FILE NO. AI20-30-09537
FILE NO. CI20-01-26627

IN THE COURT OF APPEAL

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC

(Applicant) Respondent

– and –

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP

(Respondents) Appellants

MOTION BRIEF OF THE APPELLANTS
(VOLUME II of II)

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(15)

182/05/CA

COUR D'APPEL DU NOUVEAU-BRUNSWICK

Deschênes, j.c.a.

05 333 004

ENTRE :

RBI PLASTIQUE INC. REQUÉRANTE - et - SPORT MASKA INC. et KPMG à titre de séquestre intérimaire/syndic INTIMÉES	)	M[e] Bernard Twyford Raymond, avocat pour la requérante M[e] Frederick C. McElman, avocat pour l'intimée Sport Maska Inc. Personne n'a comparu pour l'intimée KPMG

DATE DE L'AUDIENCE : le 12 décembre 2005
(Par téléconférence)

DATE DE LA DÉCISION : le 16 décembre 2005

DÉCISION

[1] This motion was heard by telephone conference on Monday, December 12, 2005. The parties were heard from 11:00 a.m. until 1:50 p.m. Solicitor Frederick C. McElman spoke on behalf of the moving party, Sport Maska Inc. while M[e] Bernard Twyford Raymond spoke on behalf of RBI Plastique Inc.

[2] Sport Maska Inc. sought the following orders:

1. An order dismissing the appeal pursuant to Rule 62.18.

2. Should the order dismissing the appeal not be granted, an order allowing an early hearing of the appeal.

3. An order to compel Michel Lebel or, in the alternative, RBI Plastique Inc., to furnish security for costs pursuant to Rule 58.10(1) of the Rules of Court.

4. An order lifting the statutory stay in effect pursuant to S. 195 of the *Bankruptcy and Insolvency Act.*

[3] Having heard the parties and considered the material in support of and in opposition to the motion, I hereby order that:

- RBI Plastique Inc furnish to Sport Maska Inc. security for costs in the amount of $10,000.00 by certified cheque within 30 days after filing of this order with the Registrar's office, by delivering the certified cheque to solicitor Frederick McElman to be held by him in his trust account for Sport Maska Inc. until the appeal is disposed of. Should the appellant RBI Plastique Inc. fail to comply with this order, it shall be deemed to have abandoned its appeal with costs to Sport Maska Inc.

- That the stay imposed pursuant to s. 195 of the *Bankruptcy and Insolvency Act* be lifted.

- Costs incidental to this motion shall be taken into account by the panel assigned to hear the appeal in a manner to be determined by the panel.

[4] In reaching my conclusion on the matter of security for costs and the lifting of the stay, I was satisfied, on the basis of the material before me and the arguments of the parties, that there was a strong likelihood that the appeal will fail and that it was in the interests of justice that both orders be granted.

[5] Should Sport Maska Inc. be of the view that it is still necessary to pursue their motion for a dismissal of the appeal pursuant to Rule 62.18 or for an early hearing of the appeal, it may inform the Registrar who shall fix a date for another hearing after consultation with the parties.

Alexandre Deschênes, j.c.a.
Cour d'appel du Nouveau-Brunswick

(16)

In the Court of Appeal of Alberta

Citation: Kubota Canada Ltd. v. Case Credit Ltd., 2004 ABCA 41

Date: 20040224
Docket: 0303-0405-AC
Registry: Edmonton

Between:

Kubota Canada Ltd.

Applicant/Appellant

- and -

Case Credit Ltd.

Respondent/Respondent

Reasons for Judgment of the
Honourable Madam Justice Russell

Appeal from the Order by
The Honourable Mr. Justice W.E. Wilson
Dated the 25th day of November, 2002
(QB Nos: 88979; 88845)

Reasons for Judgment of the
Honourable Madam Justice Russell

Background

[1] Kubota Canada Ltd. (Kubota) seeks an order directing the Registrar of this Court to file its Notice of Appeal pursuant to the *Alberta Rules of Court*, AR 390/68 (*Rules of Court*) or alternatively, extending the time for filing and serving the Notice of Appeal pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) and its *Rules*.

[2] The order appealed from was granted by a judge of the Court of Queen's Bench in Bankruptcy following an application to determine priority of competing personal property security claims. That determination involved the application of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (*PPSA*). The Trustee in Bankruptcy was not a party to the application and acknowledged that it did not concern property of the bankrupt.

[3] Following entry of the order on February 26, 2003, Kubota attempted to file a Notice of Appeal with the Registrar of this Court on March 10. Counsel for Kubota believed the appeal was governed by the *PPSA*; therefore, since actions under that statute are governed by the *Rules of Court*, he believed it had been filed within the appeal period. The Registrar rejected the Notice however, on grounds that the 10 day time limit for filing an appeal under the *BIA* had expired.

[4] When he learned of that rejection, counsel for Kubota immediately contacted counsel for the other party, Case Credit Ltd. (Case), who advised him that the missed deadline would not be a problem. Consequently, no application was then launched to seek leave to extend the time to appeal. On April 11, however, counsel for Case indicated that their consent to an extension of time to appeal was conditional on Kubota posting an irrevocable letter of credit for the full amount of Case's debt.

[5] Settlement discussions between the parties continued until July 2003. At that point, counsel for Case verbally advised Kubota's counsel that if Kubota did not accept its settlement offer, Case would oppose Kubota's application for an order extending the time for appeal. Although counsel for Kubota asked Case to reduce that warning to writing, Case did not do so until October 30, 2003. On October 3, 2003, Case filed a Notice of Motion seeking directions to enforce the accounting contemplated by the February 26 order. Kubota commenced this application on November 27, 2003.

[6] Kubota's explanation for the delay in making this application includes the protracted settlement discussions, the initial understanding that the application would be uncontested, the relocation of Kubota's counsel to another law firm on October 1, 2003, and the failure of Case to provide written notice of the change of its position to contest this application until October 30, 2003. The only explanation for the delay from October 30 to November 27, though, is that another lawyer in the firm who was expected to assist with the application was on holidays the week prior to November 27.

[7] Case maintains it has been prejudiced by the delay because Kubota continues to hold assets or credits awarded to Case which are valued at between $800,000 and $1,000,000; it acknowledges, however, that such prejudice could be redressed by an award of interest or costs. Of greater concern to Case is the prejudice from the failure to proceed with the accounting directed by the order. Kubota suggests that, if its application is granted, any such prejudice might be remedied by an order suspending the automatic stay provided by the *BIA* with respect to that aspect of the order only.

Analysis

Is the Appeal Period Governed by the BIA*?*

[8] Although the Trustee in Bankruptcy was not a party to the proceedings and the proceedings involved the application of the *PPSA*, the parties agreed the application should be made by Notice of Motion before a judge in bankruptcy, rather than by Originating Notice of Motion in proceedings under the *PPSA*. While the proceedings did not directly involve the property of the bankrupt, they were clearly related to the bankruptcy. Thus, although provincial legislation defined the property rights of the parties, the determination of their priorities in this case was made under the *BIA*: see ***Re Giffen***, [1998] 1 S.C.R. 91. Therefore, the appeal period established by the *BIA* and its *Rules* governs and the Notice of Appeal was properly rejected as out of time.

If So, Should That Appeal Period Be Extended in This Case?

[9] In ***Re Flair Construction v. Bank of Montreal*** (1981), 38 C.B.R. 292 (B.C. C.A.) (***Flair***) at 294, Craig J.A. held that the governing principle in applications to extend time is the presence of special circumstances, taking into account such factors as whether:

1. The applicant had a bona fide intention to appeal before the expiration of the appeal period;
2. That intention was communicated to the respondent;
3. The respondent would not be unduly prejudiced by an extension;
4. The appeal is meritorious in that there is a reasonably arguable ground of appeal; and
5. It is in the interest of the parties to grant the extension.

[10] While ***Flair*** is useful in that it is an appellate court decision involving a bankruptcy matter, the test in ***Flair*** was appropriated from the general law in British Columbia as to when the Court of Appeal should grant leave to extend time for doing an act. The governing factors for such applications in this province were established by this Court in ***Cairns v. Cairns***, [1931] 3 W.W.R. 335 (C.A.) (***Cairns***). They include whether:

1. There was a *bona fide* intention to appeal while the right to appeal existed, and some special circumstance that would excuse or justify the failure to appeal;

2. There is an explanation for the delay and the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;
3. The appellant has not taken the benefits of the judgment from which the appeal is sought; and
4. The appeal has a reasonable chance of success if allowed to proceed.

[11] The ***Cairns*** test differs from the ***Flair*** test in at least two regards. Firstly, the requirement of a "reasonably arguable ground of appeal" in ***Flair*** may be less onerous than the Alberta requirement that the appeal have a "reasonable chance of success." Secondly, ***Cairns***, requires an applicant seeking to extend the appeal period to account for the delay; ***Flair*** does not appear to require such an explanation. More recent case law in this province, however, acknowledges an unfettered discretion in such applications to do what justice requires having regard to the circumstances of the case: ***Higdon v. Smoky Lake General & Auxiliary Hospital & Nursing Home District 73*** (1983), 29 Alta. L.R. (2d) 215 (C.A.).

[12] The test which applies in Alberta is ***Cairns.*** Case does not dispute that Kubota formed the intent to appeal within the appeal period and communicated that intent to Case, nor does it dispute that Kubota has not "taken the benefits" of the February 26 order. What Case does dispute is whether there is a reasonable explanation for the delay in making the application, whether Case has been prejudiced by that delay, and whether the appeal is meritorious.

The Merits

[13] With respect to this aspect of the test, the issue in the proposed appeal is whether the judge in bankruptcy erred in law by relying on the decision of one member of a panel of this court in ***Chiips v. Skyview Hotels*** (1994), 155 A.R. 281 (C.A.) **(*Chiips*)**, without referring to the concurring decision. The chambers judge interpreted ***Chiips*** to mean that, in security agreements, intention to subordinate an interest in secured property to the interest of another party can only be found where a contract uses the word 'priority.' However, the concurring decision in ***Chiips*** held that, in determining whether a clause functions to subordinate an interest, one must look to the intentions of the drafters and an explicit waiver is not always necessary. Given the different tests enunciated in the reasons and the fact that the third member of the panel in ***Chiips*** was in dissent, I am satisfied there is a reasonable chance of success on the merits.

The Explanation for the Delay

[14] Given the ongoing settlement discussions and Case's failure to comply with Kubota's request for written confirmation that Case had changed its initial position not to oppose this application, I am satisfied that a reasonable explanation has been provided for the delay up until October 30, 2003. While the practice of relying on assurances by opposing counsel that an application of this nature will not be opposed may have been ill advised, it was not unreasonable considering the ongoing

settlement discussions, Case's lack of effort to enforce the order until October 3, and Case's failure to confirm its intentions respecting this application until October 30.

[15] While there is no explanation for three weeks of the delay that occurred after October 30, when considered in the context of the whole period of delay, that additional delay is of moderate significance. No special prejudice is asserted with respect to that portion of the delay.

The Prejudice

[16] The order under appeal declares Kubota's security interest subordinate to that of Case, and requires Kubota to both account to Case for the proceeds of the collateral Kubota held, and cover the bankrupt's indebtedness to Case. The outcome of the October 3 application in Queen's Bench for directions respecting the accounting, is dependent upon the success of this application.

[17] If leave is granted, the *BIA* provides for an automatic stay of the order: see s. 195. Kubota does not dispute that a stay of the accounting would prejudice Case, but suggests that a suspension of the stay to permit the accounting to proceed would alleviate that prejudice.

[18] It is acknowledged that any prejudice which might result from the delay in payment can be offset by an award of interest. Since both parties are large, solvent corporations, there is no evidence of risk of non-payment.

Conclusion

[19] Considering the modest period of unexplained delay relative to the total period of delay, the initial understanding that this application would be unopposed followed by Case's failure to confirm its change of position in that regard, and the lack of any incurable prejudice to Case, I am satisfied that in the unique circumstances of this case, it is in the interests of justice to extend the time to appeal. Leave to extend time to appeal is granted. However, given the relative merits of the appeal and potential prejudice to Case from any further delay in the accounting, the stay of the order provided for by s. 195 of the *BIA* is varied by suspending, until the date set for the hearing of the appeal, the stay of that portion of para. 3 of the February 26 order requiring Kubota to forthwith account to Case for the proceeds of the Kubota collateral.

Appeal heard on January 15, 2004

Reasons filed at Edmonton, Alberta
this 24th day of February, 2004

Russell J.A.

Appearances:

M.J. Penny
for the Applicant/Appellant

N.J. Pollock, Q. C.
For the Respondent/Respondent

(17)

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Bodanis, 2020 ONCA 185
DATE: 20200306
DOCKET: M51328 (C67467)
M51356 (C67464)

Nordheimer J.A. (Motions Judge)

BETWEEN

Royal Bank of Canada

Moving Party
(Respondent)

and

David Bodanis

Responding Party
(Appellant)

AND BETWEEN

Royal Bank of Canada

Moving Party
(Respondent)

and

Irenka Bodanis

Responding Party
(Appellant)

Rachel Moses, for the moving party

Scott Rosen, for the responding parties

Heard: March 2, 2020

REASONS FOR DECISION

[1] There are companion motions in these two bankruptcy proceedings that seek directions. The moving party asserts that the appellants in these matters do not have an appeal as of right but rather must seek leave to appeal. In the alternative, the moving party says that the automatic stay that would result from an appeal as of right ought to be cancelled.

[2] Both appellants owe monies to the moving party and others pursuant to various judgments and costs awards totalling in the hundreds of thousands of dollars. They have owed these monies, in some cases, for many years. In November 2018, the moving party commenced bankruptcy applications against the appellants. A trial was held on these applications and, at its conclusion, on August 12, 2019, the trial judge granted bankruptcy orders. The appellants then filed appeals from those orders.

[3] The first issue is whether there is an appeal as of right. The conclusion on that issue turns on the wording of s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, which reads:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;

> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[4] Each of ss. 193(a), (b) and (c) are invoked in this case. I agree that neither ss. 193(a) nor (b) apply. Based on the analysis contained in *Ravelston Corp (Re)* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.), I conclude that a bankruptcy order does not involve future rights. Similarly, there is no evidence in this case that the bankruptcy orders will likely affect another case raising the same or similar issues in the same bankruptcy proceedings, unlike the situation in *Wong v. Luu,* 2013 BCCA 547, 55 B.C.L.R. (5th) 129, at para. 21. Consequently, s. 193(b) does not apply.

[5] However, in my view, s. 193(c) does apply to this case. Clearly, the value of the property involved in this appeal exceeds $10,000. Indeed, there is no dispute that that is the case. However, the moving party submits that the bankruptcy orders, which appoint a Trustee in Bankruptcy, simply preserve the assets of the bankrupt and therefore do not "involve" property of more than $10,000. The moving party relies on observations made in certain other cases including *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* 2013 ONCA 282, 115 O.R. (3d) 617, *2403117 Ontario Inc. v. Bending Lake Iron Group*

Limited, 2016 ONCA 225, 369 D.L.R. (4th) 635, and *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.,* 2019 ONCA 588, 72 C.B.R. (6th) 245.

[6] Each of those decisions is distinguishable from the case at hand. In all three of those cases, the order being appealed was an order appointing a Receiver over certain properties. It was not a bankruptcy order as is the case here. There are distinctions between orders appointing a Receiver and bankruptcy orders appointing a Trustee in Bankruptcy. Among those distinctions is the fact that, unlike a Receiver, the Trustee in Bankruptcy does not require court approval in order to monetize the bankrupt's assets (except in limited circumstances). Instead, the Trustee has a duty to dispose of the bankrupt's assets and distribute the proceeds amongst the creditors, subject to the inspectors' approval.

[7] In relying on these decisions, the moving party points out the commentary that has been made in them that s. 193(c) ought to be narrowly construed in order to avoid conflict with other statutes, particularly the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36. As laudable a goal as that may be, it cannot be used to, in effect, read the subsection out of the statute. On that point, counsel for the moving party fairly concedes that, if the interpretation of s. 193(c) that she urges in this case were to be adopted, the subsection would not apply to any bankruptcy proceeding, since all of them will realistically involve assets totalling more than $10,000.

[8] While I appreciate the concerns that are used to justify the narrow approach, I do not see how a court can invoke those concerns in order to avoid the plain wording of the statute. The basic principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 S.C.R. 27, at para. 21. If there is a pressing concern on this issue, it is one that Parliament must address.

[9] While the facts of each case may determine whether s. 193(c) properly applies, in my view, it clearly applies here where the appellant's entire property have been taken out of their control and placed into the hands of a Trustee in Bankruptcy, who has the right to dispose of that property and distribute it among the creditors, without further court intervention. The orders here are more akin to the type of orders that were considered in *Crate Marine Sales Ltd (Re),* 2016 ONCA 140, 33 C.B.R. (6th) 169, and *Comfort Capital Inc v. Yeretsian*, 2019 ONCA 1017, where an appeal as of right was found to exist. Consequently, I conclude that the appellants have an appeal as of right.

[10] That conclusion then raises the second issue: should this court cancel the automatic stay that results from an appeal? Section 195 of the *Bankruptcy and Insolvency Act* reads:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[11] In considering whether the automatic stay should be cancelled, the court will principally consider two factors: (1) the merits of the appeal and (2) the relative prejudice to the parties: *First National Financial GP Corp. v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 40; *Yewdale v. Campbell, Saunders Ltd.* (1995), 9 B.C.L.R. (3d) 252 (C.A.), at para. 15.

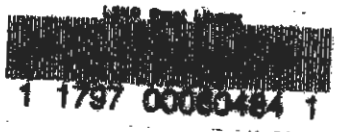
[12] In this case, while the appeals may not be entirely meritless, they are ones that appear to only challenge either the trial judge's exercise of discretion in refusing an adjournment, or his factual findings that an act of bankruptcy had been committed. Their chances of success cannot be seen as being very high.

[13] In addition, I fail to see any prejudice to the responding parties if the automatic stay is cancelled. Their sole significant asset appears to be their residence and it is already the subject of mortgage proceedings by the Toronto-Dominion Bank. Another factor is, as the trial judge noted, that the responding parties have a history of delay. Further, there is some evidence of the responding parties' improper dealings with their property, as evidenced by a fraudulent conveyance action that was commenced in 2014.

[14] All of these considerations favour the moving party. Consequently, I conclude that the automatic stay under s. 195 should be cancelled.

[15] The moving party is entitled to its costs of these motions fixed at $5,000, inclusive of disbursements and HST.

"I.V.B. Nordheimer J.A."



BENNETT

on

RECEIVERSHIPS

Third Edition

by

Frank Bennett

L.S.M., LL.M.

Toronto, Canada

CARSWELL®

11

Discharge

1. Grounds
2. Court Appointment
3. Private Appointment
4. Refloating the Charge

1. GROUNDS

Once the receiver has achieved the goals of the receivership, principally the sale of the debtor's business or property and the distribution of the sale proceeds, the court in the case of a court appointment and the security holder in the case of a private appointment should terminate receiver's appointment and discharge the receiver.

