declaration that a mortgage is in default. This must be established by statements of fact in the petition, verified by affidavit.
> > A declaration that the whole amount is owing such is the case. This is the effect of the acceleration clause. If the mortgage requires notice to be given before the acceleration clause operates, there must be proof of such notice, and that the time required by the notice has elapsed.

3. The fixing of the redemption period of 6 months from the date of the Order Nisi.

4. Personal judgement against the mortgagor(s) and the guarantor(s) for the amount due on the date of the Order Nisi.

5. An order for a summary accounting of the amount required to redeem the mortgage, i.e., the amount payable on the date of the application and the per diem thereafter…

6. Leave to apply for a further accounting where there is a variable interest rate in the case the petitioner receives any monies during the redemption period, or has to make disbursements for taxes or insurance, etc..

7. Costs…

Redemption

7. Chief Justice McEachern went on to comment (at p. 585) that,

> Generally speaking, the period of redemption should not be more or less than 6 months from the date of the Order Nisi. It should only be more than 6 months where very special circumstances are shown which cannot be accommodated upon an application for extension of the redemption period. The redemption period should not be less than 6 months unless":
>
> > The premises are abandoned or are suffering waste…
> >
> > The mortgagor has no equity and is unlikely to be able to refinance and the mortgagee will likely suffer a loss or an increased loss if the usual order is made.

Evidence

8. On evidence, the Chief Justice noted (at p. 585):

> In this connection reliable appraisal or other evidence should be furnished. The judges tend to be skeptical about "walk past" or "drive past" opinion on value unless they persuasively suggest a range far above or below the amount required to redeem, or unless they update an earlier appraisal.

Conduct of Sale

9. With respect to conduct of sale, he said (at pp. 588-589):

> The first principle is that, in the absence of special circumstances, a first mortgagee is not entitled to an order for conduct of sale, or for sale, until after the expiration of the redemption period. [Citing *Pope v. Roberts* (1979), 10 B.C.L.R. 50 (C.A.).] The reason for this, of course, is that in order for conduct of sale, or for sale, before the expiration of the redemption period abridges the mortgagor's opportunity to redeem his property. Every order for conduct of sale made during the redemption period should lapse upon the expiration of the redemption period. If, however, the circumstances are such that an immediate Order Absolute could be made because

> of abandonment, waste, or no equity, then it may be good practice to make both an Order Nisi (with the usual or an abridged redemption period) and an order for conduct of sale.
>
> Some lawyers have recently been applying for an order for conduct of sale without asking for an Order Nisi. This is equivalent to an Order Nisi without a redemption period. This practice should be discouraged, but if such an order is made it should be only for 6 months although it could presumably be renewed. [Citing *Devaney v. Brackpool* (1981), 31 B.C.L.R. 256 (S.C.).]
>
> ...
>
> As a general rule, ... if a first mortgagee is entitled to an order for sale upon the expiration of the redemption period as he has a prima facia right to pursue such a remedy and is only in this way the mortgagee can effectively assert his action on the mortgagor's covenant.
>
> The judge, however, has an equitable discretion to refuse such a remedy in special circumstances, particularly if the mortgagor has substantial equity or in other circumstances which would entitle the mortgagor or a subsequent encumbrancer to an extension of the redemption period. There is no standard practice in this connection. If the mortgagee asks for a right of sale after the expiration of the redemption period, it should usually be granted. On the other hand, if the mortgagor is asking for the extension of the redemption period, then it may be given on terms that the mortgagee have an order for conduct of sale.
>
> There are, of course, other alternatives but the above fairly describe the practice which is followed in most cases.

The Petitioner Seeks to Bypass the Usual Foreclosure Process

10. By its petition, the petitioner seeks to take advantage of certain aspects of the usual foreclosure practice (declarations and judgements), while at the same time asking for the appointment of a receiver with power to sell the Harlow Lands immediately, thus effectively foreclosing the Borrowers' equity of redemption, without any evidentiary justification for such a radical departure from the usual foreclosure practice.

