No.:H-241069
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DESJARDINS FINANCIAL SECURITY LIFE ASSURANCE COMPANY

PETITIONER

AND:

I4PG HASTINGS STREET INC., HASTINGS STREET LIMITED PARTNERSHIP, I4 PROPERTY GROUP INC., MYRON CALOF, TRAVELERS INSURANCE COMPANY OF CANADA, LONGTHORN HOLDINGS LTD., LANE CONSTRUCTION SERVICES LTD.,ELKH SHOTCRETE INC., ATRYSTEN PLUMBING & HEATING LTD., GREER CONTRACTING LTD., PDQ CONSTRUCTION LTD., LMS LIMITED PARTNERSHIP, RED SEAL ELECTRIC LTD., KERKHOFF CONSTRUCTION (2022) LTD., LIONS GATE WATER TREATMENT LTD., PEAKHILL CAPITAL INC., KOFFMAN KALEF LLP AND CAMERON STEPHENS MORTGAGE CAPITAL LTD.

RESPONDENTS

RESPONSE TO PETITION

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

Filed by: Myron Calof, I4PG Hastings Street Inc, Hastings Street Limited Partnership, and I4 Property Group Inc, (the "petition respondent(s)")

THIS IS A RESPONSE TO the petition filed November 20, 2024

The petition respondent(s) estimate that the application will take 2 hours.

Part 1:ORDERS CONSENTED TO

The petition respondent(s) consents to the granting of the orders set out in the following paragraphs of Part 1 of the petition: NIL

Part 2: ORDERS OPPOSED

The petition respondent(s) oppose(s) the granting of the orders set out in paragraphs ALL of Part 1 of the petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The petition respondent(s) take(s) no position on the granting of the orders set out in paragraphs ALL of Part 1 of the petition.

Part 4: FACTUAL BASIS

1. The property at issue in these proceedings was acquired by the Respondent Hastings Street Limited Partnership in 2017.

2. It's purchase and the progress it has made in the project to date were financed by the proceeds of the mortgage which forms the basis of this action, as a first mortgage, a mortgage from Travellers Insurance Company of Canada, in the amount of approximately $5 million and the Limited Partners have contributed approximately $6,000.000.00.

3. The obtaining of a development permit and an excavation permit took a period of almost 4 years.

4. The Partnership retained Kerkhof Construction (2022) Ltd. (Kerkhof 2022) on a fixed-price basis as a general contractor. As events transpired, the fact that that company was a single purpose corporation incorporated for purposes of this project caused the project considerable difficulties.

5. Kerkhof 2022 had difficulty with the excavation, and by June 2023 the project was in financial difficulties.

6. The Partnership could not pay Kerkhof 2022 its draws for July and August, because Kerkhof 2022 could not provide the required statutory declarations that its sub- trades had been paid.

7. At the end of August, it was determined that Kerkhof 2022 would not be able to continue, and early in September 2023 it was given notice of default and it was formally terminated on September , 2023.

8. Negotiations took place between the partnership and Kerkhof 2022, to settle its claims and see to payment of the sub- trades.

9. The result of those negotiations was an agreement requiring the Partnership to contribute the holdback of $281,000, and a further $925,000. Kerkhof 2022 was required to pay the balance owing to the trades of about $400,000.

10. Those difficulties called both for the preparation of a new budget, and for a further equity injection of about $1,650,000. While certain of the limited partners no longer wish to contribute any additional funds, approximately 75% of them, have agreed to contribute those funds if the construction budget going forward can be confirmed.

11. The difficulties with Kerkhof 2022 not only caused massive delay with the project, it resulted in a number of liens being filed against the project, and it required an entire reconsideration of the project and its budget. The General Partner has now established a total project budget of $48,850,105.41.

12. The General Partner believes it can meet that budget by a combination of financing and deferrals of monies due certain parties.

13. The budget also requires that the Petitioner's initial construction loan remains unchanged and that its construction loan increase also remains unchanged

14. The Respondent, Travellers Insurance Company of Canada, who are insuring the presale deposits, will increase its obligations due to additional deposits, in the amount of $5,449,000.

15. The General Partner has also arranged for a mezzanine loan of $850,000, and in addition to the existing Limited Partners contribution, a new investor, who will contribute $560,000.