The appointment of the receiver is usually terminated when the estate has been fully administered or the appointment no longer serves any purpose.[1] By that time, the receiver will have taken possession of and disposed of all the debtor's assets, property, and undertaking. Then, the receiver will have no other function, except in the case of a court appointment, to pass its accounts before being discharged. In a court appointment, the court terminates the appointment; it is not terminated automatically. The receiver then proceeds to pass its accounts and, if satisfactory, the court discharges the receiver. In a private appointment, the security holder may change or terminate the appointment of a receiver at will unless there is a prohibition in the security instrument.

There are many situations where a receiver may be discharged if the administration is not completed and another receiver appointed in its place to complete the receivership. In a court appointment, there is a heavier onus on the debtor or third party who seeks to discharge or replace a receiver in the course of the administration than there is upon a party opposing the court appointment in the first instance. The

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1 See *Metropolitan Trust Co. of Canada v. Dancorp Developments Ltd.* (1993), 79 B.C.L.R. (2d) 169, 1993 CarswellBC 125 (B.C. Master), appeal dismissed (1993), 1993 CarswellBC 1998 (B.C. S.C.), where the court dismissed an application to discharge the receiver as the receiver had not completed the administration of the estate, and, in particular, the receiver had not resolved warranty issues, obtained tax refunds, and disposed of some of the remaining units of a condominium project at the time of the application.

court considers the delay in bringing the motion, the stage of the proceedings as well as the increased costs in replacing a receiver during the course of administration.[2]

The court or security holder may discharge the receiver in the following situations:

(1) Where the administration has been fully completed.
(2) If there is a conflict of interest with the receiver.

A receiver ought not to continue the appointment if there is any apparent conflict of interest. For example, a receiver who accepts an appointment as trustee in bankruptcy or as trustee under a proposal pursuant to the *Bankruptcy and Insolvency Act* or *vice versa* has a conflict of interest if the creditors are challenging the security instrument under which the appointment was made as being defective, or if the creditors are challenging the enforcement thereof or that the taking of the security is preferential to other creditors.

However, the court may permit the receiver to take both positions if the creditors consent or the inspectors of the bankrupt estate approve the appointment. Even if there is no litigation involving the security, the court may permit the dual position if the major creditors consent or do not oppose, or, in the case of a bankruptcy, the inspectors of the estate consent.[3] In addition, if the receiver is in a conflict of interest position but has taken steps to resolve the conflict, the court will dismiss the application.[4]

In *Re YBM Magnex International Inc.*,[5] the court considered the following factors, acknowledging that there may be additional factors, in deciding whether to remove a receiver:

(a) the gravity of the conflict or potential conflict;
(b) the receiver's qualifications, and the experience and familiarity already gained by the receiver;
(c) the prejudice to the estate in removing the receiver, in particular, the knowledge which would be lost and the time and costs which would be incurred in substituting a new receiver and bringing that person up to speed;
(d) he receiver's conduct, in particular, whether the receiver: (i) has disclosed the conflict or potential conflict from the outset; (ii) has established measures to reduce the dangers of conflicts or potential conflicts; and (iii) has in any way acted improperly;
(e) delay by the applicant in alleging conflict and bringing the motion for removal;
(f) tactical reasons for bringing the motion for removal; and
(g) the wishes of various stakeholders.

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2 *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80, 1985 CarswellBC 475 (B.C. S.C.); *Canada Trustco Mortgage Co. v. York-Trillium Dev. Group Ltd.* (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.); *Royal Bank of Canada v. Walker Hall Winery Ltd.* (2010), 2010 ONSC 4236 (CanLII), 2010 CarswellOnt 6025 (Ont. S.C.J. [Commercial List]).

3 See Chapter 12 "Bankruptcy and Receivership, 6. Conflict of Interest". See also sections 13.3 and 13.4 of the *Bankruptcy and Insolvency Act*.

4 *Re YBM Magnex International Inc.* (2000), 275 A.R. 352, 9 B.L.R. (3d) 296, 2000 CarswellAlta 1068 (Alta. Q.B.), appeal dismissed (2001), 293 A.R. 337, 23 B.L.R. (3d) 293, 257 W.A.C. 337 (Alta. C.A.).

5 Above. With respect to factor (a), the court considered (i) the existence of the conflict; (ii) the alleged favouritism by the receiver; (iii) the nature of the conflict for auditors affiliated with receivers; and (iv) the conclusion on the nature of the conflict.

(3) If the receiver has breached its duties or has not diligently fulfilled the powers entrusted to it by the court order or in enforcing the rights of the security holder.[6]
(4) If the receiver is negligent or incompetent.[7]

Needless to say, the receiver will not be discharged for minor breaches. The court or the security holder must assess the nature of the breach and the consequences in terms of the receiver's duties and powers and their effect on the debtor and other interested persons. The court reviews the receiver's actions as they unfold, rather than reviewing its actions with the benefit of hindsight.[8]

(5) If the receiver dies, is dissolved, or becomes insolvent.
(6) If there are sufficient facts to show partiality and bias.
(7) If the receiver is dishonest or fraudulent.
(8) If after the appointment, there appears to be no reason or purpose to continue with the receivership as, for example, there are no substantial assets to administer or where the estate would be better administered under the *Bankruptcy and Insolvency Act*.[9]

In *Kotler et al. v. Bayshore Investments Ltd. et al.*,[10] the court discharged the receiver on the basis that the costs of the receivership would lead to a dissipation instead of a preservation of assets.

However, in conflicts between the security holder and the debtor as to who should be the receiver, the court considers the fact the debtor is suing the receiver, the nature of the claims being made against the receiver and the costs to be incurred in substituting a new receiver.[11] In *Prince Albert Fashion Bin et al. v. Prince Albert Credit Union Ltd. et al.*[12] the debenture holder appointed a private receiver who allegedly was selling the debtor's inventory at less than cost. The debtor sued the debenture holder and receiver for damages, obtained an *ex parte* injunction and then

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6 In *Investors Group Trust Co. Ltd. v. Nussbaumer* (1980), 25 B.C.L.R. 133, 1980 CarswellBC 339 (B.C. S.C.), the receiver improperly performed her duties in a mortgage receivership. She failed to take prompt action to find tenants for the properties and took no steps to renegotiate any leases. In view of the fact that the mortgage was going to be redeemed within a short period of time, the court dismissed the application to discharge the receiver.

7 See *Aquilon Capital Corp. v. Sucor* (2010), 357 N.B.R. (2d) 336, 67 C.B.R. (5th) 288, 923 A.P.R. 336 (N.B. Q.B.), where if the privately appointed receiver is acting in good faith and is commercially reasonable in the sale of the debtor's assets, the court will not substitute the receiver or enjoin the receiver from selling.

8 *Canada Trustco Mortgage Co. v. York-Trillium Dev. Group Ltd.* (1992), 12 C.B.R. (3d) 220, 1992 CarswellOnt 168 (Ont. Gen. Div.).

9 In *Re United Maritime Fishermen Co-op* (1988), 87 N.B.R. (2d) 333, 68 C.B.R. (N.S.) 170, 221 A.P.R. 333 (N.B. Q.B.), appeal allowed (1988), 88 N.B.R. (2d) 253, 69 C.B.R. (N.S.) 161, (sub nom. *Cdn. Co-op. Leasing Services v. United Maritime Fishermen Co-op.*) 51 D.L.R. (4th) 618 (N.B. C.A.), the court terminated a receivership where the re-structuring of the debtor appeared no longer feasible so that a trustee in bankruptcy could better serve the creditors and sell the assets without the court.

10 (1982), 41 C.B.R. (N.S.) 223, 1982 CarswellBC 482 (B.C. S.C.), reversed (1982), 42 C.B.R. (N.S.) 127, 1982 CarswellBC 484 (B.C. C.A.).

11 *Royal Bank of Canada v. Vista Homes Ltd.* (1985), 63 B.C.L.R. 366, 57 C.B.R. (N.S.) 80, 1985 CarswellBC 475 (B.C. S.C.).

12 (1980), 37 C.B.R. (N.S.) 160, 1980 CarswellSask 30 (Sask. Q.B.).

applied to substitute a court-appointed receiver for the privately appointed receiver. Although the court refused to substitute the receiver on the grounds that the added cost did not justify another receiver, the court imposed a condition on the privately appointed receiver not to sell below cost without an order of the court or the consent of the debtor.

(9) If a prior encumbrancer appoints its own receiver or applies to the court in a court-appointed receivership for a receiver.[13]

(10) If the receiver requests its own removal where, for example, the receiver is a natural person and is ill or becomes incapable of fulfilling the duties of a receiver.

(11) If the court appoints a receiver, the appointment of a privately appointed receiver is terminated.[14]

(12) If the debtor challenges the validity of the appointment,[15] if a creditor alleges that the security instrument under which the receiver was appointed was a fraudulent conveyance,[16] or if the security holder does not post security pursuant to the order.

(13) If the receiver is in constant conflict with the debtor such that the evidence leaves little doubt that the receiver cannot remain impartial and disinterested.[17]

(14) In a mortgage receivership, if the mortgagee obtains a Rice order,[18] or purchases the property, the effect is to terminate the appointment of the receiver subject to the passing of accounts.[19]

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13 *Imperial Life Assur. Co. v. Glenburn Mtge. Ltd. et al.* (1978), 28 C.B.R. (N.S.) 302, [1979] 1 W.W.R. 245, 1978 CarswellBC 298 (B.C. S.C.), following *Re Metro. Amalg. Estates Ltd.; Fairweather v. The Company*, [1912] 2 Ch. 497 (Eng. Ch. Div.).

14 *Re Slogger Automatic Feeder Co.; Hoare v. Slogger Automatic Feeder Co.*, [1915] 1 Ch. 478 (Eng. Ch. Div.). If the order appointing the receiver is being appealed, the security holder cannot resort to the powers under the instrument in order to sell: *Price Waterhouse Ltd. v. Creighton Holdings Ltd. et al.* (1984), 36 Sask. R. 292, 54 C.B.R. (N.S.) 116, 1984 CarswellSask 39 (Sask. Q.B.).

15 *Mercantile Bank of Can. v. Nelco. Corp.* (1982), 47 C.B.R. (N.S.) 165, 1982 CarswellAlta 332 (Alta. Q.B.).

16 *Royal Bank v. First Pioneer Invts. Ltd. et al.* (1979), 27 O.R. (2d) 352, 32 C.B.R. (N.S.) 280, 106 D.L.R. (3d) 330 (Ont. H.C.), appeal dismissed (1981), 32 O.R. (2d) 121, 39 C.B.R. (N.S.) 147, 121 D.L.R. (3d) 510 (Ont. C.A.), appeal allowed [1984] 2 S.C.R. 125, 5 O.A.C. 195, 52 C.B.R. (N.S.) 225 (S.C.C.).

17 *First Pac. Credit Union v. Grimwood Sports Inc. et al.* (1984), 59 B.C.L.R. 145, 16 D.L.R. (4th) 181, 56 C.B.R. (N.S.) 7 (B.C. C.A.).

In *Azura Management (Hemlock) Corp. v. Hemlock Valley Resorts Inc.* (2006), 22 C.B.R. (5th) 60, 2006 BCSC 824 (CanLII), 2006 CarswellBC 1264 (B.C. Master), where the court dismissed the receiver's motion to approve the sale of the debtor's business, the court also discharged the receiver and substituted another. Here, the receiver's sale price was low, the sale was not in the best interests of the majority of interested parties, and the receiver allowed insufficient time to market the assets so as to create a proper climate to generate offers more closely akin to the fair market value of the property.

18 In Alberta, a Rice order is an order directing a judicial sale in favour of the creditor and granting judgment for the deficiency. See *Morguard Investments Ltd. v. De Savoye* (1988), 27 B.C.L.R. (2d) 155, [1988] 5 W.W.R. 650, 29 C.P.C. (2d) 52 (B.C. C.A.), appeal dismissed [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160, [1991] 2 W.W.R. 217 (S.C.C.).

19 *Tow-Mor Properties Ltd. v. W.G. Fahlman Ent. Ltd.* (1986), 72 A.R. 81, 62 C.B.R. (N.S.) 297, 1986 CanLII 1907 (Alta. Master).

If the receiver's appointment is terminated before the administration of the estate is completed, the receiver must pass on the balance of the assets and proceeds to the successor receiver, if any, as soon as possible. The terminated receiver remains liable for its actions and will of course have the duty to account fully to the court, to the debtor, to the security holder, and to all other stakeholders. The successor receiver ought to be appointed immediately in order to provide continuity in the administration. If there is any appreciable lapse of time before a successor is appointed, it may be necessary for the security holder to move for a restraining order against the debtor.

In the case where a successor receiver is not appointed, the security holder may have to pursue other remedies that are available such as foreclosing or simply suing for arrears. If the security holder does nothing, the receiver nonetheless remains accountable for its conduct and activities. The receiver must return the debtor's property to the debtor at which time the powers of the directors and officers of the debtor corporation are restored.[20]

On the other hand, if the receiver has successfully managed the debtor's business to the extent of retiring the debt to the security holder, the receiver ought not to continue operating the business. The receiver will be without authority and therefore, notwithstanding its good intentions, the receiver may become a trespasser and liable for damages. The receiver remains accountable and becomes a fiduciary until the time when the receiver returns the business to the debtor.[21]

2. COURT APPOINTMENT

In most cases, a court-appointed receiver proceeds to administer the estate in receivership until completion. Thereafter the security holder can move for an order terminating the appointment and requiring the passing of the receiver's final accounts. However, there are situations where the receivership may be substituted or terminated earlier than by completion. Once the court terminates the appointment, the receiver then passes its accounts while the successor receiver continues with administration. The terminated receiver retains the right to apply to the court under the original order for directions.[22] When the accounts are passed, the receiver obtains an order of discharge. Usually, throughout the receivership, the receiver reports periodically to the court on the stage of the administration and at the same time requests that its conduct and activities be approved to date. The discharge order then protects the receiver from claims for maladministration and any disputes as to the validity of the appointment especially when it is on consent.[23] The order, however, does not protect the court-appointed receiver for gross negligence or wilful misconduct. If the debtor or other creditor wishes to pursue the receiver after its discharge for gross negligence or wilful misconduct, the debtor should post a full indemnity

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20 See below, "4. Refloating the Charge".

21 See *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Eng. Ch. Div.), appeal dismissed [1897] A.C. 180 (U.K. H.L.).

22 *Deloitte & Touche Inc. v. Ursel Investments Ltd. (Receiver of)*, [1992] 3 W.W.R. 106 at p. 115 (Sask. C.A.).

23 *Re Abacus Cities Ltd.*, [1986] 4 W.W.R. 564, 45 Alta. L.R. (2d) 113, 70 A.R. 55 (Alta. C.A.), leave to appeal refused (1986), 69 N.R. 240 (S.C.C.).

to protect the receiver in the event the claim is dismissed. Such an indemnity can be a payment into court or more conveniently by a letter of credit.[24]

The parties to the receivership action may settle or otherwise provide security to the court's satisfaction, thereby rendering the position of the receiver ineffective or unnecessary. Similarly if the costs of a continued receivership may lead to a dissipation of assets, the court may consider terminating the receivership where there is no likely benefit to be derived for the stakeholders.[25]

In the situation where the receiver may be substituted or replaced, the receiver must continue to act honestly and in good faith and the receiver should deal with the property in a commercially reasonable manner. Where the debtor or other stakeholders allege acts of impropriety, the court has the inherent power to remove its own officer and substitute another in its place prior to the completion of the administration.

If the debtor or a creditor brings a motion for the receiver's termination for cause, the court requires that the receiver report to the court as to the status of the administration in a timely manner. If the receiver does not present an accurate account and a record of receipts and disbursements, the court cannot assess the receiver's remuneration let alone order the discharge.[26]

On the motion for termination and discharge, the security holder and receiver should give notice to all defendants or respondents in the action and to all interested persons.[27] In many cases, only the debtor and guarantors are the defendants, although, depending upon the practice in the particular court, subordinate security holders and execution creditors may have been added as parties if they have not been paid.

The motion to discharge the receiver should be relatively straightforward when the administration has been completed since all the proceedings in the realization of assets will have been finalized, including the passing of the receiver's accounts and taxation. Persons having an interest in the debtor's equity have already had an opportunity to contest the sale proceedings and challenge the receiver's accounts. The court is reluctant to keep the administration open where all issues have been dealt with, except for possible potential claims against the estate or the receiver. In this case, the court analyzes whether such claims are sufficiently remote and hypothetical so that the administration can be finalized.[28] Thus, the motion to discharge the receiver is, in most instances, merely a house-keeping measure in the finalization of the lawsuit and relieves the receiver of any further obligations. The motion may also be a motion for advice and directions on the distribution of the sale proceeds. How-

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24 *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, 2009 CanLII 55113, 2009 CarswellOnt 6167, [2009] O.J. No. 4265 (Ont. S.C.J. [Commercial List]).

25 See *Kotler et al. v. Bayshore Invts. Ltd. et al.* (1982), 41 C.B.R. (N.S.) 223, 1982 CarswellBC 482 (B.C. S.C.), appeal allowed on other grounds (1982), 42 C.B.R. (N.S.) 127, 1982 CarswellBC 484 (B.C. C.A.). See above "1. Grounds".

26 *Guar. Trust Co. of Can. v. 208633 Holdings Ltd.; Northland Bank v. 208633 Holdings Ltd. et al.* (1982), 19 Alta. L.R. (2d) 151, 42 C.B.R. (N.S.) 90, 1982 CanLII 1100 (Alta. Q.B.).

27 The purchaser of assets from the receiver has standing on such a motion where the purchaser has potential liability: *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

28 *Bank of Montreal v. Probe Explorations Inc.* (2006), 26 C.B.R. (5th) 183, 2006 ABQB 604 (CanLII), 2006 CarswellAlta 1446 (Alta. Q.B.).

ever, if the receiver has not taken all reasonable steps to realize the assets, the court may adjourn the motion pending finalization of the estate.[29]

Once the receiver completes the administration, the security holder may then proceed to obtain the receiver's discharge or an order granting the discharge on a fixed date or on the completion of the administration. Where security is posted for the receiver's performance, the receiver's surety will not, however, be discharged until such time as the receiver passes the final accounts and taxes its remuneration.

If the receiver has assets which are unrealizable, as, for example, books and records, the court will direct that the assets be returned to the debtor subject to the security holder's charge if the debt has not been fully satisfied. Where the holder has been repaid, the receiver must deliver such surplus assets and proceeds from realization to any subordinate security holder, the debtor, or the trustee in bankruptcy as the case may be.