11. Thus, the petitioner seeks:

    a. A declaration that the Mortgage "is a mortgage charging the Harlow Lands in priority to the interests therein or claims thereto of all respondents and all persons claiming by, through or under them." [draft proposed Order, para. 28]; and

    b. A declaration that "the equitable mortgage dated October 3, 2018 granted by LP in respect of LP's beneficial interest in the Harlow Lands is a valid mortgage charging LP's beneficial interest in the Lands in priority to the interests therein or claims thereto of all Respondents and all persons claiming by, through or under them" [draft proposed Order, para. 29].

12. The petitioner further seeks a declaration that the payments due and owing under the Credit Agreement are in default, and a declaration that, as at October 16, 2023, the amount of

money due under the Credit Agreement was the sum of $95,284,936.98, together with interest accruing thereon at a rate of $24,361.64 per day from October 17, 2023, to the date of payment, subject to the compounding provisions of the Credit Agreement. (Although, that specific relief is not pursued in the draft form of order attached as Schedule A to the petition.) The Petitioner seeks judgement against the Borrowers, jointly and severally, in the amount of $95,284,936.98, together with interest thereon to the date of judgement and the petitioner's cost of and related to this proceeding.

13. The Petitioner also seeks judgement against the individual and corporate guarantors, in the amounts of their respective guarantees, plus accrued and accruing interest and costs. [draft proposed Order, paras. 42-48]

14. Nowhere, however, does the Petitioner seek a declaration that the Mortgage is in default. Nor does it seek Order Nisi of foreclosure. Instead, presumably to avoid the inconvenience of affording the Borrowers their equity of redemption, it seeks the appointment of a receiver pursuant to section 243(1) of *Bankruptcy and Insolvency Act*, [RSBC 1985] c. B-3 (the "**BIA**"), and s.39 of the *Law and Equity Act* [RSBC 1996] c. 253 (the "**LEA**"), appointing a receiver of the Harlow Lands and all personal property of the debtors located at, related to or derived from the Harlow Lands (which the petitioner defines, collectively, as the "**Property**").

15. Pursuant to the draft terms of order sought by the Petitioner, the Receiver would be immediately empowered and authorized to "market any or all of the Property, including advertising and soliciting offers in respect to the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver considers appropriate", and to "sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business".

16. In short, the Petitioner seeks immediate conduct of sale of the Harlow Lands without affording the respondent Borrowers the usual six months' equity of redemption. The court should not countenance this.

17. The Borrowers' equity of redemption should not be impeded or limited by the device of the appointment of a receiver with immediate power of sale: *Chien v. Teh*, 2015 BCSC 2287; *355498 B.C. Ltd. v. Namu Properties*, 1999 BCCA 138.

Should a Receiver be Appointed at all?

18. The Petitioner has a contractual right to appoint a receiver of the Harlow Lands. It has chosen not to exercise that right. Instead, it comes before the court seeking an Order pursuant to sections 39 of the *LEA* and 243 of the *BIA*. To succeed, the petitioner bears the onus of satisfying the court that it would be just and equitable to appoint a receiver. In the circumstances of this case, the Petitioner cannot discharge that burden.

19. Section 39 of the LEA provides:

> **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 or convenient that the order should be made.***
>
> (2) An order made under subsection (1) may be made either unconditionally or on terms and conditions the court thinks just.

20. Section 243 of the *BIA*, in turn, provides:

> **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.

21. The Petitioner has not advanced *any* evidence to suggest that the appointment of a receiver in this proceeding would be "just and equitable". For this reason alone, that part of the petition seeking appointment should be dismissed.

