

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

DBDC SPADINA LTD.

AND THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON,  
THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO,  
TO BE BOUND BY THE RESULT

**FACTUM OF COMPUTERSHARE TRUST COMPANY OF CANADA, AS CUSTODIAN,  
NOMINEE AND AGENT FOR AND ON BEHALF OF INVESTORS IN A CANADIAN  
COMMERCIAL MORTGAGE SECURITIZATION KNOWN AS INSTITUTIONAL  
MORTGAGE SECURITIES CANADA, COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2012-2**

**(Motion returnable December 18, 2013)**

Date: December 17, 2013

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Lawyers for Computershare Trust Company of  
Canada

## PART I - INTRODUCTION

1. Computershare Trust Company of Canada, as custodian, nominee and agent for and on behalf of Investors in a Canadian commercial mortgage securitization known as Institutional Mortgage Securities Canada, Commercial Mortgage Pass-Through Certificates, Series 2012-2 (the "**First Mortgagee**") brings this motion for an Order, *inter alia*:

- (a) varying and/or amending the Receivership Order<sup>1</sup> to remove the Borrower from the list of Schedule "B" corporations bound by the Receivership Order and/or setting aside the Receivership Order as it relates to the Borrower and the Mortgaged Property, and declaring that the Receivership Order does not apply to the Borrower or the Mortgaged Property;
- (b) in the alternative, varying and/or amending the Receivership Order to, among other things:
  - i. fully subordinate the Priming Charges to the secured mortgage and related security over the Mortgaged Property held by the First Mortgagee (the "**First Mortgage**") and all loan indebtedness secured thereby (the "**First Mortgage Loan**");

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<sup>1</sup> Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Affidavit of Jean Monardo sworn December 16, 2013 (the "**Affidavit of Jean Monardo**").

- ii. provide for an automatic and immediate lift of the stay of proceedings in respect of the Borrower and the Mortgaged Property upon the occurrence of any monetary default under the First Mortgage (including any failure to make any monthly payment of principal, interest and realty tax reserves when due under the First Mortgage) and allowing the First Mortgagee to proceed with enforcement of all of its rights and remedies under the First Mortgage without any further notice; and
- iii. provide for an automatic and immediate lift of the stay of proceedings in respect of the Borrower and the Mortgaged Property if on or before April 30, 2014, (A) the Mortgaged Property is not sold in compliance with sub-paragraph (iii) above, or (B) the First Mortgage Loan is not repaid to the First Mortgagee in full.

## **PART II - THE FACTS**

- 2. The First Mortgagee relies on the facts as set out in the Affidavit of Jean Monardo sworn December 16, 2013.

## **PART III - ISSUES**

- 3. The issues on this motion are as follows:

- (a) Should the Borrower and the Mortgaged Property be carved out from the Receivership Order as there is no jurisdiction to enjoin a mortgagee from enforcing its security in the absence of bad faith or fraud?
- (b) In the alternative, should the stay imposed by the Receivership Order be lifted to permit the First Mortgagee to exercise its rights and remedies under the First Mortgage?
- (c) In the further alternative, should the Receivership Order be varied to, among other things, subordinate the Priming Charges to the First Mortgage?

#### PART IV - LAW AND ARGUMENT

**A. The Borrower and the Mortgaged Property Should be Carved Out from the Receivership Order as There is No Jurisdiction to Enjoin the First Mortgagee from Enforcing Its Security**

4. There is no jurisdiction to stay the First Mortgagee from enforcing its rights under the First Mortgage. In the absence of fraud or bad faith, the Court has no jurisdiction to enjoin a mortgagee by injunction from exercising its enforcement rights unless the mortgagor or a subsequent encumbrancer redeems the mortgage or tenders the full amount owing thereunder.

*Arnold v. Bronstein et al.*, [1970] O.J. No. 1677, Brief of Authorities, Tab 1

*Maier v. Keevil*, [1996] O.J. No. 433, Brief of Authorities, Tab 2

*Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.*, [1994] O.J. No. 1735, Brief of Authorities, Tab 3

*Quest Capital Corp. v. Lakefront Estates Corp.*, 2008 CarswellOnt 9225, Motion Record Tab 4

5. The stay provisions of the Receivership Order constitute an injunction against the First Mortgagee in circumstances where neither fraud nor bad faith on the part of the First Mortgagee has been established, or even alleged.