As indicated above, the court usually grants the receiver's fees and expenses on a full indemnity basis where the receiver can establish entitlement through dockets and expenses receipts. In addition, where the debtor or other stakeholders challenge the receiver's conduct and activities, the receiver is usually entitled to the full indemnity as well. If the debtor or creditors unsuccessfully attack the receiver for claims of negligence, breach of fiduciary duty, dereliction of duty, abuse of power, or bad faith, the court has the inherent discretion to award full or substantial indemnity costs against the challenger especially where the facts have been litigated in previous proceedings.[30] The court can award costs on a full or substantial indemnity basis where the party can show reprehensible, scandalous, or egregious conduct. Similarly, if the receiver's reputation and integrity are being attacked, the court can award costs against the other party and even against a non-party if unsuccessful.[31]

3. PRIVATE APPOINTMENT

After the receiver disposes the debtor's property, the receiver normally prepares a statement of receipts and disbursements for the security holder and, if requested or required by statute, for the debtor and creditors. Such a statement is needed if the security holder intends to pursue a deficiency balance against the debtor or against any guarantor.

If the receiver does not produce a statement of receipts and disbursements, the debtor can commence a common law cause of action against the security holder for a detailed accounting with respect to the property taken and realized. In addition, the receiver is usually deemed to be the agent of the debtor, and as agent of the

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29 *Re Atlantic Travel Service Ltd.* (1982), 44 C.B.R. (N.S.) 218, 1982 CarswellBC 502 (B.C. S.C.).

30 *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2007), 31 C.B.R. (5th) 167, 2007 ONCA 145 (CanLII), 2007 CarswellOnt 1182 (Ont. C.A.); *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), (sub nom. *Bricore Land Group Ltd., Re*) 299 Sask. R. 194, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.), allowing an appeal from (2007), (sub nom. *Bricore Land Group Ltd., Re*) 298 Sask. R. 158, 33 C.B.R. (5th) 46, 2007 SKQB 144 (CanLII) (Sask. Q.B.) with respect to costs where bad faith was not alleged.

31 *Re Party City Ltd.* (2002), 32 C.B.R. (4th) 286, 20 C.P.C. (5th) 156, 2002 CarswellOnt 1116 (Ont. S.C.J. [Commercial List]).

receiver should therefore be accountable. Moreover, the receiver must be in a position to account to others who are entitled to any surplus.[32]

Where the receiver cannot realize an asset, the receiver may return it to the debtor subject to the charge. If the debtor subsequently realizes upon the asset, the holder may enforce its judgment, if any, or re-enforce its security to the extent of any deficiency balance owing.

Upon completion of the administration, the receiver pays out the net proceeds of realization to the security holder. Although the practice is not uniform, the security holder may formally notify the receiver in writing of the termination of the receivership which will end the agency relationship. The notice takes effect when it is given to the receiver even though it may be dated and executed earlier.[33]

If the security holder terminates the appointment of the receiver before completion of the administration, the receiver remains liable to the security holder and to the debtor for its conduct and activities to the date of termination. If a successor receiver is appointed in its place, the security holder directs the first receiver to turn over the files to the second receiver.

Unlike court-appointed receiverships, it is not usually clear when the receivership has been fully administered. Although the receiver may have realized upon the assets and disbursed the proceeds, there is no finality. From time to time, unresolved problems may arise for which the receiver may be responsible. In such cases, the receiver may request indemnification from the security holder initially upon appointment or prior to distribution. An indemnity from an insolvent debtor is worthless.

If the receiver has retired the amounts owing under the security, the receiver is not *pro tanto* discharged notwithstanding that the security holder has been paid in full. The receiver stands charged with the duty to account for the surplus to the debtor and, in this respect, the receiver becomes a fiduciary.[34] If the receiver is aware of competing claims or subsequent security holders of the debtor, the receiver may pay such surplus into court by way of interpleading. Alternatively, the receiver may pay a subsequent security holder upon obtaining a proper indemnity.

If the receiver has realized sufficient proceeds to retire the debt to the security holder together with the remuneration, costs, charges, and expenses, the receiver must deliver up the surplus and any unrealizable assets, subject to the rights of subordinate creditors, to the debtor as soon as possible. In some cases, this may occur before the receiver has completed its administration. If the receiver retains such proceeds and assets for an unreasonable period of time irrespective of whether the receiver has been terminated, both the receiver and the security holder may be liable for trespass and conversion.[35] If the receiver has been terminated, then the security holder might escape liability depending upon when the notice of termination had been given.

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32 *Re B. Johnson & Co. (Bldrs.) Ltd.*, [1955] 1 Ch. 634, [1955] 2 All E. R. 775, [1955] 3 W.L.R. 269 (Eng. C.A.), followed in *Smiths Ltd. v. Middleton*, [1979] 3 All E.R. 842 (Ch. Div.).

33 See *Windsor Refrigerator Co. v. Branch Nominees Ltd.* (1960), [1961] Ch. 375, [1961] 1 All E.R. 277 (Eng. C.A.), where by analogy the appointment took effect from the time it was communicated.

34 *Kennedy v. De Trafford*, [1896] 1 Ch. 762 (Eng. Ch. Div.), appeal dismissed [1897] A.C. 180 (U.K. H.L.).

35 See *Re Goldburg (No. 2); Ex parte Page*, [1912] 1 K.B. 606 (K.B.).

(19)

KERR AND HUNTER

on

RECEIVERS AND ADMINISTRATORS

EIGHTEENTH EDITION

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SWEET & MAXWELL
2005

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CHAPTER 12

DISCHARGE OF A RECEIVER

As already stated,[1] the rules regulating the appointment and control of receivers by the court have been substantially amended and codified, by new Rules, CPR 69 and CPR PD 69, revoking and replacing RSC Ord.30, with effect from December 2, 2002, with respect to proceedings commenced on or after that date.[2] The new rules relating to the discharge of receivers are as follows. **12–1**

The court is now empowered to discharge a receiver, or to terminate his appointment, at any time, and to appoint another receiver in his place.[3] In particular, at the commencement of his appointment, the court may terminate it, if he fails, by the date specified, to give the security which the court has required, or to satisfy the court as to the security which he has in force.[4]

His appointment may also be terminated, if he is proved to have failed to comply with any rule, practice direction or direction of the court.[5]

When the court is discharging a receiver, or terminating his appointment, the court may require him to pay into court any money held by him, or to specify the person (*e.g.* his successor), to whom he must pay over any money, or to transfer any assets still in his possession,[6] and to make provision for the discharge or cancellation of any guarantee given by him as security.[7]

The receiver, or any party to the proceeding, may apply to the court for the receiver to be discharged on completion of his duties.[8]

The case law. The case law on these subjects, as analysed by Sir Raymond Walton, as slightly abridged, has been printed below. Despite the updating of the rules, the principles applicable will no doubt remain much the same. **12–2**

On his own application. Unless the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge,[9] an application to the court is necessary, in order to divest his **12–3**

[1] See Ch.5, above.
[2] Civil Procedure (Amendment) Rules, 2002 (SI 2002/2058, rr.2, 26, and Sch.7.
[3] CPR 69.3.
[4] CPR 69.5(2). Under the former rules, if he did not complete the security by the date specified, his appointment terminated.
[5] CPR 69.9(1).
[6] CPR 69.11(1)(a).
[7] CPR 69.11(1)(c).
[8] Insolvency 1986, s.45(1); CPR 69.10.
[9] *Day v Sykes, Walkers & Co.* (1886) 55 L.T. 733; [1886] W.N. 209.

possession.[10] The appointment of a receiver, made previously to the judgment in the action, will not be superseded by the judgment, unless the receiver is appointed only until judgment or further order.[11] But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order.[12]

As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his application, before he has completed his duties, without showing some reasonable cause why he should put the parties to the expenses of a change,[13] otherwise he may have to pay the costs of his removal and of the appointment of his successor. If, however, he can show reasonable cause for his discharge, such as ill-health, he may be discharged and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands.[14] As an alternative, if his indisposition be only temporary, he may obtain the leave of the court to appoint an attorney for a limited period.

A manager may find himself in a situation where, without the whole-hearted co-operation of some party to the action, which is not forthcoming and cannot be privately compelled, he is unable to function effectively as a manager. In these circumstances, it is proper for him to apply in the alternative to be discharged, or to have his functions restricted to those which it is possible for him to carry out.[15]

Similarly, if there proves to be no advantage in continuing to carry on a business, either because it cannot be run at a profit, or because the possible profits do not justify the expenses of managing it, the manager, may, and indeed should, make a similar application.[16]

A receiver ought not to make an application for discharge to come on with the further consideration of the action; for the court can, on the further consideration, discharge him without such an application. Accordingly, the costs of a separate application for discharge have been refused.[17]

12–4 On satisfaction of incumbrance. A receiver is generally continued until judgment in the action in which he has been appointed; but, if the right of the claimant ceases before that time, the receiver will be discharged at once.[18] But where the appointment is made in a foreclosure action at the instance of a claimant who is subsequently paid off, another incumbrancer may, on application, obtain leave to be added as claimant, in which case the

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[10] *Thomas v Brigstocke* (1827) 4 Russ. 64; see now CPR 69.10.
[11] See para.5–40, above.
[12] *Ponsonby v Ponsonby* (1825) 1 Hog. 321; *Anon.* (1839) 2 Ir. Eq. R. 416.
[13] *Smith v Vaughan* (1744) Ridg. temp. Hard. 251; *cf. Cox v M'Namara* (1847) 11 Ir. Eq. R. 356.
[14] *Richardson v Ward* (1822) 6 Madd. 266.
[15] *Parsons v Mather & Platt Ltd*, unreported, December 9, 1974, CA (Appeal Court Judgments (Civil Division) No.392A), where (in effect) the manager was relieved of his management duties and restricted to those of a pure receivership.
[16] See *e.g.* the master's order in *Fillippi v Antoniazzi* (1976) R. 2251 unreported of November 1, 1977, directing that the receiver and manager be at liberty to cease trading forthwith at the premises of the partnership business.
[17] *Stilwell v Mellersh* (1851) 20 L.J. Ch. 356.
[18] *Davis v Duke of Marlborough* (1818) 2 Swan. 108.

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receivership may be continued.[19] Similarly, if a receiver is appointed for the purpose of satisfying a number of claims, he will not be discharged merely on the application of a satisfied claimant, if some of the other claims are still outstanding.[20] Proceedings may always be stayed without prejudice to the receivership.[21]

Continuance becoming unnecessary. If, in the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees.[22] Again, where a receiver, who had been appointed in consequence of the executors of a testator's will having refused to act, moved away from the vicinity of the estates over which he had been appointed receiver, the court, on the consent of the other parties, and the executors expressing their willingness to act, made an order that the receiver should pass his accounts.[23] A receiver will be discharged, when the object of his appointment has been fully effected,[24] as, for instance, when arrears of annuity, to obtain which he was appointed, have been paid.[25] **12–5**

Other causes for discharge. A receiver is liable to be discharged for irregularity in carrying in his accounts, for conduct making it necessary to take proceedings to compel him to do so, and for so submitting his accounts that the amount of the balance in his hands cannot be ascertained.[26] So also, if his conduct has been such as to impede the impartial course of justice,[27] or to amount to a gross dereliction of duty,[28] or if his appointment as a receiver has been improper.[29] **12–6**

It is conceived, however, that a charge of misbehaviour against a receiver, for suffering the owner of an estate, over which the receiver was appointed, to remain in part possession of it to the prejudice of the estate, will not be regarded by the court as a sufficient reason for discharging the receiver, for in such a case the parties themselves have caused the loss, by not compelling the owner, by the authority of the court, to deliver up possession to the receiver.[30]

Where a receiver becomes bankrupt, he will be discharged, and another receiver appointed.[31]

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[19] See *Munster, etc., Bank v Mackey* [1917] 1 Ir.R. 49.
[20] *Largan v Bowen* (1803) 1 Sch. & Lef. 296.
[21] *Damer v Lord Portarlington* (1846) 2 Ph. 34; *Paynter v Carew* (1854) 18 Jur. 417; *Murrough v French* (1827) 2 Moll. 497.
[22] *Bainbrigge v Blair* (1841) 3 Beav. 421, 423. It is otherwise where, on the appointment of new trustees, there are questions still outstanding: See *Reeves v Neville* (1862) 10 W.R. 335.
[23] *Davy v Gronow* (1845) 14 L.J. Ch. 134.
[24] *Tewart v Lawson* (1874) L.R. 18 Eq. 490. See, too, *Hoskins v Campbell* [1869] W.N. 59.
[25] *Braham v Lord Strathmore* (1844) 8 Jur. 567.
[26] *Bertie v Lord Abingdon* (1845) 8 Beav. 53.
[27] *Mitchell v Condy* [1873] W.N. 232.
[28] *Re St. George's Estate* (1887) 19 L.R. Ir. 566.
[29] *Re Lloyd* (1879) 12 Ch. D. 447; *Nieman v Nieman* (1889) 43 Ch. D. 198; *Re Wells* (1890) 45 Ch. D. 569; *Brenan v Morrissey* (1890) 26 L.R. Ir. 618.
[30] *Griffith v Griffith* (1751) 2 Ves.Sen. 400.
[31] *Daniell's Chancery Practice* (8th ed.), p.1479.

If a receiver has been wrongly appointed over property belonging to a person who is not a party to the action, he will be discharged, even though there has been an abatement of the claim by the death of a sole defendant.[32]

The court will discharge a receiver upon the application of a prior mortgagee who demands to go into possession as such by himself or by his receiver.[33]

Where a receiver had been appointed in an administration suit, another person, who was willing to act at a lower salary, was ordered to be substituted for him, as receiver, on the application of a mortgagee of a tenant for life of the property.[34]

12–7 Property to be sold. Where estates, over which a receiver has been appointed, have been ordered to be sold, the receiver will be continued, until completion of the sale, in order that he may collect any arrears of rent.[35]

12–8 Balance due to receiver. The receiver of an estate will not be discharged until he has received from the estate any balance found due to him on passing his accounts.[36] In administration actions, a receiver may be discharged on passing his accounts, and be paid his remuneration and costs, without waiting to see whether the estate is sufficient to pay all costs payable out of it.[37]

12–9 Application of one party only. A receiver, being appointed for the benefit of all the parties interested, will not be discharged on the application of that party only at whose instance he was appointed.[38]

12–10 Mode of application to discharge. The application to discharge a receiver appointed in a claim should be made by application notice[39]; the direction for his discharge may be given in the judgment at the trial, or in the order upon further consideration.[40]

In the Queen's Bench Division, an application to discharge a receiver is made to the master by application notice,[41] which may be issued before or after submission of the receiver's final account. In the former case, the order is made, subject to the receiver complying with the usual Central Office regulations; in the latter, on production of the master's certificate, and proof that the receiver has complied with the directions therein.

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[32] *Lavender v Lavender* (1875) 9 Ir.R.Eq. 593.
[33] *Re Metropolitan Amalgamated Estates* [1912] 2 Ch. 497; above, para.2–27.
[34] *Stanley v Coulhurst* (1868) W.N. 305.
[35] See *Quin v Holland* (1745) Ridg. temp. Hard. 295.
[36] *Bertrand v Davies* (1862) 3 Beav. 436.
[37] *Batten v Wedgwood, etc., Co.* (1885) 28 Ch. D. 317.
[38] *Davis v Duke of Marlborough* (1812) 2 Swans. 108; *Bainbrigge v Blair* (1814) 3 Beav. 421, 423.
[39] *Atkin's Court Forms,* Vol.33 (1981 Issue), p.247; forms of order, *Seton* (7th ed.), p.781; see also Palmer's *Company Precedents* (16th ed.), Vol.III, Chap.69.
[40] *Seton* (7th ed.), pp.781, 782.
[41] See now CPR 69.10.

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Where, under the former procedure, a bond has been given up on application at the General Filing Department, it will be delivered up on production of the master's order: see below.

Service and appearance. An application for the discharge of a receiver should be served on all the parties.[42] The service of it on the receiver should be personal, and such service will not be dispensed with, unless an order for substituted service is obtained.[43] But a receiver, though served, is not entitled to appear at the hearing of the application, unless some personal charge is made against him. If he appears, he will not be allowed the costs of his appearance,[44] except under special circumstances.[45] **12–11**

Form of order on discharge. If the receiver has not submitted his final account, nor paid over any balance shown thereby, or determined after examination to be due from him, the order discharging him will direct him to do so. **12–12**

The order of discharge may be conditional on the performance of some act by the receiver, or be otherwise contingent on some future event. On proper evidence of compliance or of the happening of the event, the master will indorse on the order a direction that any guarantee given by the receiver is to be cancelled. On production of the order in the Filing Department, Central Office, the guarantee is indorsed with the vacating note and delivered to the solicitor against his receipt.[46]

Effect of discharge. The court has power, by making an order for release and discharge, to protect the receiver from all liability for acts done in the court of his duties. This power should not be exercised without the court first investigating, or making provision for the investigation of, claims of which the court has notice. But the court is not obliged to wait until the end of the limitation period, before protecting its officer against such a claim, if the claimant, having had ample opportunity to do so, neglects to prosecute any claim.[47] **12–13**

Notice to surety. Under the usual form of guarantee, the receiver is bound to give to the surety by post notice of his discharge: and within seven days thereafter, send the surety an office copy of the order discharging him. **12–14**

In an Irish case, in which a receiver was discharged owing to gross dereliction of duty, the order discharging him disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of the appointment of his successor.[48]

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[42] *Daniell's Chancery Practice* (8th ed.), p.1499.
[43] *Att.-Gen. v Haberdasher's Company* (1838) 2 Jr. 915.
[44] *Herman v Dunbar* (1857) 23 Beav. 312.
[45] *General Share Co. v Wetley Brick Co.* (1882) 20 Ch. D. 260, 267.
[46] CPR 69.11. This does not arise, where the receiver is a licensed insolvency practitioner and is covered by continuous security.
[47] *IRC v Hoogstraten* [1984] 3 W.L.R. 933, at p.944H.
[48] *Re St. George's Estate* [1887] 19 L.R. Ir. 566.

In Company Cases

12–15 Administrative receivers; vacation of office. There are now special rules dealing with the vacation of office by administrative receivers.[49] Such a receiver must forthwith vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company.[50] Where he vacates office at any time, his remuneration, and any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time, in priority to any security held by the person by or on whose behalf he was appointed.[51]

12–16 Resignation of administrative receiver. When an administrative receiver proposes to resign, he must give *at least seven days' notice,* stating the date when he intends his resignation to take effect, to (i) his appointor, (ii) the company, or, if it be in liquidation, the liquidator, and (iii) to the members of the creditors' committee, if any.[52] No such notice is, however, required if he resigns in consequence of the making of an administration order.[53] If the receiver dies in office, his appointor must, *forthwith on becoming aware of the death,* give notice to the same persons.[54] The making of an order does not itself terminate his appointment; but since an order can only be made, where an administrative receiver is in office, with the consent of his appointor,[55] his resignation will necessarily follow.