22. In *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 ("**Textron**"), the court considered whether a receiver of a hotel property should be appointed and whether the receiver should have conduct of sale of the undertaking and property of the hotel prior to judgment and without a redemption period. With respect to the former, Justice Wilcock, as he then was, said:

> [55] ... I conclude that ***the statutory requirement that the appointment of a receiver be just and convenient does not permit or require me to begin my assessment of the material with the presumption that the plaintiff is entitled to a court-appointed receiver unless the defendant can demonstrate a compelling commercial or other reason why the order should not be made.*** Of the considered judgments on the issue from this Court, I prefer the approach taken by Masuhara J. in *Maple Trade Finance*. ***That approach permits the court, when it is appropriate to do so, to place considerable weight upon the fact that the creditor has the right to instrument-appoint a receiver. It also permits the court to engage in that analysis described by Taylor J. in Cal Glass when considering whether the applicant has established that it is appropriate and necessary for the court to lend its aid to a party who may appoint a receiver without a court order.***

23. A similar analysis was applied by the court in *Bank of Montreal v. Gian's Business Centre Inc.*, 2016 BCSC 2348 ("***Gian's Business Centre***"). There, Justice Fitzpatrick said (at paras. 22-24):

> 22] I am aware that there is some divergence in our Court concerning the test to be applied in respect of appointing a receiver in these circumstances. On one hand, there are two decisions of Justice Burnyeat in *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 and *CIBC v. Can-Pacific Farms Inc.*, 2012 BCSC 437. In both decisions, Burnyeat J. took the view that where a receivership order is sought by a secured creditor and default under the security is proven, a receiver should be granted as a right unless there is some other compelling reason why the order should not be made.
>
> [23] On the other hand, there is Justice Masuhara's decision in *Maple Trade Financing Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527. At para. 25 of *Maple Trade*, the Court refers to various factors from Bennett on Receivership which may be considered in determining whether it is appropriate to appoint a receiver. Maple Trade was subsequently followed and applied in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477 by Justice Willcock, as he then was. Both of these decisions are to the effect that while it is not necessary for a secured creditor to show jeopardy before a receiver is appointed, ***no such presumption of appointment should be made; rather, the court should review the matter holistically and decide whether on the whole of the circumstances it is, in fact, just and convenient to appoint a receiver.*** The Court in *Textron* also considered and applied *Korion Investments Corporation v. Vancouver Trade Mart Inc.* [1993] B.C.J. No. 2352 (S.C.), a decision which was referred to me by Gian's counsel.
>
> [24] I followed *Maple Trade* and *Textron* in my later decision on the issue: *Cascade Divide Enterprises, Inc. v. Laliberte*, 2013 BCSC 263 at para. 77. I propose to follow the same approach here. Accordingly, relying on the second line of authorities outlined above, ***the analysis calls for a robust review of all the circumstances***. [Emphasis added]

24. The principles governing the court's power to appoint receivers were more recently summarized by Justice Fitzpatrick in her reasons in *Vancouver Coastal Health Authority v. Seymour Health Centre Inc.*, 2023 BCSC 1158 ("***Vancouver Coastal Health***"), at paras. 47 *et seq*:

> 47 The relevant legal bases and principles that apply [to the appointment of a receiver] are not in dispute.
>
> 48 VCH applies for the appointment of a receiver under s. 39 of *the Law and Equity Act,* R.S.B.C. 1996, c. 253 [*LEA*], s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], s. 66 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 and *Supreme Court Civil Rules*, R. 10-2.
>
> 49 Under s. 39 of the *LEA*, the central question is whether it appears to the court that the appointment is "just or convenient" in the circumstances.
>
> 50 As I stated in *Cascade Divide Enterprises, Inc. v. Laliberte*,2013 BCSC 263, at para. 81, the granting of a receivership order is "extraordinary relief which should be granted cautiously and sparingly."
>
> 51 The governing authorities have invariably endorsed the Court's consideration of many different factors in deciding whether the appointment of a receiver is justified. These non-exhaustive factors are found in *Bennett on Receiverships*, 2nd

ed. (Toronto: Carswell, 1999), at p. 130, and were applied in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, at para. 25, *Textron Financial Canada Limited v. Chetwynd Motels Ltd.*, 2010 BCSC 477, at para. 50, and many other cases.

52 The *Maple Trade* factors include:

> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.

53 Justice Gomery has recently confirmed that the above factors are not a checklist but are to be viewed holistically: *Pandion Mine Finance Fund LP v. Otso Gold Corp.*, 2022 BCSC 136 at para. 54; and *Royal Bank of Canada v. Canwest Aerospace Inc*, 2023 BCSC 514 at para. 9.