Affidavit of Jean Monardo, at para 17

6. This well accepted statement of law was recently upheld by Justice Campbell in *Romspen Investments Corporation v. Edgeworth Properties – Derrick View Estates Inc., et al.*

Transcription of December 12, 2011 Endorsement of C.L. Campbell J., *Romspen Investments Corporation v. Edgeworth Properties – Derrick View Estates Inc.* [“Edgeworth”], CV-11-9452-00CL (“Edgeworth Endorsement”); December 12, 2011 Endorsement of C.L. Campbell J [Handwritten], Brief of Authorities, Tab 5

7. In *Edgeworth*, the Court appointed a receiver over certain properties owned by Edgeworth Properties Inc. and its related and affiliated entities (collectively, the “**Edgeworth Group**”) following proceedings commenced by the Edgeworth Group under the *Companies Creditors’ Arrangement Act* (Canada). One of those properties was subject to a first mortgage held by Firm Capital Mortgage Fund Inc. (“**Firm Capital**”). The second mortgage was a collateral mortgage in favor of the Romspen Investment Corporation (“**Romspen**”). Neither Romspen nor any other stakeholder made any attempts to redeem the Firm Capital Mortgage.

8. First Capital argued that the Court did not have jurisdiction to burden the property over which it had a first mortgage and sought to lift the stay imposed by the

receivership order. Dismissing the opposition by Romspen, the receiver and other stakeholders, Justice Campbell stated “*there is a distinction between the rights of mortgage creditors and those who may have general property claims to assets other than land within a CCAA order*” and agreed to lift the stay to permit Firm Capital to enforce on its mortgage.

Edgeworth Endorsement, Brief of Authorities, Tab 5

9. Similarly, in the case at bar, the First Mortgagee’s enforcement rights cannot be stayed in favour of a shareholder with only a potential equitable interest in the Borrower (which ranks even lower than a creditor with a general property claim as was the case in *Edgeworth*).

10. The Applicants have not attempted to redeem the First Mortgage, nor have they tendered the full amount owing thereunder. The Applicants should not be permitted to do indirectly what they could not do directly – i.e. obtain an injunction interfering with the First Mortgagee’s right to enforce its security.

11. Therefore, the Receivership Order should be amended to remove the Borrower from the list of Schedule "B" corporations bound by the Receivership Order and/or set aside as it relates to the Borrower and the Mortgaged Property permitting the First Mortgagee to exercise its rights and remedies under the First Mortgage.

**B. In the alternative, The Stay Imposed by the Receivership Order Should be Lifted**

12. The First Mortgagee is prejudiced by, among other things, the stay provisions of the Receivership Order and should be granted an Order lifting the stay and permitting the First Mortgagee to exercise its rights and remedies under the First Mortgage.

13. On a motion to lift a stay imposed pursuant to a receivership order, the court should focus on the totality of circumstances and the relative prejudice to the parties.

*Peoples Trust C. v. Rose of Sharon (Ontario) Retirement Community*, 2012 ONSC 7319 [“Peoples Trust”], at para 5, Brief of Authorities, Tab 6

*Haunert-Faga v. Faga*, 2013 ONSC 5161, at para 15, Brief of Authorities, Tab 7

14. The Court can also lift the stay where it is equitable to do so.

*Janodee Investments Ltd. v. Pellegrini*, 2001 CarswellOnt 1232, [“Janodee”], at paras 31-35, Brief of Authorities, Tab 8

***The Stay Imposed by the Receivership Order Causes Material Prejudice to the First Mortgagee***

15. In the case at bar, the First Mortgage is already in default and the First Mortgagee expects both (a) an imminent monetary default by the Borrower under the First Mortgage Loan and (b) that the net proceeds of any sale of the Mortgaged Property by the Receiver may not be sufficient to pay the loan indebtedness under the First Mortgage Loan to the First Mortgagee in full.

Affidavit of Jean Monardo, at para 23

16. The Mortgaged Property has experienced and continues to experience rapidly declining occupancy. During the 18 month period between May, 2012 and November, 2013, occupancy of the Mortgaged Property has declined from approximately 93% of the available rentable area to approximately 67% as of today's date.

Affidavit of Jean Monardo, at para 24

17. The current net operating income from the Mortgaged Property ("NOI") from the Mortgaged Property is insufficient to permit the Borrower to make its regularly scheduled monthly payments to the First Mortgagee under the First Mortgage Loan when due. The First Mortgagee estimates that there is a current annual NOI shortfall of approximately \$172,730 with respect to the cash available to pay the First Mortgagee its scheduled monthly payments of principal and interest under the First Mortgage Loan. The Mortgaged Property and the Borrower generate no income or revenues other than rents payable by tenants of the Mortgaged Property. In these circumstances, Midland and IMS expect an imminent monetary default under the First Mortgage Loan as early as January 1, 2014.