Where an administrative receiver vacates office on completion of his receivership, or by resignation, or by virtue of having ceased to be qualified as an insolvency practitioner, he must *within 14 days* give notice to the registrar of companies,[56] and *forthwith give notice* to the company or its liquidator, and to the members of the creditors' committee (if any).[57]

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[49] An administrative receiver may now only be removed by the court: Insolvency Act 1986, s.45(1).

[50] Insolvency Act 1986, ss.45(2), 62(2): for the meaning of "insolvency practitioner qualified to act in relation to the company," para.4–7, above.

[51] Insolvency Act, 45(3).

[52] Insolvency Rules 1986, r.3.34(1), (2).

[53] *ibid.*, r.3.33(3). See Ch.14, below, s.1.

[54] *ibid.*, r.3.34(1).

[55] Insolvency Act 1986, Sch.B1, para.15(1)(b).

[56] Insolvency Rules 1986, r.3.35(1), (2).

[57] Insolvency Act 1986, s.45(4); Insolvency Rules 1986 (SI 1986/1925) r.3.35(2): notice may be given by the individual by indorsement, on the notice given of his cessation, to the register of charges: Insolvency Act 1986, s.48—Companies Act 1985, s.405(2); Insolvency Rules 1986, r.3.35(4).

CHAPTER 26

TERMINATION OF ADMINISTRATIVE RECEIVERSHIP

26–1 Displacement of the receiver: general. A receiver appointed by the debenture-holders may, if the court thinks fit, be displaced by the court (but only by the court), on the application of other debenture-holders, or of the appointor, in favour of its own receiver. A receiver appointed by or on behalf of subsequent debenture-holders will be displaced by the appointment of a receiver by or on behalf of prior debenture-holders.[1–2] On the making of an administration order,[3] or the extra-judicial appointment of an administrator and its taking effect, any administrative receiver[4] of the company must vacate office[5]; and any receiver of part of the company's property must vacate office, on being required to do so by the administrator.[6]

26–2 Removal. Just as his appointment takes effect only when communicated to the receiver, so also (in the absence of any special provision) notice of removal, under a power to remove, is effective only when received by him.[7] To the extent to which it is his duty to have paid preferential debts, a receiver who is removed from office must ensure that these are discharged, or that he retains sufficient assets in his hands to meet them, before he parts with the assets. Alternatively (see below), his removal may be accompanied by another appointment, under such circumstances that the receivership may properly be regarded as continuous, in which case he will be justified in transferring the whole of the assets in his hands, save as mentioned below, to the new receiver. If he does not either ensure payment of the preferential debts, or else that the receivership may properly be regarded as continuous, he will be personally liable to any disappointed preferential creditor whose debt he ought to have discharged.[8]

Having regard to the personal liability imposed upon all receivers by statute in respect of their own contracts (save in so far as such contracts

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[1–2] *Re Maskelyne British Typewriter Co.* [1898] 1 Ch. 133; *Re Slogger Automatic Feeder Co.* [1915] 1 Ch. 478.

[3] See Chap.14 above.

[4] See, as to appointments of administrators, judicial or extra-judicial, Pt III, above.

[5] For the meaning of "administrative receiver", see para.21–1.

[6] Formerly, Insolvency Act 1986 Pt II, s.11(1)(b) (repealed): now, since the Enterprise Act 2002, Pt 10, see Insolvency Act 1986, Sch.B1, para.41(1).

[7] n.6, above para.41(2).

[8] *Windsor Refrigerator Co. Ltd v Branch Nominees Ltd* [1961] Ch. 375, CA; *per* Donovan L.J. at p.398.

may provide, which is unusual, to the contrary), a receiver who has been removed will, like any other agent who has properly made himself liable in respect of his principal's contracts, have a lien on the assets in his hands against all such liabilities personally incurred by him.[9]

Duty to cease to act. If, at any stage of his management of the company, the receiver has in his hands sufficient moneys to discharge all the debts of the company which he is bound to discharge, all possible claims which could be made against him and in respect of which he is entitled to an indemnity, his own remuneration, and all moneys secured by the instrument pursuant to which he was appointed, it will be his duty to cease to act with all due expedition; this should confine his further activities to taking the necessary steps to conclude his administration. If he continues to act, any accounts will be taken against him thereafter with annual rests from the date when he had sufficient moneys in his hands to cover all such amounts.[10] His continuance in possession of the company's assets thereafter might also be regarded by the courts as wrongful, since his appointment is only for the purpose of enabling the encumbrancers, entitled to the benefit of the instrument under which he was appointed, to recover their debt; once this purpose has been achieved, there is no ground for his continuance in office. The effect would be that thereafter he would be in the position of trespasser.[11] **26–3**

For various reasons, the receiver may have sufficient moneys in his hands for the above purpose, but may not be in a position to settle all possible claims which could be made against him and in respect of which he is entitled to an indemnity. He should then request his appointor to apply for his discharge, and should retain sufficient moneys to answer his indemnity, and account at once for any balance to the company. Alternatively, he may (but cannot be forced to) accept an indemnity from the company which may (but cannot be compelled to) offer such indemnity.

Death. If, after the death of a receiver, the company attempted to deal with its assets before the debenture-holders had an opportunity of appointing a new receiver, the company could clearly be restrained by injunction from so acting. In the normal case, an appointment will be promptly made in replacement, and the receivership can then be regarded as continuous,[12] but provision will of course have to be made to ensure the indemnification of the receiver's estate against all liabilities personally incurred by him. **26–4**

Continuity of receivership. Although the only directly relevant decision relates to a special statutory situation,[13] where a new receiver is appointed, **26–5**

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[9] *I.R.C. v Goldblatt* [1972] 498. The debenture holder who procured the removal of the receiver was also held liable. Crown preferences, involved in that case, have been abolished by Enterprise Act 2002, s.251 with effect from September 15, 2003.

[10] *Foxcraft v Wood* (1828) 4 Russ. 487.

[11] *cf. Ashworth v Lord* (1887) 36 Ch. D. 545.

[12] See below.

[13] *Re White's Mortgage* [1943] Ch. 166 (appointment of receiver requiring leave under the Courts (Emergency Powers) Act 1939.

in the place of a receiver who has died or been removed, without undue delay, the receivership may be regarded as continuous.[14] This is particularly important as regards any undischarged statutory duties, such as the duty to discharge preferential debts.[15] If these have not been discharged prior to the death or removal, then his personal representatives or the receiver himself, as the case may be, will, if the receivership can be regarded as being continuous, but not otherwise, be justified in accounting to the new receiver in respect of the entirety of the assets in his hand (save for such portion thereof as is required for his protection against contractual claims), leaving it to the new receiver to complete the statutory obligations in this regard.

If, however, the receivership cannot be regarded as continuous,[16] he cannot safely take this course. Nor, if no further receiver is to be appointed, can he simply take the course of accounting to the company, without first discharging all preferential debts, and distributing, if required, the "prescribed part" to the unsecured creditors.

26–6 Ceasing to act. Upon ceasing to act as such, the receiver or manager is required to render accounts, as set out below, and is also, on so ceasing, is required to give the registrar of companies notice thereof.[17] This notice is entered by the registrar in the register of charges. Default incurs a fine on summary conviction not exceeding one-fifth of the statutory maximum, and on conviction after continued contravention, a default fine not exceeding one-fiftieth of the statutory maximum.[18]

26–7 Vacation of office by administrative receiver. An administrative receiver will automatically vacate office on the making of an administration order[19]; but no such order is made without the consent of his appointor,[20] unless the security whereunder he was appointed is considered by the court to be liable to be set aside as being at an undervalue, or a voidable preference, or an invalid floating charge.[21] The relationship between the appointments of administrators and the appointment and functions of administrative receivers is considered in Chapter 14, above.[22]

Apart therefrom, he may at any time be removed from office by order of the court, but not otherwise.[23] Accordingly, no provision in the debenture

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[14] Insolvency Act 1986, s.46(2): see also s.62(6).
[15] Under Insolvency Act 1986, new s.176A, inserted by Enterprise Act 2002, s.253: see Ch.29, below.
[16] In *Re White's Mortgage*, n.14, above, a delay of 10 months was held to break the continuity of the receivership.
[17] Companies Act 1985 (as amended), s.409(2).
[18] n.17, above s.405(4). All notices under Companies Act 1985, s.405 must be in the prescribed form: see s.405(3). The appropriate form is Form 405(2) in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).
[19] Formerly under Insolvency Act 1986, s.11(1)(b) (repealed): now under Insolvency Act 1986, Sched. B1, paras 39(1)(a), 41(1).
[20] Formerly under n.19, s.9(3)(a) (repealed); now under Insolvency Act 1986, Schedule B1, para.39(1)(b)(c)(d).
[21] n.19, s.9(3)(a)
[22] See Chap.14 above.
[23] Insolvency Act 1986, s.45(1).

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whereunder he was appointed, authorising his removal by the appointor, or by anybody else other than the court, will be effective.

He will similarly vacate office, if he ceases to be qualified to act as an insolvency practitioner in relation to the company[24]; This will be without prejudice to the validity of any acts which he may have carried out, after he ceased to be so qualified.[25] In this event, he must forthwith give notice of his vacation of office to the liquidator of the company, if it is in liquidation, and to the members of the creditors' committee, if there is one.[26] Within 14 days, he must also send a notice to that effect to the registrar of companies.[27]

He may resign, by giving at least seven days' notice of his intention to do so to his appointor and to the company, or, if it is then in liquidation, its liquidator, specifying the date on which he intends his resignation to take effect.[28] Then, within 14 days after his vacation of office, he must send a notice to that effect to the registrar of companies.[29]

If the administrative receiver dies, his appointor must, forthwith upon his becoming aware of the death, give notice of it to the registrar of companies[30] and to the company, or, if it is then in liquidation, to its liquidator.[31]

He will also, of course, vacate office on the completion of his receivership: all the same, in this case notices must be given as if he had vacated office in consequence of ceasing to be qualified as an insolvency practitioner.[32]

When he vacates office, his remuneration, any expenses properly incurred by him, and any indemnity to which he is entitled out of the assets of the company, will be charged on and paid out of any property of the company which is in his custody or under his control at that time in priority to any security held by his appointor.[33]

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[24] n.23, s.45(2).
[25] Insolvency Act 1986, s.232; Schedule B1, para.104.
[26] Insolvency Rules 1986, r.3.35(1).
[27] Insolvency Act 1986, s.45(4). Such notice may be given by means of an indorsement on the notice required by Companies Act 1985, s.405(2) for the purposes of the register of charges: Insolvency Rules 1986, r.35(2). If an administrative receiver, without reasonable excuse, fails to comply with this obligation, he is liable on summary conviction to a fine not exceeding one-fifth of the statutory maximum, and on conviction after continued contravention to a daily default fine not exceeding one-fiftieth of the statutory maximum: Insolvency Act 1986, ss.45(5). 430, Sch.10. He is no longer liable to a daily default fine, for continued default: s.45(5), as amended by Companies Act 1989, ss.107, 212, Sch.16.
[28] Insolvency Rules 1986, r.3.33(1), (2). The appropriate form is Form 3.9 in Sch.4: see r.12.7. No notice is necessary if he resigns in consequence of the making of an administration order: *ibid.* r.3.33(3). As appears from the text to nn.4–7 above, the receiver will automatically vacate office on the making of such an order, and the precise import of this subrule is accordingly unclear.
[29] See n.27, above, above.
[30] Insolvency Rules 1986, r.3.34(a). The appropriate form is Form 3.7 in Sch.4 to the Insolvency Rules 1986, r.12.7.
[31] Insolvency Rules 1986, r.3.34(b).
[32] Insolvency Rules 1986, r.3.35(1).
[33] Insolvency Act 1986, s.45(3).

26–8 Floating charge "re-floating" after receiver ceases to act. Where a receiver has ceased to act, for one reason or another,[34] for a period of one month, and no other receiver has been appointed, the floating charge, by virtue of which he was appointed, ceases to attach to the property the subject of the charge, and again subsists as a floating charge.[35]

For the purposes of calculating that period of one month, no account shall be taken of any period when an administration order was in force. A charge to which these provisions apply is sometimes referred to as having "re-floated".[36]

26–9 Accounts to be rendered upon ordinary receiver ceasing to act. On ceasing to act, the receiver must deliver the usual abstract within one month, and must include the figures from the last abstract,[37] up to the date of so ceasing.[38] It will, as in the case of all other abstracts, show the aggregate amount of his receipts and of his payments during all preceding periods since his appointment.[39]

Where a receiver is appointed out of court, and subsequently the same person is appointed administrative receiver in a debenture-holders' action, his accounts are taken in the action: if a different person is appointed, the first receiver may apply by summons to have his accounts taken in the action.[40]

26–10 Accounts upon administrative receiver ceasing to act. Within two months (or such extended period as the court may allow) after ceasing to act as administrative receiver, he must send to the registrar of companies, to the company and to his appointor, and to each member of the creditors' committee (if there is one), the requisite account of his receipts and payments as receiver.

26–11 Balance in accounts due to company. The duty of the receiver to keep accounts and make them available for inspection by the company, as and when required, has already been noted. But whereas the receiver is not a debtor to the company in respect of any intermediate balance which might appear from his accounts to be due to the company, he will be a debtor to the company in respect of the final balance, after discharging all preferential debts and so forth, shown by his accounts to be due to the company. It follows that this balance can be the proper subject of a third party debt order.[41]

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[34] By dying, or losing his qualification, or resigning, or being removed by order of the court.
[35] Insolvency Act 1986, s.62(6).
[36] See n.35, above.
[37] The prescribed form is Form 497 in Sch.3 to the Companies (Forms) Regulations 1985 (SI 1985/854).
[38] Insolvency Act 1986, s.38.
[39] For penalty for default, see Insolvency Act 1986, s.38.
[40] *Practice Note* [1932] W.N. 79.
[41] As envisaged by the judgment in *Seabrook Estate Co. Ltd v Ford* [1949] 2 All E.R. 94, 97.

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Co. Ltd v Ford [1949] 2 All E.R. 94, 97.

Remuneration, expenses and indemnity on vacation of office. Where a receiver or manager appointed under powers contained in an instrument, whether or not an administrative receiver, vacates office, his remuneration,[42] expenses properly incurred by him, and any indemnity[43] to which he is entitled out of the assets of the company, are charged on, and are to be paid out of any property of the company which is in his custody or under his control at that time, in priority to any charge or other security held by the person by or on whose behalf he was appointed.[44] **26–12**

Withdrawal of receiver before payment off of debenture holders in full. If a receiver is withdrawn by consent, before the debenture-holders have been paid off in full, any floating charge comprised in their security, having once crystallised, will not refloat automatically, and can only be made so to do by express agreement. A more difficult question is whether, after the withdrawal of a receiver, the debenture-holders are still entitled to a fixed equitable charge on the assets so released to the company; in principle, there appears to be no reason why this charge should not continue to attach to any assets which belonged to the company at the date of crystallisation, and which have not been disposed of during the receivership. The charge would not attach to assets of the company acquired subsequently to the date of crystallisation.[45] The practical results of this position are so inconvenient that it is thought that an intention to waive the fixed charge will readily be implied. **26–13**

Destination of books and papers. The ownership of documents in the possession of a receiver at the end of the receivership may vest in the company, or in the debenture-holders, or may remain with the receiver, depending on their nature. All documents generated by or received by the receiver pursuant to his duty to manage the business of the company, or to dispose of its assets, vest in the company. Documents containing advice and information about the receivership, or about the companies brought into existence by the receiver for the purpose of enabling him to advise the debenture-holders, belong to them. Notes, calculations, working papers and memoranda prepared by the receiver, not pursuant to any duty to prepare them, but better to enable him throughout to discharge his professional duties, belong to the receiver. **26–14**

[42] As to the court's power to fix his remuneration, see n.33, above.

[43] As to his indemnity, see para.9–17 above. For the indemnity enjoyed by a receiver appointed by the court, see para.8–11 above.

[44] Insolvency Act 1986, s.37(1), (4) (ordinary receivers); s.45(3) (administrative receivers).

[45] *Re Yagerphone* [1935] Ch. 392. The passage in the test was criticised by Russell L.J. in *N.W. Robbie & Co. Ltd v Witney Warehouse Co. Ltd* [1963] 1 W.L.R. 1324 at 1338; but he omitted to observe that it is dealing with the position of future assets, acquired after (i) a crystallisation of the charge and (ii) a subsequent withdrawal of the receiver. It is still submitted that future assets fall within the scope of the floating charge only.

26–15 Transitional provisions of the Insolvency Act 1986. The 17th edition of this work contained, at pp.441 *et seq.* a detailed analysis of the law in force before Insolvency Act 1985 and Insolvency Act 1986 came into force, and of the changes effected by the new legislation, and of the transitional provisions relating to preferential debts.

(20)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re)*,
2017 BCCA 303

Date: 20170817
Dockets: CA44619; CA44620

Docket: CA44619

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centers Inc.

Respondents
(Petitioners)

And

TNW Networks Corp.

Appellant
(Respondent)

And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Docket: CA44620

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centers Inc.

Respondents
(Petitioners)

And

Teliphone Corp.

Appellant
(Respondent)

And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated July 18, 2017 (*8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)*, 2017 BCSC 1291, Vancouver Docket No. S1610905).

Oral Reasons for Judgment

Counsel for the Appellant (CA44619), TNW Networks Corp.:	G.F. Gregory
Counsel for the Appellant (CA44620), Teliphone Corp.:	C.R. Clarke, Q.C.
Appearing for 8640025 Canada Inc. and Teliphone Navigata-Western Inc.:	Sandeep Panesar
Counsel for the Respondent, Ernst & Young Inc.:	S.F. Collins
Counsel for the Bank of Nova Scotia:	H.L. Williams
Counsel for TELUS Communications:	J.R. Sandrelli
Counsel for Cascade Divide Enterprises:	D.F. Hepburn

Place and Date of Hearing:	Vancouver, British Columbia August 14, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 17, 2017

Summary:

An order for sale of assets of a business made pursuant to s. 36 of the Companies' Creditors Arrangement Act ("CCAA") is challenged on the basis that some of the assets authorized to be sold were assets of entities not before the Court in the CCAA proceeding. Held: appeal allowed. The Court did not have the jurisdiction under the CCAA to authorize the sale of assets of entities that had not brought themselves within the CCAA proceeding.

[1] **HUNTER J.A.**: These appeals from an order made under the *Companies' Creditors Arrangement Act* ("*CCAA*") come to the Court with leave.

[2] The order under appeal authorizes a sale of certain assets pursuant to s. 36 of the *CCAA*. The appellants argue that some of the assets to be sold under this authorization are owned by parties other than the companies that are subject to the *CCAA* proceeding. This, they say, goes beyond the jurisdiction of the *CCAA* court. If that is a correct characterization of the effect of the order under appeal, the issue is one of law and the standard of review is one of correctness.