16. The total cost of the budget and how it will be achieved is set out as follows: The total budget is now $48,850,105.41, to be satisfied as follows:

1. Desjardins' initial construction loan		$29,200,000
2. Desjardins' construction loan increase		$3,476,500
3. Travelers Ins. Co. Of Canada with DPI increase		$5,449,000
4. Lane Construction Mezz. Loan		$850,000
5. Steelcrest Construction Management Fee Deferral		$500,000
6. Longthorn Holdings loan forgiveness and postponement		$500,000
7. Miscellaneous Deferrals:		
(a) Bigfoot Crane	$225,000	
(b) Censorio	$89,300	
(c) SITINGS Realty	$44,554.37	
(d) I4 Property Group	$70,000	
SUB-TOTAL		$428,854.37
8. Limited Partners' Loan, unchanged		$1,013,725
9. Limited Partners Current Capital, unchanged		$5,234,071.20
10. Limited Partners' Resolution approved by requisite # of Partners holding 75% of current capital who have agreed to fund the entire approved amount.		$1,637,804.84
11. New Investor		$560,150
Total Sources of Funds		**$48,850,105.41**

17. As indicated, the arrangements reached with Kerkhof 2022 required the partnership to pay $925,000, plus the holdback of $281,161.25 which, together with funds from Kerkhof 2022, would satisfy the liens. Kerkhof 2022 was obligated to try and reduce the various liens claimed.

18. It did not do so, but in order to be able to finance the project budget, The General Partner undertook negotiations with various of the lienholders, and all but two of them have agreed to accept the payment of $0.30 on the dollar, in exchange for a discharge of their liens.

19. The key to that arrangement is that all lienholders are agreeing to that amount, so that none gets preferential treatment. Finalizing that reduced payment to the lienholders is the only remaining cost in the projected budget going forward to finalize.

20. The excavation and construction of the two levels of parking is complete. The project has been halted, but it is not suffering any damage or waste and while construction has been halted, if this application is refused, it can very easily be recommenced.

21. The cost and borrowings of a receiver to finish the project will be very substantial, and a sale of the project in its present condition is not likely to even discharge the mortgage in favour of the Petitioner.

22. Should this order be granted, the various Lien claimants will likely lose the amount of their liens, and the Limited Partners will likely lose the amount of their investment.

Part 5: LEGAL BASIS

1. There is perhaps no area of the law where the contribution of equity is so complete as the law with respect to the enforcement of mortgages. In ***355498 B.C. Ltd. v. Namu Properties*, 1999 BCCA 138**, Madam Justice Southin sets out the oft cited judgment of Lord Jessell, M.R. in *Campbell v. Holyland* (1877), 7 Ch. 166:

> [12] The jurisdiction of a court of equity to re-open an order absolute of foreclosure is of considerable antiquity. The situation in equity is summed up in the judgment of Jessel M.R. in *Campbell v. Holyland* (1877), 7 Ch. 166, as follows:
>
> Now, what is the principle? The principle in a Court of Equity has always been that, though a mortgage is in form an absolute conveyance when the condition is broken, in equity it is always security; and it must be remembered that the doctrine arose at the time when mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid at the day, the estate should become the estate of the mortgagee; that was the contract between the parties; yet Courts of Equity interfered with actual contract to this extent, by saying there was a paramount intention that the estate should be security, and

> that the mortgage money should be debt; and they gave relief in the shape of redemption on that principle. Of course that would lead, and did lead, to this inconvenience, that even when the mortgagor was not willing to redeem, the mortgagee could not sell or deal with the estate as his own, and to remedy that inconvenience the practice of bringing a foreclosure suit was adopted, by which a mortgagee was entitled to call on the mortgagor to redeem within a certain time, under penalty of losing the right of redemption. In that foreclosure suit the Court made various orders (interim orders fixing a time for payment of the money) and at last there came the final order which was called foreclosure absolute, that is, in form, that the mortgagor should not be allowed to redeem at all; but it was form only, just as the original deed was form only; for the Courts of Equity soon decided that, notwithstanding the form of that order, they would after that order allow the mortgagor to redeem. That is, although the order of foreclosure absolute appeared to be a final order of the Court, it was not so, but the mortgagee still remained liable to be treated as a mortgagor, subject to the discretion of the Court. (Emphasis added in the original)

2. The equity of redemption, then, is something that arises out of the relationship between mortgagor and mortgagee. That fundamental relationship in the law of British Columbia was, of course, confirmed in the well-known case of *North Vancouver v. Carlisle*, 1922 CanLII 726 (BC CA). In British Columbia, despite the changes to the *Land Title Act*, RSBC 1996, c. 250 in 1989, a mortgage operates as if it were a conveyance with a right of defeasance. The right of defeasance, that is, the equity of redemption, does not arise as result of a foreclosure action being commenced. In fact, foreclosure actions were designed to bring some finite limit to the already existing right of redemption.