Affidavit of Jean Monardo, at para 26

18. The very high vacancy rate of the Mortgaged Property has also significantly reduced its potential market value and has significantly eroded or eliminated the Borrower's original equity investment. The First Mortgagee expects to incur a material principal loss on its First Mortgage Loan as a result of the existing vacancy rate.



Affidavit of Jean Monardo, at para 27

19. The current vacancy rate of the Mortgaged Property is not likely to improve in the near term. The Borrower's website does not indicate that there is any space in the Mortgaged Property available for lease, as at November 27, 2013, there was no evidence of any signage or information available at the Mortgaged Property that described the vacant space, and no real estate brokers have been hired to lease the vacant space.

Affidavit of Jean Monardo, at para 28

20. The absence of a leasing plan to lease-up the vacant space in the Mortgaged Property makes it unlikely that such vacant space will be leased and occupied by the tenants any earlier than 12 months following the date that a proper leasing plan for the Mortgaged Property is commenced (assuming stable leasing market conditions).

Affidavit of Jean Monardo, at para 29

21. The Receiver has provided no information concerning its plans for the leasing of the vacant space. Any leasing plan for the vacant space in the Mortgaged Property will likely require a minimum of 12 months to implement and requires immediate time and attention, as well as leasing experts to complete. Any sale of the Mortgaged Property by the Receiver prior to the completion of such a leasing plan will likely result in a sale at a value that is insufficient to repay the First Mortgage Loan in full.

Affidavit of Jean Monardo, at para 30

22. The Receivership Order has prevented the First Mortgagee from exercising its rights and remedies as holder of the First Mortgage Loan and has prevented the First Mortgagee from implementing a proper leasing plan for the Mortgaged Property to mitigate its expected loan losses.

Affidavit of Jean Monardo, at para 31

23. The First Mortgagee is very concerned that the Receiver will not have adequate time, attention, and resources to implement a leasing plan for the Mortgaged Property which will adequately mitigate the loan loss under the First Mortgage Loan that the First Mortgagee is expecting. The time and attention of the Receiver spent on other properties and Schedule "B" Corporations' issues has already delayed the need for immediate action on the Mortgaged Property to preserve and increase the NOI to a level necessary to avoid a substantial loan loss under the First Mortgage Loan.

Affidavit of Jean Monardo, at para 32

***No Prejudice to the Applicants or the Borrower From an Order Lifting the Stay***

24. On the other hand, there is no detriment to the Borrower, the Applicants or any other party from lifting the stay and permitting the First Mortgagee to proceed with its rights and remedies under the First Mortgage.

25. There is no benefit to selling the Mortgaged Property and any of the remaining Real Estate of the Schedule "B" Corporations in a package or portfolio sale transaction.

Affidavit of Jean Monardo, at para 33

26. If the sale of the Mortgaged Property by the First Mortgagee is permitted by this Court and generates net proceeds in an amount exceeding the Borrower's indebtedness to the First Mortgagee, such surplus funds can be paid over to the Receiver and held for the benefit of the Applicants while their shareholder dispute with the Respondents is ongoing.

27. There is simply no harm to the Borrower, the Applicants or any other party from allowing the First Mortgagee to exercise its rights and remedies under the First Mortgage.

28. Based on the foregoing, the stay of proceedings imposed by the Receivership Order should be lifted, and the First Mortgagee should be permitted to exercise its rights and remedies under the First Mortgage.

C. **In the Further Alternative, the Receivership Order Should Be Amended to Subordinate the Priming Charges to the First Charge**

29. As a general rule, the collateral of secured creditors cannot secure costs incurred by the receiver, unless the receiver has been appointed with the approval of the secured creditors or the receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors.

*Robert F. Kowal Investments Ltd., et al v. Deeder Electric Ltd.*, [1975] O.J. No 2363 ("Kowal"), at paras 11-17, Brief of Authorities, Tab 9

30. The well accepted statement of law on the issue of costs of a receivership made in *Kowal* provides as follows:

*When a court appoints a general receiver of the property of an individual or a corporation, at the instance of a creditor other than a mortgage lienholder, part or all of this property may be covered by liens or mortgages. The general purpose of a general receivership is to preserve and realize the property for the benefit of the creditors in general. No receivership may be necessary to protect or realize the interests of lienholders. In such cases the mortgagees and lienholders cannot be deprived of their property nor of their property rights and the receivership property cannot as a rule be used nor the business carried on and operated by the receiver in such a way as to subject the mortgagees and lienholders to the charges and expenses of the receivership. A court under such circumstances has no power to authorize expenses for improving or making additions to the property or carrying on the business of the defendant at the expense of prior mortgagees or lienholders without the sanction of such mortgagees or lienholders.*