[3] The respondents' position is that the intent of the asset purchase agreement is to restrict the sale to the Petitioners' assets, but if some of the assets do in fact belong to other entities, the Monitor is nonetheless entitled to sell them with the Court's approval. The Monitor relies on orders of the *CCAA* court leading up to the sale approval and the broad discretion of a *CCAA* court under s. 11 of the *CCAA*.

[4] Given the need for a decision on this appeal in a compressed timeline, I will not review all of the background to the order under appeal, but a brief review of the proceedings is necessary to provide context both for the order for sale and some of the arguments raised by the parties in this appeal.

[5] These proceedings commenced on November 25, 2016, when 8640025 Canada Inc., which I will refer to as 864, and Teliphone Data Centres Inc. filed a petition pursuant to the *CCAA* seeking the protection of that legislative regime in order to file a plan of compromise or arrangement. A third company, Teliphone

Canada Corp., was subsequently added as a Petitioner. I will refer to these three companies as the Petitioners.

[6] The Petitioners are members of a group of telecommunication companies, referred to as the TNW Group of Companies. The appellants are also part of the TNW Group of Companies, although neither of the appellants is a petitioner in these proceedings.

[7] The TNW Group sells telephone and long distance services to business and residential customers. They currently utilize the facilities of Telus Communications Company and Bell Canada, although Telus has served notice of its intention to disconnect the TNW Group for failure to meet their financial obligations to Telus.

[8] On November 30, 2016, an amended and restated initial order was made by the Supreme Court of British Columbia pursuant to the *CCAA*. The order stated that the petitioners were companies to which the *CCAA* applies, thereby founding jurisdiction. The order went on to extend the stay of proceedings which had been issued a few days earlier and appointed a monitor to monitor the business and financial affairs of the Petitioners.

[9] On December 21, 2016, a further order was made replacing the initial monitor with Ernst & Young, further extending the stay, and containing the following direction:

> 5. The Monitor is authorised and directed as part of the Petitioners restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise... In determining the Solicitation Process and Solicitation Plan, the Monitor will review and evaluate the assets of the Petitioners, and the costs and values associated with the Business.

[10] The distinction between the assets of the Petitioners and those associated with the Business has emerged as the most difficult challenge for the Monitor in this proceeding. The evidence was that all of the companies in the group operated seamlessly together as one business. The companies in the TNW Group use the same facilities and the degree of integration is so great that financial statements of

most of the companies in the Group are prepared on a consolidated basis. It quickly became apparent that the integrated nature of the business of the TNW Group would create difficulties in separating out what assets belonged to the Petitioners and what assets used in the Petitioners' Business were owned by other parties not within the *CCAA* process.

[11] To address this problem, in January of 2017, six of the secured creditors of the Petitioners applied to the *CCAA* judge for an order adding three parties, TNW Networks Corp. and Teliphone Corp., (who are appellants in this appeal) and a subsidiary of Teliphone Corp. called Teliphone Canada Corp., as petitioners to the *CCAA* proceedings. TNW Networks Corp. was identified as a critical part of the operations of the TNW Group. Teliphone Corp. and Teliphone Canada Corp. were characterized as being involved in the Petitioners' business.

[12] This application was dismissed by Mr. Justice Affleck with reasons indexed as 2017 BCSC 303. The reasons for judgment of Affleck J. are significant in light of the issue before this Court.

[13] Mr. Justice Affleck began his analysis by reference to s. 3(1) of the *CCAA* in these terms:

> [24] Subsection 3(1) on its face makes the *Act* applicable to a company which is a debtor or affiliated debtor company. A debtor company is defined in s. 2 of the *Act* as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or has made an assignment in bankruptcy or is in the course of being wound up because of insolvency.
>
> [25] The record before me does not demonstrate that the proposed petitioners are insolvent. ...

[14] He described s. 3 as a gateway to applying the *Act* to an eligible company, and held that since the proposed petitioners were neither insolvent debtors nor affiliated insolvent debtors, the *Act* was not applicable to them.

[15] He also observed that:

> [52] ... If the prospective petitioners could be added, despite their opposition, the court would then become engaged in reorganizing their businesses, perhaps even selling them, and probably imposing the stay

> contemplated by s. 11.02(2) of the *Act*. I do not accept that *Act* is intended to be applied to a company that objects to coming under its constraints.
>
> [Emphasis added.]

[16] No further attempt was made to bring Teliphone Corp. into the *CCAA* proceedings. The appellant Teliphone Corp. relies in part on this judgment, which was not appealed, for the proposition that the *CCAA* court does not have jurisdiction over it or its assets in the *CCAA* proceeding.

[17] Further efforts were made, however, to bring TNW Networks Corp. into the proceeding, primarily because it emerged that the customer contracts, which were a significant asset of the Petitioners' business, had been assigned to TNW Networks Corp. prior to the initial *CCAA* order.

[18] Following further applications and cross-applications, on March 21, 2017, the appellant TNW Networks Corp. provided the Monitor with an Undertaking and Acknowledgement that assigned to the Monitor "all of the assets of TNW Networks Corp. that are used in or necessary for the business of the petitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by TNWN."

[19] On April 6, 2017, Mr. Justice Bowden made a further order providing a detailed process by which the Monitor was authorized to determine which assets of TNW Networks Corp. were derived from the property of the Petitioners and which were not. The Monitor was also given powers to market the property of the Petitioners, including any property of TNW Networks Corp. derived from the property of the Petitioners.

[20] The text of this order is of some consequence to the issues in this appeal. Paragraph 6 is relied on by the Monitor as providing authority for the asset purchase agreement that was ultimately negotiated, and was also referenced by the chambers judge who approved the agreement. Paragraph 6 reads as follows:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entitles subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.

[21] Networks is defined in the order as TNW Networks Corp.

[22] The other part of the April 6 order of relevance to this appeal is para. 7(l) which reads in relevant part as follows:

> The Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of all of the assets and undertakings of the Companies (the "Property") and, without in any way limiting the generality of the foregoing, the Monitor is hereby empowered and authorized ... to sell, convey, transfer, lease or assign the Property (other than the Networks property) or any part or parts thereof ... with the approval of this Court ...

[23] Companies is defined collectively in the order as TNW Networks Corp. and the Petitioners.

[24] The effect of these provisions is to provide the Monitor with the authority to sell, subject to the approval of the court, all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded by the process established in para. 6. Nothing in the April 6 order authorizes the Monitor to sell any other assets.

[25] In the end, no plan of arrangement was presented to the creditors for approval. Having resolved the problem of the integration of operations between the Petitioners and TNW Networks Corp. through the Undertaking and the April 6 order, the Monitor focussed his efforts on a sale of the Petitioners' assets as a going concern.

[26] The problem of separating out the assets of the Petitioners from other assets of the other companies in the TNW Group remained. On June 7, 2017, if not before, the Monitor became aware that several of these companies were asserting ownership in some of the assets used in the Business of the Petitioners.

[27] In his 7th Report to the Court, issued June 27, 2017, the Monitor outlined the steps he had taken to determine the scope of the Petitioner's assets:

> 111. As indicated in the response of the Monitor's legal counsel to the May 27 Letter, the Monitor, on numerous occasions and over several months, requested of Mr. Laliberte a list of property, including assets, customer agreements, property, plant and equipment or otherwise which were being used in the Business; but were not property of the Petitioners or TWN Networks.
>
> 112. On June 7, 2017, Mr. Laliberte presented the Monitor with a report (the "**Asset Report**") which purported to outline Teliphone Corp. and subsidiaries' interest in various property in the possession of the Petitioners and TNW Networks. ...
>
> 113. The Asset Report provided by Mr. Laliberte provides an overview of a series of acquisitions made by Teliphone Corp., the Petitioners and other related parties that sought to segregate the ownership of assets and customer relationships between the various legal entities that were party to those transactions.
>
> ...
>
> 115. Notably, the Asset Report asserts that various property in the possession of the Petitioners and TNW Networks are owned by legal entities other than the Petitioners (the "**Outside Property**"), including:
>
> a) 101234472 Saskatchewan Ltd.;
>
> b) Investel Capital Corporation (the parent company of the Petitioners);
>
> c) Teliphone Corp. (a related company); and
>
> d) 8583498 Canada Ltd. (a related company);

[28] The Monitor expressed some skepticism as to the accuracy of this report, but pointed out the difficulty in determining ownership of the assets used in the Petitioners' Business:

> 119. The Monitor is of the view that the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly and would likely

> conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors. ...
>
> 120. The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets. ...

[29] The Monitor went on to note that the secured creditors had advised that they held security over the entities identified as the owners of the Outside Property.

[30] The Monitor reported on the progress of the Solicitation Plan as follows:

> 129. The Monitor received seven (7) LOIs [Letters of Intent] from Prospective Offerors (collectively, the "**Offerors**") seeking to purchase the assets of the Business. No LOIs were received from parties interested in making an investment in the Business or in the Petitioners.
>
> [Emphasis added.]

[31] On June 28, 2017, an affidavit was filed by Lawry Trevor-Deutsch, the former President of Teliphone Corp. providing details of the assets used in the Petitioners' Business that he asserted belonged to Teliphone Corp. and its subsidiaries, and also details of additional assets that were said to belong to other companies, primarily affiliates of the Petitioners. Copies of source documents substantiating the ownership of these assets were provided as exhibits to this affidavit.

[32] At this point, time was becoming very tight. The stay of proceedings that was protecting the Petitioners was set to expire July 14, 2017. The question of what assets were available for a going concern sale was unresolved.

[33] On July 7, 2017, the Monitor issued his 8th Report to the Court in which he advised the Court of an Asset Purchase Agreement or APA that had been negotiated, subject to the Court's approval, with an affiliate of the Distributel Group of Companies. Once again the subject matter of the sale was referred to as the assets of the Business. The Monitor specifically referred to the ownership dispute in these terms:

> 29. The purchase price (the "Distributel Purchase Price") payable by Distributel for all of the assets of the Business, wherever located, including accounts receivable and other current assets, property plant and equipment, other network assets and all customer agreements and relationships (the

> "Purchased Assets") include assets that the Shareholder Representatives assert are assets of other entities, ...

[34] He also commented briefly on the assertion of ownership of assets by Teliphone Corp. in the Trevor-Deutsch affidavit in these terms:

> 39. ... (f) ... The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as **Appendix "H"** to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

[35] The Monitor maintained this position before the chambers judge and in his submissions before us. The effect of this position is to assert that even if the assets that are part of the Purchased Assets were not assets of the Petitioners, they may be transferred if they were assets of one of the petitioners' subsidiaries or if the assets are subject to the Secured Creditors security, Secured Creditors being the secured creditors of the Petitioners.

[36] An application was then made to approve the Distributel APA, returnable July 13, 2017. The appellants opposed approval of the sale on the ground that the assets that were subject to the sale included assets belonging to Teliphone Corp. or other companies not part of the *CCAA* process, and accordingly the *CCAA* court did not have jurisdiction to approve the terms of the sale in the Distributel APA. A second ground was advanced relating to the process followed by the Monitor.

[37] The status of the proceedings at the time of the July 13 application was described by the chambers judge in these terms:

> [7] ... At this stage, the decision reduces itself to the approval of this one sale, or an alternative outcome, which is difficult to know or define. There is no evidentiary base from which to conclude that the Respondents are in a position to carry on. They are about to run out of money and have no credit. Their business relationships with those they must deal with to carry on business, Telus being a prime example, are damaged beyond repair. The Distributel deal, on the other hand, can likely save the employment of dozens of employees, and allow a business to carry on. I do not see a viable alternative to the requested orders.

[38] I agree with the practical wisdom of these comments, and if what was being sold was the assets of the Petitioners I would agree with the disposition approved by the chambers judge. The impediment to this disposition, however, is the dispute over the ownership of the assets that the Monitor had been unable to resolve.

[39] The chambers judge addressed this jurisdictional question in these terms:

> [19] The Respondents also argue that the Monitor lacked the authority to sell the assets which are the subject of the Distributel agreement. However, para. 6, in one of this Court's orders made on April 26, 2017, contains a presumption against the assets being the property of an entity whose assets the Monitor could not sell. Moreover, the Monitor further addressed the asset question in its seventh report, dated June 27, 2017, at paragraphs 110–123. I quote here paragraphs 122 and 123:
>
> > Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any, was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the security interests of the Secured Creditors.
> >
> > If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking.
>
> [20] In my view, the further work offered by the Monitor in paragraph 123, quoted above, would be wasteful of time and money, and the Court does not require it. The ownership and transfer of assets among the group of companies owned and controlled by the Respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's eighth report, dated July 7, 2017, which contains an acknowledgment and undertaking on behalf of the Respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor.

[40] After commenting on the second ground advanced by the appellants, the chambers judge approved the sale in the terms sought.

[41] In considering the issues before this Court, I note that the chambers judge who heard the application for approval of the APA was the third judge to hear and determine applications in this *CCAA* proceeding. It is unclear how much of the voluminous material presented to us was presented and explained to the chambers judge hearing the application for approval of the sale. I recognize that trial scheduling for an ongoing matter such as this can be very complicated, but if possible, given the complexity of proceedings such as this it would be desirable to have a single judge supervise the proceedings throughout.

[42] On this appeal, the appellants renew their jurisdictional argument that the *CCAA* court did not have the authority to approve this APA because some of the assets included in the sale belonged to parties not within the *CCAA* proceedings. The threshold question on this appeal is whether the APA does in fact purport to sell assets belonging to Teliphone Corp. or the other parties not before the Court. In these reasons I will refer to these assets as third party assets.

[43] The July 18 order on its face does not purport to sell third party assets, but the APA approved by the order does contain asset schedules including both physical assets and intellectual property which the appellants say demonstrably include third party assets. The order approving the sale also includes a provision whereby the "ownership and other adverse claims" of Teliphone Corp. in addition to seven other entities not before the Court are "expunged and discharged".

[44] Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA, we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

[45] In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

[46] The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

[47] The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets of the Business lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

[48] I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

[49] The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

[50] The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

[51] In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category. Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.

[52] These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.

[53] The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:

> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as **Appendix "H"** to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

[54] With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.

[55] The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process.

[56] The final argument raised by the Monitor before the chambers judge and briefly addressed before us is that the while the ownership claims of Teliphone Corp. and the other entities were being "expunged and discharged" by the order under appeal, the expungement related to claims to the assets themselves, whereas the order deferred the question of distribution of the proceeds to another day. The suggestion was that Teliphone Corp. and the other entities in question could still advance a claim against the purchase funds. The July 18 order is based on the B.C. Model Approval and Vesting Order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-83, and the Monitor pointed out that Explanatory Note 6 from the B.C. Model Insolvency Order Committee states that claims being vested out may in some cases include ownership claims.

[57] This submission was not fully argued before us and it would not be appropriate for this Court to embark upon a detailed assessment of whether this Model Order has the meaning suggested in relation to ownership claims or whether such a process is appropriate for a sale under s. 36 of the *CCAA*. I note that even if there was authority to convert third party assets into cash, the claims preserved for further assessment appear to be limited to security interests or other financial or monetary claims, not claims of outright ownership. In any event, it is sufficient for purposes of this appeal to observe that to give effect to this argument would not only be inconsistent with the previous order of Affleck J. refusing to include Teliphone Corp. in these proceedings, but would also require a source of jurisdiction under the *CCAA* that has not been established in this appeal.

[58] In my opinion, the documented evidence of Teliphone Corp. that some of the assets scheduled to the APA belonged to it or other entities not before the Court, in combination with the inability of the Monitor to confirm that the assets were all the property of the Petitioners, precluded the ability of the Court to approve the asset purchase agreement presented for approval. The *CCAA* Court had no jurisdiction to authorize the sale of assets other than the assets of the Petitioners and TNW Networks Corp.

[59] In light of my conclusions concerning the assets that are included in the APA, it is not necessary to consider the appellants' further argument concerning the process of this *CCAA* proceeding.

[60] For these reasons, I would allow the appeals and set aside the order approving the Distributel APA. I would extend the stay of proceedings to August 28, 2017 in order to give interested parties an opportunity to consider the implications of this judgment. Further proceedings in this matter are remitted back to the Supreme Court of British Columbia.

[61] **GOEPEL J.A.**: I agree.

[62] **FITCH J.A.**: I agree.

[submissions by counsel re. costs]

[63] **GOEPEL J.A.**: If the appellants wish to pursue the question of costs, they are at liberty to file written submissions concerning that because, it seems to me, that it raises a somewhat potentially important practice point which we are not going to attempt to deal with summarily. If, as I say, the appellants wish to seek costs, they have liberty to file written submissions. Those submissions should be filed within the next 15 days. The Monitor will have a week to respond to those submissions. If the appellants, upon reflection, decide not to pursue the issue of costs, then there will be no costs of the appeal.

"The Honourable Mr. Justice Hunter"

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CASE VIEWS:

Source

All-Canada Weekly Summaries

Plaza Mining Corp., Re
1983 CarswellBC 556 British Columbia Court of Appeal British Columbia August 26, 1983 *(Approx. 8 pages)*

1983 CarswellBC 556, [1983] B.C.J. No. 1179, [1984] B.C.W.L.D. 94, 22 A.C.W.S. (2d) 22, 48 C.B.R. (N.S.) 225, 49 B.C.L.R. 199

Re PLAZA MINING CORPORATION; BANK OF MONTREAL v. PLAZA MINING CORPORATION and VANTREIGHT

Original Go to

Judgment: August 26, 1983
Docket: Vancouver Nos. CA001112, CA815321, 97812, 228/82

Counsel: *J.G. Fitzpatrick*, for appellants John and Jones.
R.P. Sloman, for Troutline Creek Golds Limited.
D.J. Mullan, and *D.K. Fitzpatrick*, for Ernst & Whinney Inc., trustee in bankruptcy.
R. McRae, for Erickson Gold Mining Corporation.
N. Kornfeld, and *G. Cutler*, for receiver-manager Thorne Riddell Inc.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.e Power of inspectors to approve
XIV.6.e.ii Miscellaneous

Bankruptcy and insolvency

XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous

Headnote

Bankruptcy --- Administration of estate — Sale of assets — Power of inspectors to approve — General

Bankruptcy --- Administration of estate — Sale of assets

Administration of estate — Sale of assets — Power to sell — Application to stay sale pending appeal of order approving sale — Order being supported by evidence and law — Chances of appeal succeeding not high — Stay prejudicing sale and thus creditors — Stay refused.

Inspectors — Power and duties — Application to stay sale of assets approved by inspectors pending appeal of order approving sale — Inspectors being governing authority unless exceeding power, or acting fraudulent or not in good faith — Stay refused.

The shareholders and directors of a bankrupt mining company brought an application for an order staying the sale of substantially all the assets of the company pursuant to an order obtained by the trustee in bankruptcy which was under appeal. A financing proposal from the applicants had been considered by the inspectors of the bankrupt estate along with three offers for the assets, but they approved acceptance by the trustee of the sale later approved by the court.