25. Here, a "holistic" review of the facts does not reveal any compelling reason to appoint a receiver.

The Petitioner's Arguments

26. The Petitioner advances five "factors" which it says favours the appointment of a Receiver. Thus, it says that:

    a) The Credit Agreement expressly provides for the appointment of a Receiver upon default;

    b) The Borrowers have been in default of their respective obligations to the Petitioner since at least September 8, 2023;

    c) The Petitioner is owed upwards of $95,000,000, whereas [the Borrowers] continue to derive rental income from the Harlow Lands;

    d) The Harlow Lands, the most valuable asset comprising the Harlow Property, is a development property that, given the current economic climate, will only be appealing to a small subset of the real estate market, necessitating the appointment of a Receiver to effectively list and market the property to the appropriate audience; and

    e) No party will be prejudiced by the appointment of a Receiver.

27. With respect to factors (a) and (b), the Borrowers acknowledge that the Credit Agreement expressly provides for the appointment of a Receiver and that they are in default of their obligations respecting the Loan. For the reasons articulated in *Textron, Gian's Business Centre* and *Vancouver Coastal Health,* among other authorities, the Borrowers say that it is not enough for the Petitioner to simply assert a default and a contractual right. It must also demonstrate that the appointment of a Receiver is "just and equitable" in the circumstances.

28. With respect to factor (c), the Petitioner has seized $15,000,000 of cash collateral; accordingly, the amount outstanding, today, is about $80,000,000, not $95,000,000. Further, rental income from the Harlow Lands is collected by a property manager, FirstService. Net rental revenue, after payment of expenses, is deposited to the account of the Partnership at the Bank of Montreal. The Borrowers have undertaken, and here further undertake, to ensure that FirstService continues to collect the rent and deposit that money to the Partnership's] account with the Petitioner. The latter may, as it chooses, apply this revenue to outstanding interest arrears, pursuant to the terms of the Credit Agreement and the GSA.

29. As the court said in *Cascade Divide Enterprises Inc. v. Laliberte*, 2013 BCSC 263 at para.81:

> [81] ... ***[A] receivership is extraordinary relief which should be granted cautiously and sparingly***. Accordingly, if the court can fashion a remedy that avoids receivership, then that is certainly something that should be considered. Both counsel before me are experienced insolvency counsel, and it is well taken that the appointment of a receiver is an extraordinary remedy that can, and in some cases, likely will, cause harm to the company in terms of the public perception and public reaction to that event. There is also, of course, the cost of the receivership, which, in respect of this type of a company, I have no doubt would be considerable. To that end, ***this Court must consider whether there are other measures that might be employed to balance the interests of the parties pending trial.***

30. Here, the Borrowers have undertaken to continue to have FirstService deposit net rent money with the Partnership's account with the petitioner. This is an "other measure" that might be employed to "balance the interests of the parties pending trial." See also *Coromandel Properties Ltd. (Re)*, 2023 BCSC 2187 at paras 40-41. There is no need to layer on the additional expense of a receivership in this foreclosure matter.

31. With respect to factor (d), this is pure speculation. The Petitioner offers no evidence to support the proposition that, "given the current economic climate, the Harlow Lands will only be appealing to a small subset of the real estate market". Nor does it provide any evidentiary support for the proposition that the appointment of a Receiver is necessary to "effectively list and market the Property to the appropriate audience". Receivers are not real estate agents. Any Receiver appointed will simply, in turn, appoint one of the major commercial real estate firms to market and sell the Harlow Lands. There is simply no need for the additional layer of expense that would inevitably accrue from the appointment of a Receiver.