> Proceedings for redemption were invented before proceedings for foreclosure.
>
> ***CIBC Mtge. Corp. v. Burnham*, 1986 CanLII 1032**, para. 11

3. Indeed, the concept of the equity of redemption is the golden thread, to borrow from criminal law, that runs through the mortgage relationship, and impacts any actions taken to enforce the mortgage or its terms.

> A Court would not allow a right of redemption to be in any

way fettered.

355498 B.C. Ltd., supra, para. 13, see also para. 15

> [26] In *Fairclough v. Swan Brewing Co.* (1912), 28 T.L.R. 450, which was an appeal from the Supreme Court of Australia, Lord MacNaghten stated:
>
> > The arguments of counsel ranged over a very wide field. But the real point was a narrow one. It depended upon a doctrine of equity which was not open to question. 'There is,' as Vice-Chancellor Kindersley said in *Gossop v. Wright*, 32 L. J. Ch. at p. 653, 'no doubt that the broad rule is this: that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be security, either by any contemporaneous instrument with the deed in question or by anything which this Court would regard as a simultaneous arrangement or part of the same transaction ... it [is] now firmly established by the House of Lords that ... that equity would not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption. Counsel on behalf of the respondents admitted, as he was bound to admit, that a mortgage could not be made irredeemable. That was plainly forbidden.

***Chien v. Teh*, 2015 BCSC 2287**, para. 35

4. That fundamental right is not lost by an election on the part of a mortgagee to sue on the covenant and seek an Order for Sale. It is certain, of course, that a mortgagee may elect to commence action on the covenant or to appoint a Receiver, all without commencing a foreclosure action.

5. In those circumstances, however, the equity of redemption is neither side-stepped nor avoided.

> That passage defines what is now the everyday procedure in these cases. 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. Const. Ltd.*, 1988 CanLII 3004 (BC CA)**, para. 16

6. The Court also adopted a decision of Taylor, J.:

> But I am satisfied that the granting of an order for sale at that stage would be as much a matter of discretion as the granting of an order for sale after decree nisi and I do not accept the proposition that a mortgagee who thus obtained an order for sale in lieu of decree nisi would be relieved of the normal obligation to account and the setting of a period within which the mortgagor may redeem. While the court may waive the requirement for accounting and the establishment of a redemption period, it is no more likely, I think, to do so in one case than in the other.

F.B.D.B. v. F.J.H. Const. Ltd., supra, para. 19

7. In other words, whether by way of action on the covenant, appointment of Receiver, or otherwise, an immediate Order of Sale can only be made if the facts and evidence justify it. Absent such evidence, before any Order for Sale is made, a mortgagor is entitled to a redemption period of some length.

8. Indeed, usually it is the commencement of enforcement proceedings by the mortgagee, on the covenant or otherwise, that triggers the mortgagor's right to enforce its equity of redemption.

9. The Court of Appeal undertook a very complete analysis of the right of a mortgagee to seek a sale of the property based on the mortgage contract, without commencing a foreclosure proceeding, in ***South West Marine Estates Ltd. v. Bank of B.C.*, 1985 CanLII 570 (BC CA)**. the Court said:

> [12] The following submission is contained in the factum of the appellant:
>
> > 16. While a mortgagor's equity of redemption is an interest in land that equity has always guarded, it is respectfully submitted that protection of the equity of redemption by the setting of a redemption period is only appropriate, in a situation where a mortgagee seeks the aid of the Court in the enforcement of its remedy of foreclosure.