Held:

Application dismissed.

The order approving the sale had much support from the evidence and the law, including the resolution of the inspectors which should be given great weight. In the practical administration of an estate, the governing authority is the inspectors and not the court, unless they have exceeded their power, or have acted fraudulently, or not in good faith. The sale could be lost if the stay were

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BKY.XIV.6.e.ii Bankruptcy and insolvency — Administration of estate — Sale of assets — Power of inspectors to approve — Miscellaneous

BKY.XIV.6.h Bankruptcy and insolvency — Administration of estate — Sale of assets — Miscellaneous

granted, thus prejudicing the creditors. Although the applicants were acting bona fide, and refusing the application would frustrate their appeal, the court was entitled to consider the chances of the appeal succeeding, which were not high.

Table of Authorities

Cases considered:

Indust. Dev. Bank v. Douglas Plywood Log Sales Ltd.; Indust. Dev. Bank v. Can. Plywood Corp., [1972] 4 W.W.R. 114, leave to appeal to S.C.C. refused [1972] 4 W.W.R. 115n (B.C.C.A.) — *applied*

Montreal Trust Co. v. McDonell Metal Mfg. Co. Ltd., B.C.C.A., 20th December 1967 (unreported) — *applied*

Niagara Crushed Stone Ltd., Re (1961), 2 C.B.R. (N.S.) 271 (Ont. S.C.) — *followed*

Pachal's Beverages Ltd., Re (1969), 13 C.B.R. (N.S.) 160, 70 W.W.R. 70, 7 D.L.R. (3d) 113 (Sask. C.A.) — *followed*

Petersen (Eric) Const. Ltd., Re (1966), 9 C.B.R. (N.S.) 158 (B.C.S.C.) — *applied*

Application for stay of proceedings pending hearing of appeal from order approving sale of assets of bankrupt company.

***Macdonald J.A.* (orally):**

1 This is an application for an order granting a stay of proceedings and in particular an order that the assets of Plaza Mining Corporation not be sold pending the outcome of the appeal. The appeal is from an order of Lander J. made 17th August 1983 approving a sale of assets of Plaza; it was approval of a sale to Erickson Gold Mining Corporation.

2 Plaza owned a gold mining operation in northern British Columbia. It consisted of mineral claims which were being mined, an ore pile of broken ore piled up and ready for smelting, and a mill on the site. The main asset was certain mineral claims known as the Wildcat claims held under option from Troutline Creek Golds Limited. Troutline's consent is required to any assignment or disposition of those claims.

3 On 29th December 1981 Thorne Riddell Inc. was appointed receiver-manager of Plaza, firstly pursuant to a debenture given to the Bank of Montreal and then, on this date, by order of the court. Plaza made a proposal under the Bankruptcy Act, R.S.C. 1970, c. B-3, on 11th March 1982 with the aim of repaying all creditors in full. The claims of the unsecured creditors total in excess of $5,000,000. On 2nd May 1983 Troutline commenced action against Plaza, alleging default under the option agreement. On 20th May the court annulled the proposal of Plaza by reason of its default under the proposal and Plaza is now bankrupt. Thorne Riddell as receiver-manager has since January 1983 been attempting to sell the assets of Plaza by way of tender. That firm received an offer from Sable Resources Ltd.; however, Troutline refused to consent to Sable acquiring the claims. A sale to Sable was approved by a judge in the Supreme Court 25th March 1983 on condition that Troutline's consent be obtained, and the right of any party to discharge the Bank of Montreal debenture and thereby terminate the Sable offer. Troutline refused consent. Proceedings were taken before another judge in the Supreme Court to obtain an order dispensing with Troutline's consent on the ground that it was being unreasonably withheld. There was a three-day hearing and that application was dismissed.

4 On 10th August at a hearing before van der Hoop L.J.S.C., sitting as a local judge, offers were submitted by the receiver-manager but the judge was told that other parties had shown an interest in purchasing Plaza's assets. In the upshot the judge ordered that all interested parties submit offers, not to the receiver-manager, but to the trustee in bankruptcy on or before 12:00 noon 15th August for the consideration of the inspectors. The trustee received three offers. One was from Sable for all assets of Plaza which were offered in a tender package by the receiver-manager for the price of $3,056,000. It was conditional upon the trustee obtaining the consent of Troutline to transfer of the claims. Then, there was an offer from June Resources Inc. for substantially all of the assets of Plaza offered in the tender package by the receiver-manager. The price was $3,050,000, again conditional upon the trustee obtaining the consent of Troutline. Then there was an offer from Erickson Gold Mining Corporation for substantially all of the assets of Plaza including the shares of Plaza Resources Corporation, a wholly owned subsidiary, but excluding certain mineral claims and equipment. The offer was for $4,055,000, but did not require the consent of Troutline because that had already been obtained.

5 The offers were taken before Lander J. at a hearing on 17th August. At that hearing Sable raised its offer to $4,056,000. June raised its offer to approximately $4,200,000. The trustee had also received a refinancing proposal from the shareholder-directors, Mr. John and Mr. Jones, who are the appellants in this court. The day before the hearing before Lander J. the inspectors met to consider the offers and the refinancing proposal and resolved to accept the Erickson offer. The Erickson offer was as I have already indicated approved by Lander J. The judge had before him a document entitled "Refinancing Proposal",

executed 15th August 1983 by Mr. John for and on behalf of the former directors of Plaza, and counsel for the directors told the judge that a trust account had been set up with First Guaranty Limited of Newport Beach, California to which a total of $3,500,000 had been committed which would be available to the creditors of Plaza within 60 days. The proposal also provided for the eventual repayment of all Plaza creditors.

6 One of the assets of Plaza, as I have already indicated, is a stockpile of broken ore requiring processing. The material shows that if the stockpile should freeze, it will have to remain in place over the winter months. Lander J. on 17th August, had material indicating the detail of efforts of the shareholders and directors since the beginning of 1982 to refinance the company.

7 The notice of appeal puts forward two grounds: the first, that the learned chamber judge erred in refusing adjournment applications for the purpose of allowing the parties to prepare appropriate officers; the second, alternatively, that he erred in accepting the Erickson offer as the best offer available under the circumstances. In argument, counsel for the appellants focused it this way: that the judge erred in refusing adjournment applications for the purposes of allowing the parties to prepare appropriate offers and for the purpose of giving directions so that the best possible price could be obtained for the assets.

8 The affidavit of Mr. John describes what happened with respect to the application for adjournment. In paras. 12 and 13 of one of his affidavits he says this:

> Mr. Hardy, counsel for June, requested an adjournment to make a better offer. He provided to the Court the Affidavit of Mr. Bruce H. Campbell, filed the date of the hearing August 17, 1983. A copy of the Affidavit is attached hereto and marked Exhibit 'A' to this my Affidavit.

That affidavit states that more time is needed to gather information and allow June to put forward its best offer to the trustee. Then, in para. 13, Mr. John continues:

> Mr. Jones and myself, through counsel, supported an adjournment on two bases: (a) the bids were virtually increasing in the Courtroom and it was in the best interests of the creditors to get the best possible value. In line with this, we, through counsel, represented that there were various items in the offer which indicated that the values of the items to be sold may be substantially different than the evidence before the Court and we further offered to pay half the cost of a proper valuation which we estimate could be $5,000 to $10,000 in total; (b) our offer was not given fair consideration because of aspersions cast on our past financing efforts and we wished to confirm to the Court the availability of financing under our proposal.

It is to be noted that the appellants in this court are Mr. John and Mr. Jones. June is not appealing.

9 The application for a stay which is made to me is opposed by the receiver-manager, the trustee in bankruptcy, Erickson, and Troutline. Lander J.'s reasons were oral and there has not been time to transcribe them. What he had to say appears from the affidavit of Paul Cameron Wilson, barrister, who was present at the hearing, and I will paraphrase the account he gives in a number of paragraphs of his affidavit. After describing the nature of the application and what had happened before van der Hoop L.J.S.C., Lander J. said that he had reviewed two things in his decision, the affidavits of Mr. McMullen, the trustee — two affidavits — and all of the steps taken by the directors as early as March 1983, and other actions before that. The judge noted that counsel for the directors told him there were sufficient funds in a trust account in Newport Beach, California to refinance Plaza, but he said there was no affidavit material to support the contention, and Mr. McMullen's affidavits (Mr. McMullen is a member of the trustee's firm responsible for the matter) said that his affidavits said that similar assurances had been given by the directors at other times; further, that he noted that the escrow agreement with respect to the funds provided for a lot of conditions and collateral before any funds would be released from the account. He therefore said that he would give no weight to Mr. McMullen's affidavits, and he was of the opinion that the refinancing by the directors was not even possible at that time. The judge rejected counsel for the directors' adjournment application on the basis that they had attempted in the past to raise moneys and were unsuccessful and there was no indication in the materials that they were going to have any more success now. He dealt with the other offers and said that the two best were from Erickson and Sable. He said that he had looked at the steps taken by the trustee in approving the Erickson offer, including a resolution of the inspectors, and he was of the opinion that he had to give great weight to that resolution for the considerations stated by Smily J. in the Ontario case *Re Niagara Crushed Stone Ltd.* (1961), 2 C.B.R. (N.S.) 271 (S.C.). He also considered the position taken by Troutline, the position that they would consent to a transfer of the claims to Erickson, but not to other bidders. The judge noted that Troutline's reason was that they had considered Erickson's track record in the mining industry; and the judge said he had also considered Erickson's track record and that, definitely, royalties would flow to Troutline if the Erickson offer were approved. He went on to say that if he were to accept an offer other than Erickson's, and Troutline continued to take its present position, refusing consent, it would be necessary to have another trial to determine whether the withholding of the consent was reasonable. He stressed that it was a bankruptcy, and a decision should be made now, that all parties had been involved for some time, and the proceedings had gone on long enough. The judge noted the argument of counsel for June that his clients had been unintentionally misled by the trustee with regard to the shares of Plaza Resources Corporation. But, he said counsel candidly admitted that his clients in fact were not misled and he said anyway that the amount involved would not be sufficient to justify any delay in arriving at a conclusion. The judge found that the trustee had a duty to act prudently and follow a cautious course; and he said, on the materials before him, it would seem that the trustee had done this and that he should follow the trustee

and inspectors' decision. He said the trustee is an officer of the court and his decision should be weighed heavily as long as he is acting properly and there was no indication that he was not.

10 The judge then said that Erickson had put up a $1,000,000 irrevocable letter of credit and had given the trustee a certified deposit cheque of $200,000, those actions showed good faith, that they meant business, and were able to carry through on the offer.

11 I come now to a summary of the submissions the appellant makes to me. Firstly, with respect to the nature of the proceedings before Lander J., Mr. Fitzpatrick said that what was before the judge was an application by the receiver-manager for the approval of the sale of assets. He said that no argument was advanced to the judge as to whether that was the nature of the application or whether it was the trustee taking a proceeding in bankruptcy. Counsel said that van der Hoop L.J.S.C. expressly said he was not deciding that matter. As to what it was in fact, Mr. Fitzpatrick said it was not a bankruptcy proceeding, but Lander J. incorrectly assumed that it was. In the result counsel said there was an arguable case that the judge applied the wrong test. He went on to say that even if it was a proceeding in bankruptcy, the bankruptcy test had not been met. Counsel invoked the judgment of Tysoe J.A. (as he then was) in chambers in *Montreal Trust Co. v. McDonell Metal Mfg. Co. Ltd.* B.C.C.A., 20th December 1967 (unreported), which was an application for a stay of proceedings, and counsel said that the principles that should govern me emerged from what Tysoe J.A. said on p. 2 of his reasons as follows:

> The principal matters impelling me are the following. Though the appeal may of course fail, I am satisfied the appellant has an arguable case. If the appeal should succeed and in the meantime the sale authorized and which has been tentatively arranged is completed the appellant's victory may turn out to be a barren one. Against this there is the possibility that the proposed transaction of sale will fall through unless it is completed very shortly. I have weighed these considerations and others, including the equitable rights of the appellant as mortgagor, and feel that the balance of convenience is in favor of preserving the status quo for the time being.

As to the function of the court when the receiver-manager is seeking an order, Mr. Fitzpatrick cited the judgment of this court in *Indust. Dev. Bank v. Douglas Plywood Log Sales Ltd.; Indust. Dev. Bank v. Can. Plywood Corp.*, [1972] 4 W.W.R. 114, leave to appeal to S.C.C. refused [1972] 4 W.W.R. 115n (B.C.C.A.), when, in the course of the judgment given for the court, McFarlane J.A. said this at p. 116:

> I feel no doubt that the function of the Court in advising and giving directions to its officer, the Receiver, whom it appointed, is, so far as can reasonably be done, to obtain for the assets of the mortgagor company the best price which can be obtained for the benefit of all of the creditors.

12 Counsel put to me that before Lander J., in effect, a bidding war was going on and that the proper handling of matters would likely produce better bids. He pointed out that the bids had doubled in the period through which the appellants were trying to refinance. Then counsel said that even if the correct test is the bankruptcy test applied by the judge there was the factor that the inspectors adopted their resolution on 16th August in ignorance of the developments of the hearing the following day, the developments being the significant raising of the offers of Sable and June. Then, counsel said further there was confusion in the bidding as to whether shares of the subsidiary company were included and, if so, their value.

13 It is my opinion that Lander J. had a significant foundation for dealing with this proceeding as one in bankruptcy, that is to say, an application by the trustee in bankruptcy for approval of a sale. On 10th August, before van der Hoop L.J.S.C., an offer was brought in by the receiver-manager. But, as I have said, the judge terminated the proceedings before him by directing that bids be submitted by noon, 15th August, not to the receiver-manager but to the trustee, and for the consideration of the inspectors. And, of course, it was a matter that greatly concerned the creditors. The trustee had the right to redeem the Bank of Montreal security, a right given by the Bankruptcy Act, s. 99(3). The offers indicated a substantial surplus after redemption. The Erickson offer would produce for the unsecured creditors approximately 40 cents on the dollar. Then, before Lander J. there was a notice of motion by the trustee for approval of the Erickson bid; and the receiver-manager through its counsel asked for an adjournment of its motion. Counsel for the receiver-manager informed me without challenge from other counsel here that Lander J. repeatedly indicated during the hearing that he regarded the matter as one in bankruptcy. Now if it was a proceeding of that nature, on that basis, the judge had, I think, much support from the evidence and law for his approval of the Erickson offer. The resolution of the inspectors is significant and I have read it. This is a resolution of 16th August:

> Having carefully considered all of the information available with respect to the offers of Erickson Gold Mining Corp. ... Sable Resources Ltd. ... and June Resources Inc ... as well as the refinancing proposal of the directors of Plaza Mining Corporation, and having had counsel's comments regarding the number of times in the past that the directors' assurances on refinancing have not been fulfilled, and noting that the refinancing proposal as presented August 15, 1983 provides no cash, no guarantees and no security; and further being mindful of the problems which may be encountered in achieving a satisfactory sale of the assets, if there should be further delay particularly in view of the oncoming deterioration of weather, the inspectors have resolves to support the acceptance of the Erickson offer for the following reasons:
>
> 1. The Erickson offer contains provision for the delivery of consent from Troutline Creek Golds Ltd. ... necessary to assign the wildcat claims, which provision is not in the offers of either Sable or June;

2. The Erickson offer provides for the dismissal of the action of Troutline against Plaza and others which provision is not in the Sable or June offers or in the Refinancing Proposal;

3. The Erickson offer is competitive with the Sable and June offers as to final price;

4. The Erickson offer provides for a favourable means of adjustment with respect to a multitude of items covered under 'Parcel E';

5. Under the Erickson offer there are certain assets left behind for subsequent disposal by the Trustee with the inspectors' approval;

6. The Erickson offer provides a $1,000,000.00 (One Million Dollars) irrevocable Letter of Credit which matures on December 30, 1983;

7. The Erickson offer is accompanied by $200,000.00 cash deposit which is to be forfeited in the event that Erickson does not complete;

8. The Erickson offer provides for participation to a maximum of $1,000,000.00 in future profits derived from ore mined from claims acquired.

14 Then, as to the law, there is the decision of the Saskatchewan Court of Appeal in *Re Pachal's Beverages Ltd.* (1969), 13 C.B.R. (N.S.) 160, 70 W.W.R. 70, 7 D.L.R. (3d) 113. In the judgment as it was given by Culliton C.J.S. (as he then was), and starting at p. 164 he said [quoting from Duncan and Honsberger, Bankruptcy in Canada, 3rd ed. (1961), p. 563] in reference to the Bankruptcy Act:

> The scheme of the Act is that in practical administration of the estate the governing authority is to be the inspectors and not the Court, and, unless it is shown that they have exceeded their powers ... or have acted fraudulently or not in good faith, the administration is to be governed according to their directions...

Culliton C.J.S. then referred to the expression of the same view in two Ontario cases, one being *Re Niagara Crushed Stone Ltd.*, to which I referred earlier.

15 Counsel for the appellants is quite correct in saying that the inspectors could not have been aware when they passed the resolution of the bid increases the next day by June and Sable. They did not see, I am told, the appellants' escrow loan committal document. However, that document was before Lander J. who noted the conditional nature of the commitment. The inspectors were not aware of the Telex from Munroe Limited Escrow Limited to the solicitors for the appellants saying:

> This is to verify that Escrow 0HJ-1-8075 has been established this 18 day of August for Harold Jones in amount of 2,853,650 U.S. Dollars. We are awaiting further instructions.

16 Then counsel is right in saying that there is some confusion with respect to the Plaza Resources Ltd. shares, that is, the subsidiary I mentioned. The material indicates varying opinions as to the value of those shares. Those shares were included in the Erickson offer but the material indicates that Erickson has signified its willingness to amend the offer simply to exclude them.

17 I think it is noteworthy that it is not the creditors who are seeking this stay, but two shareholder-directors, the two who are applying to refinance. With respect to their efforts I would not conclude, as I was urged to by counsel for the trustee, that they were simply attempting to frustrate and delay the administration of the estate. I think their efforts were bona fide, but there were several efforts and all were unsuccessful, and if a stay is granted the present attempt may still be unsuccessful.

18 In dealing with this application I think statements in the affidavit of Mr. Ross, the president of Erickson, are significant. In paras. 2-5 he says:

> 2. That the Plaza Corporation Mind, Mill and Mineral Claims, are located approximately forty miles south of the British Columbia-Yukon border near Cassiar, B.C. The mineral claims from which ore has been mined to date are all situated on Table Mountain over 4500 feet above sea level. The mine site is subject to snow and freezing from September to May of each winter. The first snowfall of this winter season was on August 17.
>
> 3. That one of the principal assets of Plaza is a large mass of broken ore that is stockpiled at the Minesite. That Stockpile will freeze solidly by mid-October of 1983. Once that has occurred, it will not be economically feasible to mill the stockpiled ore until the Stockpile thaws in approximately mid-May of 1984.
>
> 4. That Erickson's offer to purchase the Assets of Plaza is dependant on its ability to mill the Stockpile before the winter weather makes it economically impossible to do so. That is why paragraph 22 of the Offer leaves it open for acceptance only on or before September 1, 1983. Erickson's present offer and terms of payment might have to be withdrawn if these proceedings delay the milling of the Stockpile until the Spring of 1984.
>
> 5. That Erickson's offer is based on the current world Gold prices. If the price of Gold should fall, future offers on Plaza's assets would be correspondingly lower.