32. Finally, with respect to factor (e), there is always prejudice from the appointment of a Receiver. As the court said in *Southern Cone Capital Ltd. v. EnVest Food Products (Mauritius) Ltd.*, 2017 BCSC 2385:

> [43] There is no emergency or risk of dissipation of assets at this time. SCC has perfected the majority of its security with the shares being held at the registered office of DLC in British Columbia. These shares are currently held by DLC's solicitors. Conveniently, DLC's office is in the exact same location as that of SCC's office. While there is one share certificate in Mauritius, there is no allegation the shares cannot be traded. Mr. Pajak, being the majority shareholder in DLC, could transfer that share certificate as required. The one instance of alleged dissipation is alleged to have occurred in 2014. This timeline belies urgency and does not establish the pressing need required in such an instance or as shown in Cascade. Very few, if any, of the factors as discussed in Maple Trade can be considered applicable.
>
> [44] The only real benefit of a receivership for SCC is what has been expressed to be a desire for an orderly and cost-effective way of managing the process through a court appointed receiver. <u>That, however, is not sufficient to overcome the stigma and prejudice suffered when a receiver is appointed</u> (see *Korion Investments Corporation v. Vancouver Trade Mart Inc.*, [1993] B.C.W.L.D. 2928 (S.C.)).

33. Similar reasoning should be applied here. There is no need for the appointment of a receiver.

34.

If a Receiver Is Appointed, Should it Have Conduct of Sale?

35. Where the mortgage seeks a power to sell, it ordinarily should not be granted that power until after the expiration of a fixed period of redemption: *F.B.D.B. v. F.J.H. Construction Ltd.*, 1988 CarswellBC, 24 B.C.L.R. (2d) 100 (C.A.) at para. 27; *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899.

36. The complexities of commercial foreclosure litigation militate against a pro-active order for conduct of sale (at the time of *Order Nisi*) to take effect upon expiration of a redemption period. See: *No. 151 Cathedral Ventures Ltd. v. Titan Pacific Contracting Inc.*, 2015 BCSC 1655 at para. 40.

37. In *Textron*, the court considered whether a receiver of a hotel property should be appointed and whether the receiver should have conduct of sale of the undertaking and property of the hotel prior to judgment and without a redemption period.

38. With respect to sale, the court said:

> [57] A party foreclosing on a mortgage must afford the borrower an opportunity to redeem the property in all but exceptional circumstances. In *Bank of Montreal v. Mrazek* (1985), 64 B.C.L.R. 282 (C.A.), the Court considered an appeal from an order granting the foreclosing bank immediate and exclusive right to sell a mortgagor's property, with the proviso that the order would not be entered for one month and the mortgagor would have the right to redeem the property prior to court approval of the sale. The Court, referring to *Devany v. Brackpool* (1981), 31 B.C.L.R. 256 (S.C.) and *Canlan Investments Ltd. v. Gibbons* (1983), 42 B.C.L.R. 199 (S.C.), held that the law is clear that an immediate order for sale or an immediate order absolute can only be made on proof by the mortgagee of exceptional circumstances, because the mortgagor loses the right to redeem and is personally liable for the shortfall, if any, on the sale. The court will look to the amount of the shortfall, whether the asset is wasting and whether the market is worsening, among other factors, in determining whether the circumstances are exceptional.

39. The court said:

> [62] In *Canlan*, the petitioner had not brought a foreclosure petition on for hearing but applied for and obtained an order declaring a mortgage to be in default and an order for sale. An application came on before Van Der Hoop L.J.S.C. for approval of the sale. The court held:
> In this file, the order for sale was sought and obtained against principle and authority. At the time the order was given no accounting was made and no time for redemption fixed, no judgment had been given on the personal covenant, and there was no evidence that the security of the applicant was in jeopardy.
>
> [63] That being the general rule in foreclosure actions, the question before me is whether the receiver of a business ought to be empowered to sell the real property of that business without affording the debtor an opportunity to redeem. The

plaintiff says the receiver acquires the full range of powers to acquire and dispose of assets formerly enjoyed by the debtor, including the power to sell real estate in the ordinary course of business in order to discharge corporate debt.

[64] The defendants say that the power to appoint a receiver is a remedy commonly afforded by security instruments and, at least where the debtor's principal asset is real estate, the lender cannot be permitted to use the power to appoint a receiver as a means of avoiding the usual redemption period.