> [13] I do not agree with this submission. Even though the mortgagee had a contractual right to obtain title in the event of default, the courts of equity intervened to protect the equity of redemption by fixing a redemption period. The intervention by a court of equity to restrain the exercise of a contractual power of sale during the redemption period is a similar interference with contractual rights in order to protect the equity of redemption.
>
> [14] If I am wrong in concluding that the courts of equity would intervene to prevent the exercise of a contractual power of sale during the redemption period, it appears to me that this is a proper case for bringing the rules of equity into accordance with modern practice. Firstly, in order that there be certainty in commercial matters it is, in my opinion, necessary that the same principles apply to all proceedings whether by way of foreclosure or by way of exercise of a contractual power of sale. This rule is as follows:
>
> > Except in special circumstances the court will not make an order for sale or permit a sale to be made pursuant to a power of sale until the expiry of the normal redemption period (6 months).
>
> Secondly, the courts should intervene to protect the equity of redemption. To distinguish between a sale in foreclosure proceedings and a sale made pursuant to a contractual power of sale as a means of permitting the mortgagee to effectively eradicate the equity of redemption is not in accordance with the basic tenets of equity. The rules of equity are not to be fashioned on semantic or technical distinctions but must be framed so as to do justice between mortgagor and mortgagee. Justice requires that, except in special circumstances, the equity of redemption will be protected by fixing a redemption period of six months.

See also ***Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2012 BCSC 899**

A. APPOINTMENT OF RECEIVER – POWER OF SALE

10. This application is brought prior to judgment. That is of significance. Receivers should only be appointed prior to judgment in special circumstances when it is necessary to do so to preserve the assets from some deterioration or jeopardy.

Toronto Dominion Bank v. First Canadian Land Corp.
(1989), 77 C.B.R. (N.S.), para. 8

11. Despite that flaw in the application, the Respondent will address the general law as to the appointment of Receivers and the granting of Orders for Sale.

12. A Receiver should only be appointed if, in all the circumstances, it is just and convenient to do so.

13. An immediate power of sale should only be granted in exceptional circumstances. It should not be granted before the expiration of the period of redemption.

B. APPOINTMENT OF RECEIVER

14. Whether or not to appoint a Receiver calls for a "holistic" review of all the circumstances, "and a robust review" of them, to determine whether it is just and convenient to appoint a Receiver.

Bank of Montreal v. Gian's Business Centre Inc.,
2016 BCSC 2348, paras. 23 & 24

15. The factors to be considered are numerous. In the oft cited case of ***Maple Trade Finance Inv. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527,** Mr. Justice Masuhara set out a list of matters to consider:

> [25] There are a number of factors that figure in the determination of whether it is appropriate to appoint a receiver. In Bennett on Receivership, 2d ed. (Toronto: Carswell, 1999), at p. 130, a list of such factors is set out as follows:
>
> 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;

i) 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.

16. The onus is on the Plaintiff, to introduce cogent evidence that it is just and convenient to appoint a Receiver addressing those factors, even post-judgment.

***Textron Financial Canada Limited v. Chetwynd Motels Ltd.*,**
2010 BCSC 477, paras. 54 & 55

17. Appointing a Receiver can only be justified following a consideration and analysis of the

position of both parties.

Textron, supra, para. 53

18. In doing so, the detrimental effect on the mortgagee must be considered.

> [38] The Court considered the applicant's argument that in cases where the appointment is made under a statutory provision "the appointment is made as a matter of course as soon as the applicant's right is established, and it is unnecessary to allege any danger to the property; for the appointment of a receiver is necessary to enable the applicant to obtain that to which he is entitled." Huddart J. dismissed that proposition at para. 12:
>
> > I have some difficulty with the proposition that the appointment of a receiver after the order nisi will usually be appropriate. The appointment by a court of a receiver and particularly of a receiver-manager says to the world, including potential investors, that the mortgagor is not reliable, not capable of managing its affairs, not only in the opinion of the mortgagee, but also in the opinion of the court. That is a large presumption for a court to make when it is considering whether need or convenience or fairness dictates an equitable remedy even if the contract at issue permits such an appointment by instrument.

Textron, supra,

See also ***Textron, supra***, para. 55

19. While a written agreement in the contract between the parties, to agree to the appointment of a Receiver is a factor of some weight, the Court does not start with presumption of an entitlement to the appointment on that basis.

> [53] The Alberta Court of Appeal has more recently applied the criteria described in Bennett and commented on the extent to which there should be consideration of the hardship arising from the appointment of a receiver. In BG International, at para. 17, the Court held:
>
> > [T]he chambers judge must carefully balance the rights of both the applicant and the respondent. The mere appointment of a receiver can have devastating

effects. The respondent referred us to the statement in Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49(Ont. Gen. Div. [Commercial List]) at para. 31:

> ... With respect to the hardship to Odyssey and Weston should a receiver be appointed, I am unable to find any evidence of undue or extreme hardship. Obviously the appointment of a receiver always causes hardship to the debtor in that the debtor loses control of its assets and business and may risk having its assets and business sold. The situation in this case is no different.