Of course, the price of gold may increase. Nevertheless, speaking of the Erickson offer, this is one that may very well be lost if a stay is granted. The trustee in his affidavit expresses his concern that it will be

lost and he refers to a letter from the solicitors for Erickson which I think gives him a basis for his concern.

19 I think another factor of weight is the happy situation of Erickson with respect to Troutline. Who can say whether other bidders will obtain consent to assignment of the claims?

20 With respect, I am of the opinion that Lander J. was correct in having regard to the need for a timely decision in this matter. The consideration of expedition was before Nemetz J., now Chief Justice of British Columbia many years ago in a case *Re Eric Petersen Const. Ltd.* (1969), 9 C.B.R. (N.S.) 158 (B.C.S.C.) and at p. 162 he said:

> There is no doubt in my mind that it is the duty of the trustee to liquidate the assets of the estate in an expeditious manner and in a manner consonant with the best interests of all of the creditors. Carrying on now would in my view cause unnecessary expense for an unlimited time with the prospect of a continually worsening situation.

Those words are apposite here.

21 Now I have to attempt to do justice between the parties, that is, not prevent an appellant from prosecuting his appeal while at the same time not causing prejudice to the respondents. Here, the refusal of a stay will effectively frustrate the appeal, but in deciding the matter I am entitled to look at the merits of the appeal; and when I do that, I do not assess as very high its chances of succeeding. Granting a stay will likely prejudice the creditors in the various ways described by the trustees' Mr. McMullen in his affidavit, and I do not know of appropriate terms that could be imposed that would eliminate or significantly reduce the prejudice if I should grant a stay.

22 The application is dismissed.

Application dismissed.

End of Document

(22)

File No: CI 20-01

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., C. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

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AFFIDAVIT OF ROBERT L. DEAN
AFFIRMED MARCH 9, 2020

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Parties"); (ii) Second Avenue, as documentation agent and a lender; and (iii) White Oak, as the administrative agent and collateral agent and a lender.

48. The Credit Agreement provided for a US$40 million senior secured revolving credit facility (the "**Revolving Credit Facility**") with a maturity date of December 30, 2022. Advances under the Revolving Credit Facility are available by way of direct advances or letters of credit (each an "**LOC**"). A copy of the Credit Agreement is attached to this affidavit as **Exhibit D**. Capitalized terms not otherwise defined in this section have the meaning given to them in the Credit Agreement.

49. White Oak has security over the Collateral (including certain real estate assets located in Winnipeg and Toronto) pursuant to a number of security agreements, deeds of hypothec and debentures, which are attached to this affidavit as follows:

(a) **Canadian Security and Pledge Agreement** entered into as of December 30, 2019 by and among 4093879 Canada Ltd., 4093887 Canada Ltd., and NIP, as grantors, and White Oak, in

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pursuant to mortgages on owned real estate of Nygard Properties Ltd. is limited to a realized value after all costs and expenses, including enforcement costs of $20 million.

its capacity as collateral agent (**Exhibit E**, redacted to remove bank account numbers).

(b) **Canadian Pledge Agreement** entered into as of December 30, 2019 by and among Nygard Properties Ltd. and NEL, as grantors, and White Oak, in its capacity as collateral agent (**Exhibit F**).

(c) **Deed of Hypothec** dated December 19, 2019 between NIP, 4093879 Canada Ltd. and 4093887 Canada Ltd., as grantors, and White Oak, as hypothecary representative (**Exhibit G**).

(d) **Charge/Mortgage of the Ontario Property** in the amount of US$50,000,000, granted by Nygard Properties Ltd. in favour of White Oak, as collateral agent, and registered on title to 1 Niagara Street, Toronto, Ontario (a multi-story office building that houses office space for the Nygård Group) on December 30, 2019, as Instrument AT5331325 (**Exhibit H**).

(e) **Debenture** dated December 25, 2019, for the principal sum of US$50,000,000, granted by Nygard Properties Ltd. in favour of White Oak, as collateral agent and registered on title to 1771 Inkster Boulevard, Winnipeg, Manitoba (a Nygård distribution

centre and office), 1300, 1302 and 1340 Notre Dame Avenue, Winnipeg, Manitoba (a Nygård warehouse and retail store), and 702 and 708 Broadway, Winnipeg, Manitoba (a Nygård retail store) on December 30, 2019, as Registration Number 5140960/1 (**Exhibit I**).

(f) **U.S. Security Agreement** dated as of December 30, 2019, made by Nygård Holdings, Nygard Inc., Fashion Ventures, Inc. and Nygard NY Retail, LLC, as pledgors, assignors and debtors, in favor of White Oak Commercial Finance, LLC, as administrative agent and collateral agent (**Exhibit J**).

50. White Oak is the first-ranking secured lender with respect to the Collateral, with the exception of (i) certain cash collateral which is pledged to BMO as security for the Nygård Group's obligations under certain BMO letters of credit and (ii) certain motor vehicles and office equipment collateral pledged to certain motor vehicle and office equipment lessors or financers.

51. Pursuant to section 5.1(a)(i) of the Canadian Security and Pledge Agreement, upon the occurrence of an Event of Default under the Credit Agreement, White Oak may appoint a receiver. Similarly, whenever the security under the Charge or Debenture becomes enforceable, White Oak

new company, notwithstanding the fact that these assets form the Lenders' collateral under the Credit Agreement.

120. The Nygård Group is in urgent need of court supervision with the assistance of a court officer. Accordingly, White Oak, through its counsel, delivered the Demand and Section 244 Notice on February 26, 2020. To date, the amounts owing to White Oak have not been repaid.

121. Given the current state of the financial and governance crisis facing the Nygård Group's business, including the request for funding beyond that available under the Credit Agreement accompanied by the threat of bankruptcy, the immediate and continuing events of default under the Credit Agreement, the destabilization of the business resulting from the very serious allegations made in the Class Action and the issues facing the wholesale business, it is critical that Richter be appointed as Receiver as expeditiously as possible so that it can take immediate steps to preserve and maintain the property of the Nygård Group, which will include the implementation of a process to: (i) identify a liquidator and liquidate the assets, (ii) consider other options for the business that would see the Lenders paid in full in the short term, and (iii) engage a broker to sell the Nygård Group's real estate assets. In the circumstances, and given the immediate crisis facing the Nygård Group, I believe that this is in the best

This is Exhibit "H" referred to in the Affidavit of Robert L. Dean affirmed March 9, 2020.

Mary E Rushing

A Notary Public in and for the State of North Carolina in the United States of America

Mecklenburg County
My pires 12/10/2023

Properties

PIN	21240 - 0094 LT	*Interest/Estate*	Fee Simple
Description	PT LT 18 SEC A PL MILITARY RESERVE TORONTO AS IN CT603366, EXCEPT THE EASEMENT THEREIN; CITY OF TORONTO		
Address	1 NIAGARA ST TORONTO		

Chargor(s)

The chargor(s) hereby charges the land to the chargee(s). The chargor(s) acknowledges the receipt of the charge and the standard charge terms, if any.

Name NYGARD PROPERTIES LTD.

Address for Service 1771 Inkster Boulevard
Winnipeg, Manitoba
R2X 1R3

I, James R. Bennett, A.S.O., have the authority to bind the corporation.

This document is not authorized under Power of Attorney by this party.

Chargee(s) *Capacity* *Share*

Name WHITE OAK COMMERCIAL FINANCE, LLC, AS COLLATERAL AGENT

Address for Service 1155 Avenue of the Americas
15th Floor, New York
NY 10036

Statements

Schedule: See Schedules

Provisions

Principal	$50,000,000.00	*Currency*	USD
Calculation Period	See Schedule		
Balance Due Date	See Schedule		
Interest Rate	See Schedule		
Payments			
Interest Adjustment Date			
Payment Date	See Schedule		
First Payment Date			
Last Payment Date			
Standard Charge Terms			
Insurance Amount	Full insurable value		
Guarantor			

Signed By

Linda Anita Kaszuba	40 King Street West, Suite 5800 Toronto M5H 3S1	acting for Chargor(s)	Signed	2019 12 30

Tel 416-595-8500

Fax 416-595-8695

I have the authority to sign and register the document on behalf of the Chargor(s).

Submitted By

MILLER THOMSON	40 King Street West, Suite 5800 Toronto M5H 3S1	2019 12 30

Tel 416-595-8500

Fax 416-595-8695

Fees/Taxes/Payment	
Statutory Registration Fee	$65.05
Total Paid	$65.05

File Number	
Chargor Client File Number :	225282.8

DEBENTURE

NYGARD PROPERTIES LTD.

Principal Sum: **USD $50,000,000**

1. **Acknowledgement and Promise to Pay**. Nygard Properties Ltd. (the "**Corporation**") for value received, hereby acknowledges itself indebted to the Mortgagee, the Lender, the Credit Parties and certain others from time to time as provided in Section 24 of this debenture, and promises to pay on demand the Principal Sum to or to the order of the Mortgagee, in lawful money of the United States. The Corporation hereby expressly waives presentment for payment, notice of non-payment and protest. The Corporation promises to pay, on demand, interest in like money on the amount of the Principal Sum outstanding from time to time and on all other amounts from time to time owing hereunder at the rate of twenty-five (25%) percent *per annum*, such interest to accrue on a daily basis and to be calculated and payable monthly on the first Business Day of each and every month, commencing on the first of the month following the date of this debenture. Such interest will be payable both before and after maturity, demand, default and judgment. The Corporation promises to pay interest, on demand, at the same rate, on overdue interest, calculated and payable monthly on the first Business Day of each and every month until paid.

2. **Place of Payment**. The Corporation promises to pay the Principal Sum, interest and all other amounts from time to time owing hereunder at the office of the Mortgagee at which any notice may be given to the Mortgagee in connection with this debenture or at such other place as the Mortgagee may designate by notice to the Corporation.

3. **Continuing Security**. This debenture secures: the Obligations, including without limitation, payment and performance by the Corporation to the Mortgagee of all debts, liabilities and obligations, including revolving indebtedness, present or future, direct or indirect, absolute or contingent, matured or not, whether from time to time reduced and thereafter increased, or entirely extinguished and thereafter incurred again, now or at any time and from time to time due or owing by the Corporation in any currency, whether arising from dealings between the Corporation and the Mortgagee or from any other dealings or proceedings by which the Mortgagee may be or become in any manner whatever a creditor of the Corporation and whenever incurred and whether incurred by the Corporation alone or with another or others and whether as principal or surety, in each case arising under or by virtue of or otherwise in connection with the Credit Agreement (all of the foregoing being herein collectively called the "**obligations secured**").

4. **Security**. As continuing security for the due and punctual payment of the Principal Sum, interest, overdue interest and all other obligations secured, the Corporation does hereby:

(1) create a security interest in and grant, mortgage, assign, transfer and charge as and by way of a fixed and specific mortgage and charge to and in favour of the Mortgagee, all the right, title, fee simple interest and benefit of the Corporation in, to, under or in respect of the real and immovable property described in Schedule "A" under the heading Owned Real Property (the "**Owned Real Property**") together with all rights and interest therein, now owned or hereafter

acquired by the Corporation including, without limitation, all licences, easements, rights-of-way, privileges, benefits, immunities, rights and options connected therewith and/or appertaining thereto and all amendments thereto, replacements thereof and substitutions therefor from time to time, and all buildings, erections, structures, improvements, fixtures, fixed plant, fixed machinery and fixed equipment at present situate thereon or therein or which may at any time hereafter be constructed or brought or placed thereon or therein or used in connection therewith, including in each and all cases any greater or other right, title and interest therein or in any part thereof which the Corporation may acquire and hold during the currency of this debenture;

(2) subject to the exception set out in Section 8 hereof, demise, sub-lease and charge as and by way of a fixed and specific mortgage by way of sublease and charge to and in favour of the Mortgagee, all the right, title, interest and benefit of the Corporation, in, to, under or in respect of all its leasehold interests in real and immovable property, including buildings and fixtures (the "**Leased Real Property**") now held or hereafter acquired by the Corporation including, without limitation, the leasehold interests in the lands and premises described in and demised by the real property leases described in Schedule "A" under the heading Real Property Leases and any modifications, amendments, restatements, assignments and renewals thereof from time to time and all leases and agreements entered into from time to time superseding or replacing such real property leases including in each and all cases any greater right, title and interest therein or in any part thereof which the Corporation may acquire and hold during the currency of this debenture, including, without limitation, any right or option to renew and any option or right of first refusal to lease or to purchase that may be contained therein and any rights acquired in connection therewith (collectively, the "**Leases**"); and

(3) create a security interest in, assign, transfer and set over unto and in favour of the Mortgagee, its successors and assigns, as and by way of a general assignment of all of its right, title, estate and interest present and future, in and to:

(i) any and all existing or future leases, subleases, agreements to lease or sublease or other occupancy or tenancy agreements relating to the whole or any part of the Owned Real Property or the Leased Real Property and all existing or future licenses or concessions whereby any person is given the right (other than an easement or a right in the nature of an easement) to use or occupy the whole or any part or parts of the Owned Real Property or the Leased Real Property and all extensions, amendments, renewals or substitutions thereof or therefor which may hereafter be effected or entered into (collectively the "**Third Party Leases**"), and all benefits, powers and advantages of the Corporation to be derived therefrom and all covenants, obligations and agreements of the tenants thereunder;

(ii) all rents and other moneys now due and payable or hereafter to become due and payable under the Third Party Leases, and each guarantee of or indemnity in respect of the obligations of the tenants thereunder with full power to demand, sue for recovery, receive and give receipts for all such rents and other moneys

and otherwise to enforce the rights of the Corporation thereto in the name of the Corporation;

(iii) any and all existing or future agreements, contracts, licenses, permits, plans and specifications, bonds, letters of credit, letters of guarantee or other documents or instruments affecting or relating to the Owned Real Property or the Leased Real Property or any part or parts thereof or the construction, use, operation or maintenance of buildings, erections, structures, improvements and fixtures thereon and all extensions, amendments, renewals or substitutions thereof or therefor which may hereafter be effected or entered into and all benefit, power and advantage of the Corporation to be derived therefrom; and

(iv) all proceeds from any and all existing or future insurance policies in respect of property damage and business interruption insurance pertaining to the Mortgaged Property and all proceeds of expropriation or similar taking of the Owned Real Property or the Leased Real Property or any part or parts thereof and all benefit, power and advantage of the Corporation to be derived therefrom; and

(4) create a security interest in and grant, mortgage, assign, transfer, pledge and charge as and by way of a floating charge to and in favour of the Mortgagee all of its undertaking, property and assets, real and personal, immovable and movable (including, without limitation, all goods, intangibles, instruments, investment property, documents of title, chattel paper and money), located at, on or used in conjunction with, the Owned Real Property or the Leased Real Property including, without limitation, all inventories, and good-will, now owned or hereafter acquired by the Corporation, of whatsoever nature, kind or description and wherever situate (other than such thereof as may from time to time be validly and effectively subjected to the charges created under Sections 4(1), 4(2) and 4(3) of this debenture). The floating charge hereby created shall not hinder or prevent the Corporation, unless the security hereby constituted shall have become enforceable, from disposing of or dealing with the subject matter of the floating charge in the ordinary course of the business of the Corporation and for the purpose of carrying on the same; provided that such action is not in breach of any specific provision of or covenant in this debenture, the Credit Agreement or any other Loan Documents.

5. **Habendum**. To have and to hold the Property and all rights hereby conferred to the Mortgagee forever for the uses and purposes with the powers and authorities and subject to the terms and conditions herein set forth.

6. **Definitions**. Unless otherwise provided, the capitalized terms used in this debenture shall have the meanings ascribed to them in Schedule "B".

7. **Attachment**. Subject to Section 29, the security interests created by this debenture are intended to attach when this debenture is executed by the Corporation and delivered to the Mortgagee.

8. **Reservation of Last Day of Lease**. The last day of any term of years reserved by any lease or any extension or renewal thereof, oral or written, or any agreement therefor, now held or

hereafter acquired by the Corporation, is hereby excepted out of the security created hereby or by any other instrument supplemental hereto and does not and shall not form part of the Property charged hereby or by any such other instrument, but the Corporation shall stand possessed of the reversion remaining in the Corporation of any leasehold interest for the time being demised as aforesaid, upon trust to assign and dispose thereof as the Mortgagee shall direct; and upon any sale of the leasehold interest, or any part thereof, the Mortgagee for the purpose of vesting the aforesaid reversion of any such term or any renewal thereof in any purchaser or purchasers thereof, shall be entitled by deed or other writing to appoint such purchaser or purchasers or any other person or persons a new trustee or trustees of the aforesaid reversion of any such term or renewal thereof in the place of the Corporation and to vest the same accordingly in the new trustee or trustees so appointed, freed and discharged from any obligation respecting the same.

9. **Consents**. Nothing herein shall constitute an assignment or attempted assignment of any contract, agreement, permit or license which by the provisions thereof or by law is not assignable or which requires the consent of a third party to its assignment unless such consent has been obtained or is deemed to have been obtained or has been dispensed with by court order. Upon such consent being obtained, being deemed to have been obtained or waived or having been dispensed with by court order, this debenture shall apply to the applicable contract, agreement, permit or license without regard to this section and without the necessity of any further assurance to effect the assignment thereof. Unless and until the consent to assignment is obtained or is deemed to have been obtained or is dispensed with by court order as provided above, the Corporation shall, to the extent it may do so by law or pursuant to the provisions of the document or interest referred to therein, hold all benefit to be derived from the applicable contracts, agreements, permits or licenses in trust for the Mortgagee, (including, without limitation, the Corporation's beneficial interest in any contract, agreement, permit or license which may be held in trust for the Corporation by a third party) as additional security for payment of the obligations secured and shall deliver up all such benefit to the Mortgagee, forthwith upon demand by the Mortgagee.

10. **Mortgagee Not To Be Obligated**.

(1) Nothing herein contained shall have the effect of making the Mortgagee responsible for the collection of any accounts or rents or any part thereof or for the performance of any obligations, covenants, terms or conditions in favour of any lessee or in favour of any party to any other agreement or contract with the Corporation or to whom the Corporation may be otherwise obligated. The Mortgagee shall be liable to account only for such moneys as may actually come into its hands, and any such moneys when received by it following an Event of Default and for so long as such Event of Default is continuing may be applied on account of any of the principal, interest and other amounts secured hereby. The Mortgagee shall not be deemed by virtue only of the grant of this debenture to be a mortgagee in possession of the Property or any portion thereof.