[65] There is the further question, in this case, whether that power ought to be granted to the receiver before judgment. The defendants say that neither the plaintiff nor a receiver should be entitled to offer the property for sale until after the plaintiff has been granted judgment and a redemption period has expired. In support of this proposition, the defendant relies on *South West Marine Estates Ltd. v. Bank Of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.) at para. 21; *Royal Bank of Canada v. Astor Hotel* (1986), 3 B.C.L.R. (2d) 252, 62 C.B.R. (N.S.) 257 [*Astor Hotel*], at para. 47; and *First Pacific Credit Union v. Grimwood Sports Inc.* (1984), 16 D.L.R. (4th) 181, 59 B.C.L.R. 145 (C.A.).

[66] There appears to be no doubt that if a party seeks a court-appointed receiver, the powers to be granted to the receiver are in the discretion of the court regardless of the broad powers which the parties might have consented to grant the receiver by contract. Bennett notes, at p. 244: "The court has the discretion to grant the receiver the power of sale even thought the security instrument contains a power of sale." The author there expresses the view that the security holder should justify to the court as to why a power of sale is required. At p. 244 he notes: "In fact the receiver should have no authority to sell the debtor's assets out of the ordinary course of business until the security holder obtains judgment against the debtor".

[67] At p. 234:

> While the court has the power to authorize a sale at any time, the security holder should have judgment against the debtor before the court authorizes a sale of the debtor's business, especially where real estate is involved. In real estate matters, the debtor would normally be entitled to a redemption period.

[68] Further, Bennett notes at p. 245:

> In the case of real property the court generally protects the debtor's equity of redemption for a period of time before it authorizes a sale. Where there are no meritorious defences, the security holder should obtain judgment first and then give the debtor an opportunity to redeem before the assets are sold.

[69] In support of that proposition, Bennett cites the cases to which I have been referred to by the defendant: *First Pacific*; *Vista Homes v. Taplow Financial Ltd.* (1985) 64 B.C.L.R. 291, 56 C.B.R. (N.S.) 225; and *Astor Hotel*.

[70] In *First Pacific*, Esson J.A. describes the appropriate role of a receiver appointed under a debenture. He considers the application for sale at p. 153:

> What seems often to be lost sight of is that there is no necessary connection between the appointment of a receiver-manager and the remedy of a sale; and that it is the plaintiff, i.e. the debenture holder, not the receiver manager

> who seeks the remedy. It is the plaintiff who has the right and opportunity to prosecute the action and it is the plaintiff who, if judgment is granted in his favour, is given the remedy of sale. The order for sale before judgment is an extraordinary remedy which should be granted only in special circumstances.

[71] At p. 154 he added:

> In many cases, orders have been made giving to the receiver-manager at the outset power to offer assets for sale subject to court approval. The power to make such an order as a matter of course is, in my view, doubtful. There is power to make such an order in an application expressly raising the issue whether there should be a sale before judgment. Such a power is given by Rule 43(2) upon a finding by the court that "there eventually must be a sale". The power under s. 16 of the *Law and Equity Act* to order a sale before judgment may apply in some debenture holders' actions. There may be other sources of jurisdiction but I know of none that authorizes an order for sale before judgment as a matter of course.

[72] In *Vista Homes*, McLachlin J. (as she then was), considered an application brought by a court-appointed receiver with a power to sell assets for an order for conduct of sale of a property held in joint tenancy by the debtor and another company. The application was dismissed as premature. The court held at p. 294:

> The creditor at whose instance the receiver manager was appointed is not entitled to realize on the debt which it alleges to be owing before judgment by having the receiver manager sell the alleged debtor's property. It follows that there should not be a sale before judgment unless special circumstances are made out: *First Pac. Credit Union* [citation omitted].

[73] In *Astor Hotel*, the Court appointed a receiver under a debenture on September 18, 1985, and granted the receiver exclusive conduct of sale effective November 10, 1985. On the application for leave to appeal that order it was argued that the order for conduct of sale should not have been made without an accounting of the debt and a redemption period. The application for leave was dismissed on the basis that the chambers judge, by delaying the power of sale for two months had implicitly recognized and afforded to the debtor a redemption period. Taggart J.A. cited, apparently with approval *First Pacific, Vista Homes, Bank of Montreal v. Appcon Ltd.* (1981), 33 O.R. (2d) 97, 123 D.L.R. (3d) 394 (Ont. H.C.); *Royal Bank of Canada v. Camex Canada Corp.* (1985), 63 B.C.L.R. 125 (S.C.); and *South West Marine Estates Ltd. v. Bank of British Columbia* (1985), 65 B.C.L.R. 328 (C.A.). The latter two cases were cited as authority for the proposition that "the trend is to treat the issues arising in mortgage foreclosure proceedings and in debenture holders' actions in similar ways".