This quotation does not reflect the law of Alberta. Under the Judicature Act, it must be "just and convenient" to grant a receivership order. Justice and convenience can only be established by considering and balancing the position of both parties. The onus is on the applicant. The respondent does not have to prove any special hardship, much less "undue hardship" to resist such an application. The effect of the mere granting of the receivership order must always be considered, and if possible a remedy short of receivership should be used.

[55] In light of these authorities, 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.

Textron, supra

20. Of the factors listed by Mr. Justice Masuhara, there is a paucity, if not a total absence of evidence from the Plaintiff:

    (a) There is no irreparable harm which might be caused;

    (b) There is no risk to the security holder, considering the equity situation;

    (c) Operating a Hotel is outside a Receiver's expertise;

    (d) There is no waste;

    (e) There is no need for protection of the assets;

    (f) The balance of convenience favours the Defendants considering the impacts arising from the appointment of a Receiver;

    (g) The Plaintiff does have a contractual right;

    (h) There will be no difficulty in enforcing rights under the mortgage; and

    (i) A receivership will be expensive to the sole detriment of the Respondent.

21. Cost and necessity militate against the appointment. Above all, there is "a principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly".

Maple Trade, supra, para. 25(i)

C. REQUIREMENT OF A REDEMPTION PERIOD

22. The Court in *Textron, supra,* quotes from *Bennett on Receivership* to the following effect:

    [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.

23. **The *Royal Bank v. Astor Hotel Ltd.*, 1986 CanLII 1072** is directly on point. It was considering an application to sell through a receiver and held that, if a significant portion of the security consists of land, the Order should not normally be made without affording a period of redemption, and that a normal period should be six months.

Royal Bank v. Astor, supra, paras. 34 & 35;
CIBC v. Burham, supra, para. 15; and
Textron, supra, para. 63 – 65, 70 and 73

24. Mme. Justice Fitzpatrick is held, in ***Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*** that the debtor's equity of redemption should be considered in deciding whether to appoint a receiver

Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership,
2024 BCSC 47, Para. 101

25. The appropriate question, she held is, "amount of time" that should be accorded the debtor, and that the onus of setting that length of time appropriately, is on the Petitioner.

***Bank of Montreal* supra**, para, 103

26. In that case, the bank had agreed not to sell the property for a number of months, and that fact, coupled with time since default, made the appointment appropriate. It is important to note she determined there was a likelihood of the bank security being in jeopardy.

27. If the court is looking at the date of default as a sort of redemption. Number in that redemption, then that redemptions period should be extended.

28. The test to extend a redemption period is well known. It is two pronged. The applicant must establish:

    (a) That there is sufficient equity in the property to protect the mortgagee; and

    (b) That there is a reasonable prospect that redemption will occur during the extended redemption period.

See ***Bancorp Growth Mortgage Fund II Ltd. v. Rouleur (Woodland) Limited Partnership,*** **2021 BCSC 898**, para. 7;

Imor Capital Corp. v. Bullet Enterprises Ltd., **2014 BCSC 2540**, paras. 9 – 12;

1103969 B.C. Ltd. v. 1069185 B.C. Ltd., **2019 BCCA 73**, para. 26

29. The test is the same, even in circumstances where the redemption period was fixed by way of Consent Order. That is undoubtedly due to the powerful nature of the equity of redemption.

Mission Creek Mortgage Ltd. v. Angleland Holdings Inc., **2010 BCSC 1593**, paras. 10, 25 – 27

30. The Respondent has satisfied the test in that:

    (a) There is evidence of value which shows the Petitioner is amply secured; and

    (b) There is evidence establishing reasonable prospects of payment of the mortgage debt.

High Wave Management Ltd. v. Englishman River Falls Park Ltd., **2017 BCSC 353**

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Myron Calof, made December 17, 2024

Date: December 17, 2024

Signature of Lawyer for the petition respondent(s)
H.C. Ritchie Clark, K.C.

Petition respondent's(s') address for service: **Attention:**

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