*Kowal*, at para 12, Brief of Authorities, Tab 9

31. In *Royal Bank of Canada v. Vulcan Machinery & Equipment Ltd.* [1992] A.J. No. 1216, the Alberta Court of Queen's Bench, following the reasoning in *Kowal*, stated:

*In my opinion, while there may have been a need, indeed an urgent need, for the court-appointed receiver, there was, in my opinion however no such emergent, unusual, or extraordinary need for the appointment of a receiver-manager with the priority clause (Section 14) such as to justify the so-called "double-barrelled" Order as granted therein, which Order, with the priority clause contained therein, had the effect of seriously prejudicing the rights of secured creditors such as Mitsubishi and Mitsui to the point of trammelling their rights. It is all well and good to argue that these parties had rights to apply to vary on a subsequent application, however that, in my view, puts the onus on entirely the wrong party.*

*Royal Bank of Canada v. Vulcan Machinery & Equipment Ltd.* [1992] A.J. No. 1216 at para 49, Motion Record Tab 10

32. The Receivership Order is of no benefit to the First Mortgagee; it is an order relating to the interests of shareholders in a shareholder dispute and is not necessary to protect or realize on the interests of the First Mortgagee.

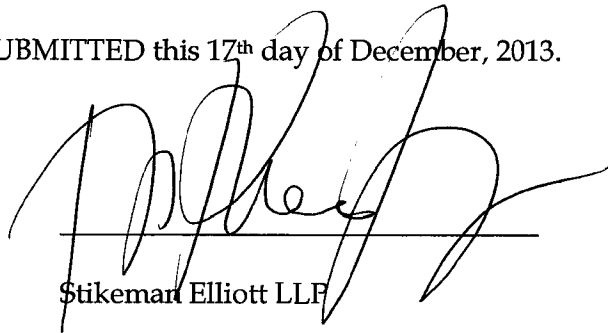
Affidavit of Jean Monardo, at para 31

33. As the receivership is not to the benefit of the First Mortgagee and the First Mortgagee strongly opposes the Receivership Order as it relates to its security, the Priming Charges should be subordinated to the First Mortgage.

#### **PART V - ORDER REQUESTED**

34. For the reasons outlined above, the First Mortgagee respectfully requests an Order as outlined in paragraph 1 hereof.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of December, 2013.

A handwritten signature in black ink, appearing to be 'M. Elliott', is written over a horizontal line. Below the line, the text 'Stikeman Elliott LLP' is printed.

Lawyers for the First Mortgagee

## SCHEDULE "A"

### List of Authorities

TAB	DOCUMENT (In Order of Appearance)
1.	<i>Arnold v. Bronstein et al.</i> , [1970] O.J. No. 1677
2.	<i>Maier v. Keevil</i> , [1996] O.J. No. 433
3.	<i>Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.</i> , [1994] O.J. No. 1735
4.	<i>Quest Capital Corp. v. Lakefront Estates Corp.</i> , 2008 CarswellOnt 9225
5.	Transcription of December 12, 2011 Endorsement of C.L. Campbell J., <i>Romspen Investments Corporation v. Edgeworth Properties – Derrick View Estates Inc.</i> ; December 12, 2011 Endorsement of C.L. Campbell J [Handwritten]
6.	<i>Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community</i> , 2012 ONSC 7319
7.	<i>Hauert-Faga v. Faga</i> , 2013 ONSC 5161
8.	<i>Janodee Investments Ltd. v. Pellegrini</i> , 2001 CarswellOnt 1232
9.	<i>Robert F. Kowal Investments Ltd., et al v. Deeder Electric Ltd.</i> , [1975] O.J. No 2363
10.	<i>Royal Bank of Canada v. Vulcan Machinery &amp; Equipment Ltd.</i> , [1992] 6 W.W.R. 307
<b>Not Cited</b>	
11.	<i>Romspen Investment Corporation v. Edgeworth Properties et al.</i> , 2012 ONSC 4693

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TO BE BOUND BY THE RESULT

Court File No: CV-13-10280-00CL

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**FACTUM OF COMPUTERSHARE TRUST  
COMPANY OF CANADA  
(RETURNABLE December 18, 2013)**

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