[74] In considering the plaintiff's application I bear in mind that there may be advantages to all parties in giving a receiver the conduct of sale of real property, Among those are the factors considered in by Burnyeat J. in *United Saving*, at paras. 32-34, in granting the receiver power to offer the hotel for sale in that case.

40. Applying these principles, the court in *Textron* declined to grant the receiver there conduct of sale:

Order for Sale

[86] The plaintiff does not seek an order permitting the receiver to receive to sell the real property without court approval but, rather seeks the conduct of sale, subject to court approval. The order sought by the plaintiff would require court approval of transactions with a value in excess of $200,000 and aggregate transactions in excess of $500,000. As conduct of sale precludes redemption, the order sought by the plaintiff is inconsistent with affording the defendants a redemption period.

[87] The defendant says that it is in the best position to refinance or market the Hotel and that there is no reason why it should not be afforded the usual redemption period when the plaintiff has not obtained judgment.

[88] It is acknowledged that business operations of the Hotel will generate insufficient revenue to permit Chetwynd and NHLP to pay interest as it accrues on the loan. The defendants will certainly make no headway in repaying the arrears that have accumulated to date. The plaintiff says there is no reasonable prospect that refinancing will make the plaintiff whole. It seeks to protect its interest by selling the assets that are the subject of the security.

[89] I cannot find on the evidence that such special circumstances exist that the plaintiff should have an order for sale before judgment and consideration of an appropriate redemption period. It is not clear that the value of the security is diminishing. To the contrary there is some evidence that the profitability and therefore the value of the Hotel is likely to increase in the interim. Some net income is being generated from operations. The order appointing the receiver shall not therefore authorize the receiver to have conduct of the sale of the Hotel. The receiver will be authorized to engage only in such sales as would occur in the ordinary course of business of the Hotel.

[90] The plaintiff shall have leave to renew the application for conduct of sale in the event of a material change in circumstances, in the event the receiver discovers a financial situation substantially different from that known to the plaintiff on this application or on obtaining judgment.

41. The same result was reached in *IMOR Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899.

42. No different result should be reached here. The Petitioner has not advanced any evidence of special circumstances that would justify an order for sale before the expiry of an appropriate redemption period. There is no evidence before the court that the value of the petitioner's security is diminishing. The Borrowers have put in evidence an appraisal of the Harlow Lands, showing a potential value of $192,000,000, as at July 31, 2023. In May 2023, the Borrowers received offers to purchase the Harlow Lands for amounts between $90,000,000 and $100,000,000. There is no evidence that the market has deteriorated since that date.

43. The Petitioner is not at risk. It has either seized or is maintaining cash collateral of more than $23,000,000. Assuming the petitioner has already applied $15,000,000 of this amount

to reduce the outstanding Loan balance, the balance owing today would be about $80,000,000, with the Petitioner holding an additional $8,600,000 of cash as collateral security. In addition to its cash and mortgage security, the Petitioner holds multiple personal guarantees and security over at least one other property as security for repayment of the Borrowers' indebtedness.

44. While it is true that the amounts involved in this proceeding are extraordinary, it is otherwise a straightforward, conventional foreclosure proceeding. The Borrowers should be afforded the usual six months redemption period, during which to attempt to either sell the Harlow Lands or find a lender to replace the Petitioner.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Kang Yu Canning Zou sworn December 12, 2023.

2. The pleadings

The petition respondents estimate that the Petition will take 2 hours or more to be heard.

Date: December 12, 2023

Signature of lawyer for petition respondents
Scott A. Turner

Petition respondents' address for service:

c/o Turner & Co
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