(2) Each of the protections, benefits, reliances, indemnities and immunities offered to the Mortgagee in accordance with and pursuant to the Credit Agreement or any other Loan

Documents shall be afforded to, are extended to, and shall be enforceable by the Mortgagee in this debenture.

(3) White Oak Commercial Finance, LLC has been appointed the Collateral Agent for the other Credit Parties pursuant to Article IX of the Credit Agreement. It is expressly understood and agreed by the parties to this Debenture that any authority conferred upon the Collateral Agent hereunder is subject to the terms of the delegation of authority made by the Credit Parties to the Collateral Agent pursuant to the Credit Agreement, and that the Collateral Agent has agreed to act (and any successor the Collateral Agent shall act) as such hereunder only on the express conditions contained in such Article IX. Any successor the Collateral Agent appointed pursuant to Article IX of the Credit Agreement shall be entitled to all the rights, interests and benefits of the Collateral Agent hereunder.

11. **Covenants of the Corporation**. The Corporation hereby covenants and agrees with the Mortgagee as follows:

(1) **Payment and Performance** - The Corporation shall pay and perform the Obligations in full as and when the same shall become due under the Loan Documents and when they are required to be performed thereunder.

12. **Representations and Warranties.**

The Corporation represents, warrants, covenants and agrees that each of the representations, warranties, covenants and other agreements of the Corporation under and as contained in the Credit Agreement are hereby incorporated herein in their entirety by this reference.

13. **Events of Default**. The Principal Sum, interest and all other obligations secured shall become immediately payable and the security hereby constituted shall become enforceable upon the occurrence and continuation of an Event of Default.

14. **Waiver of Default**. The Mortgagee may by notice to the Corporation waive in whole or in part any default of the Corporation on such terms and conditions as the Mortgagee may determine, but no such waiver shall be taken to affect any subsequent default or the rights resulting therefrom. No delay by the Mortgagee in the enforcement of its rights under this debenture shall be deemed to constitute a waiver of a default.

15. **Remedies**. Whenever the security hereby constituted shall have become enforceable, the Mortgagee may proceed to realize the security hereby constituted and to enforce its rights:

(1) by entry, with the right to have, hold, use, occupy, possess and enjoy the Property or any part thereof without the let, suit, hindrance, interruption or denial of the Corporation, its successors or assigns;

(2) by entry, with the right to make such arrangements for completing the construction of, repairing or putting in order any buildings or other improvements on the Property or any part thereof, or for inspecting, taking care of, leasing, collecting the rents of and managing generally the Property or any part thereof as it may deem expedient, and all costs, charges and expenses,

including allowances for the time and service of any employee of the Mortgagee or other person appointed for the above purposes shall be added to the Principal Sum and shall be secured hereby and payable forthwith together with interest thereon calculated at the rate and at the times and in the manner provided for herein for interest arrears on the Principal Sum;

(3) by the appointment, by an instrument in writing, of any person or persons, whether an officer or officers or an employee or employees of the Mortgagee or not, as a receiver (which term also includes an interim receiver and a receiver and manager) or receivers of all or any part of the Property, and the Mortgagee may remove any receiver or receivers so appointed and appoint another or others in his or their stead;

(4) under the provisions of Section 18 or other sale permitted at law;

(5) by proceedings in any court of competent jurisdiction for the appointment of one or more receivers, receivers and managers, or interim receivers under any applicable law;

(6) by proceeding in any court of competent jurisdiction for foreclosure and/or judicial sale;

(7) in such other manner as is permitted by the Credit Agreement; and

(8) by any other action, suit, proceeding or other remedy authorized or permitted by law or by equity.

16. **Remedies Cumulative.** No remedy for the realization of the security hereby constituted or for the enforcement of the rights of the Mortgagee shall be exclusive of or dependent upon any other such remedy but any one or more of such remedies may from time to time be exercised independently or in combination.

17. **Receiver.** Subject to the provisions of any instrument in writing appointing a receiver or receivers, upon the appointment hereunder of a receiver of the Property or any part thereof, the following provisions shall apply:

(1) Every such receiver shall have unlimited access to the Property as agent and attorney for the Corporation (which right of access shall not be revocable by the Corporation) and shall have full power and unlimited authority to, without limitation:

(i) take possession of the Property or any part thereof;

(ii) carry on or concur in carrying on the business of the Corporation;

(iii) collect the rents and profits from leases and tenancies whether created before or after these presents;

(iv) lease or concur in leasing any portion of the Property which may become vacant on such terms and conditions as he considers advisable and enter into and execute leases, accept surrenders and terminate leases;

(v) complete the construction of any building or buildings or other erections or improvements on the Property left by the Corporation in an unfinished state or award the same to others to complete and purchase, repair and maintain any personal property including, without limitation, appliances and equipment, necessary or desirable to render the premises operable or rentable, and take possession of and use or permit others to use all or any part of the Corporation's materials, supplies, plans, tools, equipment (including appliances) and property of every kind and description;

(vi) insure, manage, operate, repair, alter or extend the Property; and

(vii) sell, lease or otherwise dispose of all or any part of the Property,

and the Corporation undertakes to ratify and confirm whatever any such receiver may do with respect to the Property.

(2) The Mortgagee may at its discretion vest the receiver with all or any of the rights and powers of the Mortgagee.

(3) The Mortgagee may fix the remuneration of the receiver who shall be entitled to deduct the same out of the revenue or the sale proceeds of the Property.

(4) Every such receiver shall be deemed the agent or attorney of the Corporation and, in no event, the agent of the Mortgagee and the Mortgagee shall not be in any way responsible for the acts or omissions of any such receiver except in the case of any gross negligence, wilful misconduct, dishonesty or fraud of such receiver.

(5) The appointment of any such receiver by the Mortgagee shall not, to the extent permitted by law, result in or create any liability or obligation on the part of the Mortgagee to the receiver or to the Corporation or to any other person and no appointment or removal of a receiver and no actions of a receiver shall constitute the Mortgagee a mortgagee in possession or responsible as such.

(6) No such receiver shall be liable to the Corporation to account for monies other than monies actually received by him in respect of the Property, or any part thereof, and out of such monies so received every such receiver shall, in the following order, pay:

(i) his remuneration as aforesaid;

(ii) all costs and expenses of every nature and kind incurred by him in connection with the exercise of his powers and authority hereby conferred;

(iii) interest, principal and other money which may, from time to time, be or become charged upon the Property in priority to these presents, including taxes;

(iv) to the Mortgagee all interest, principal and other monies due hereunder to be paid in such order as the Mortgagee in its discretion shall determine;

(v) and thereafter, every such receiver shall be accountable to the Corporation for any surplus as required by applicable law.

The remuneration and expenses of the receiver shall be paid by the Corporation on demand and shall be a charge on the Property and shall bear interest from the date of demand at the same rate as applies to the principal hereby secured.

(7) Every such receiver may, with the consent in writing of the Mortgagee, borrow money for the purpose of maintaining, protecting or preserving the Property or any part thereof, or for the purpose of carrying on business of the Corporation, and any receiver may issue certificates (in this sub clause called "**receiver's certificates**") for such sums as will, in the opinion of the Mortgagee, be sufficient for obtaining security upon the Property or any part thereof for the amounts from time to time so required by the receiver, and such receiver's certificate may be payable either to order or to bearer and may be payable at such time or times, and shall bear such interest as the Mortgagee may approve and the receiver may sell, pledge or otherwise dispose of the receiver's certificates in such manner and may pay such commission on the sale thereof, as the Mortgagee may consider reasonable, and the amounts from time to time payable by virtue of such receiver's certificates shall form a charge upon the Property in priority to the amounts secured under this debenture;

(8) Save as to claims for accounting to which the Corporation is entitled under applicable law pursuant to clause (6) above, the Corporation hereby releases and discharges any such receiver from every claim of every nature, whether sounding in damages or not which may arise or be caused to the Corporation or any person claiming through or under him by reason or as a result of anything done by such receiver unless such claim be the direct and proximate result of gross negligence, wilful misconduct, dishonesty or fraud.

(9) The Mortgagee may, at any time and from time to time, terminate any such receivership by notice in writing to the Corporation and to any such receiver.

(10) The statutory declaration of an officer of the Mortgagee as to default under the provisions of these presents and as to the due appointment of the receiver pursuant to the terms hereof shall be sufficient proof thereof for the purposes of any person dealing with a receiver who is ostensibly exercising powers herein provided for and such dealing shall be deemed, as regards such person, to be valid and effectual.

(11) The rights and powers conferred herein in respect of the receiver are supplemental to and not in substitution of any other rights and powers which the Mortgagee may have.

18. **Sales.**

(1) **Method of Sale** – Upon the security hereby constituted becoming enforceable and the Mortgagee making demand hereunder, the Mortgagee may, upon the expiry of any applicable notice period, either before or after any entry, sell and dispose of the Property or any part thereof including, without limitation, any rents and profits thereof either as a whole or in separate parcels, at public auction or by tender or by private sale at such time or times as the Mortgagee may determine, and may make such sale either for cash or credit or part cash and

part credit, and with or without advertisement, and upon such conditions as to upset and price and with or without a reserve bid as the Mortgagee may deem proper.

(2) **Rescission and Resale** - The Mortgagee may also rescind or vary any contract of sale that may have been entered into and resell with or under any of the powers conferred hereunder and adjourn any such sale from time to time without being answerable for any loss occasioned by such sale or by any postponement thereof.

(3) **Deeds** - The Mortgagee may execute and deliver to the purchaser or purchasers of the Property or any part thereof good and sufficient deeds, assurances and conveyances for the same, the Mortgagee being hereby constituted the irrevocable attorney of the Corporation for the purpose of making such sale and executing such deeds, assurances and conveyances.

(4) **Sale, Bars, Claims through Corporation** - Any such sale made as aforesaid shall be a perpetual bar both in law and in equity against the Corporation and all other persons claiming the said property or any part thereof, by, from, through or under the Corporation.

(5) **Sale Proceeds** - In the case of a sale for cash or credit, or part cash and part credit, the Mortgagee shall be bound to pay to the Corporation only such moneys as have been actually received from purchasers after the satisfaction of all claims of the Mortgagee including payment of any costs, charges and expenses (including without limitation all solicitors' fees as between a solicitor and his client) incurred by the Mortgagee in the taking, recovering, collecting, realising on, keeping possession of, and any sale of, the Property.

19. **Prior Encumbrances and Expenses.** The Mortgagee may pay the amount of any encumbrance, lien or charge now or hereafter existing, or to arise or to be claimed upon the Property having priority over this debenture, including any taxes, utility charges or other rates on the Property, or any of them, and may pay all costs, charges and expenses and all solicitors' fees as between a solicitor and his client, which may be incurred in taking, recovering and keeping possession of the Property, or in protecting, repairing, restoring or preserving the Property, and generally in any proceedings or steps of any nature whatever properly taken in connection with or to realize this security, or in respect of the collection of any overdue interest, principal, insurance premiums or any other monies whatsoever payable by the Corporation hereunder whether any action or any judicial proceedings to enforce such payments has been taken or not. The amount so paid shall be added to the debt hereby secured and be a charge on the Property and shall bear interest at the rate aforesaid, and shall be payable forthwith by the Corporation to the Mortgagee. Further, the non-payment of such amount shall entitle the Mortgagee to make demand hereunder and to exercise the remedies hereby given. In the event of the Mortgagee paying the amount of any such encumbrance, lien or charge, taxes or rates, either out of the monies advanced on the security or otherwise, the Mortgagee shall be entitled to all the rights, equities and securities of the person or persons, company, corporation, or Government so paid.

20. **No Set-Off, etc.** The Principal Sum, interest and other amounts hereby secured will be paid and shall be assignable free from any right of set-off or counterclaim or equities between the Corporation and the Mortgagee or any other person or persons.

21. **No Merger**. The taking of a judgment or judgments under any of the covenants in this debenture shall not operate as a merger of the covenant or affect any other right of the Mortgagee under this debenture or otherwise.

22. **Lien in Addition, etc**. This debenture is in addition to and not in substitution for any other security now or hereafter held by the Mortgagee or any other person. No payment to the Mortgagee shall constitute payment on account of any of the Principal Sum, interest or other amounts from time to time owing hereunder unless specifically so appropriated by the Mortgagee by notation of such payment on this debenture. The taking of any action or proceedings or refraining from so doing, or any other dealing with any other security for the monies secured hereby, shall not release or affect the charge of this debenture and the taking of the security hereby granted or any proceedings hereunder for the realization of the security hereby granted shall not release or affect any other security held by the Mortgagee for the monies hereby secured.

23. **Discharge of Debenture**. Upon the expiry of the obligations secured or termination of the Credit Agreement as provided therein, then this debenture and the rights hereby granted shall cease and be void and thereupon the Mortgagee shall at the request and at the expense of the Corporation, its successors or assigns, cancel and discharge the mortgage and charge of this debenture and execute and deliver to the Corporation, its successors or assigns, such deeds and other instruments as shall be requisite to cancel and discharge the mortgage and charge hereby constituted; provided however that this debenture shall not be deemed to have been discharged or redeemed by reason of the account of the Corporation having ceased to be in debit at any time or times prior to such cancellation and discharge. No postponement or partial release or discharge of the charge in respect of all or any part of the Property shall in any way operate or be construed so as to release and discharge the security hereby constituted in respect of the Property except as therein specifically provided, or so as to release or discharge the Corporation from its liability to the Mortgagee to fully pay and satisfy the Principal Sum, interest and all other monies due or remaining unpaid by the Corporation to the Mortgagee.

24. **Pledge of Debenture**. Notwithstanding the provisions of Section 23, this debenture at any time and from time to time may be assigned, transferred, pledged, hypothecated, lodged, deposited or delivered by the Corporation to the Mortgagee as security for advances or loans to or for indebtedness or other obligations or liabilities of the Corporation to the Mortgagee and/or such other parties as the Mortgagee and the Corporation may in writing agree and in such event this debenture shall not be deemed to have been discharged or redeemed or the amounts payable hereunder to have been satisfied or reduced by reason of the account of the Corporation having ceased to be in debit while this debenture remained so assigned, transferred, pledged, hypothecated, lodged, deposited or delivered.

25. **Demand Debenture**. For greater certainty all amounts payable under this debenture are payable on demand, it being understood that demand may be made only in accordance with the terms and conditions of the Credit Agreement.

26. **Quiet Possession**. Subject to the provisions of the Credit Agreement, until an Event of Default has occurred, it shall be lawful for the Corporation to peaceably and quietly have, hold, use, occupy, possess and enjoy the Property, and receive and take the rents and profits thereof to its

own use and benefit, without let, suit, hindrance, interruption or denial by the Mortgagee, or any other person or persons whomsoever lawfully claiming, or who shall, or may lawfully claim by, from, under or in trust for it, them or any or either of them. If any Event of Default has occurred and is continuing, the Mortgagee may peaceably and quietly enter into and hold and occupy the Property without hindrance, interference or denial of the Corporation or of anyone claiming under it or of any prior encumbrances whatsoever.

27. **Deemed Covenants Excluded.** The covenants deemed to be included in a charge by subsection 7(1) of the *Land Registration Reform Act* (Ontario) shall be and are hereby expressly excluded from the terms of this debenture.

28. **No Obligation to Advance.** Neither the execution and delivery nor the registration of this debenture shall for any reason whatsoever obligate or bind the Mortgagee to advance any monies, or, having advanced a portion, obligate the Mortgagee in any way to advance the balance thereof; but nevertheless the charge shall take effect forthwith upon execution of this debenture and shall operate as security for the actual amount of all the debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Corporation to the Mortgagee or the Lender or any other Credit Party including without limitation those at any time owing under the Credit Agreement, the other Loan Documents and otherwise owing under this debenture.

29. **After Acquired Property.** The Corporation covenants and agrees that if and to the extent that any of its right, title and interest in any of the Property is not acquired until after delivery of this debenture, this debenture shall nonetheless apply thereto and the mortgages, charges, assignments, transfers, pledges and security interests in favour of the Mortgagee hereby created shall attach to such Property, subject to Sections 8 and 9, at the same time as the Corporation acquires rights therein, without the necessity of any further mortgage, charge, pledge, assignment, transfer, grant of security interest or assurance. The Corporation covenants and agrees to execute such further and other documentation and/or instruments in respect of any after-acquired property, at such time or times and in such form and manner as the Mortgagee may reasonably request.

30. **Greater Estate.** The Corporation expressly covenants and agrees that if the Corporation either alone or together with any co-owners of interests in any of the Leased Real Property described in Section 4(2) shall acquire fee title or any other greater estate to such leasehold land and premises, then, to the extent that the leasehold estate and fee title or such other greater estate merge, the lien of this debenture shall attach, extend to, cover and be a lien upon the Corporation's interest in such fee simple title or other greater estate.

31. **Conflicts.** This debenture is being entered into pursuant to the Credit Agreement. In the event of any conflict, inconsistency, ambiguity or difference between the terms of this debenture and the terms of the Credit Agreement, the terms of the Credit Agreement shall govern and be paramount and any such provision in this debenture shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference. Notwithstanding the foregoing, if there is any right or remedy of the Mortgagee set out in this debenture or any part hereof which is not set out or provided for in the Credit Agreement, such additional right or remedy shall not constitute a conflict or inconsistency and the Mortgagee

shall, notwithstanding this Section 31, be entitled to exercise such rights and enforce such remedies.

32. **Amalgamation.** The Corporation acknowledges and agrees that in the event it amalgamates with any other company or companies it is the intention of the parties hereto that the term "Corporation" when used herein shall apply to each of the amalgamating companies and to the amalgamated company, such that the mortgages, charges, assignments, transfers, pledges and security interests granted hereby: (i) shall extend to the "Property" (as that term is defined herein) owned by each of the amalgamating companies and the amalgamated company at the time of amalgamation and to any "Property" thereafter owned or acquired by the amalgamated company; and (ii) shall secure the amounts due and owing under the Credit Agreement from each of the amalgamating companies and the amalgamated company at the time of amalgamation and any amounts due and owing under the Credit Agreement by the amalgamated company thereafter arising. The mortgages, charges, assignments, transfers, pledges and security interests granted hereby shall attach to the "Property" owned by each company amalgamating with the Corporation and by the amalgamated company, at the time of the amalgamation, and shall attach to any "Property" thereafter owned or acquired by the amalgamated company when such becomes owned or is acquired. For greater certainty, nothing in this Section 32 shall be interpreted or deemed to permit the Corporation to merge, combine, consolidate or amalgamate in any manner whatsoever with any other person or entity, except as permitted by the terms of the Credit Agreement.

33. **Extension of Time/Forbearance.** The Mortgagee may grant extensions of time and other indulgences, take and give up securities, accept compositions, grant releases and discharges, release the Property to third parties and otherwise deal with the Corporation's guarantors or sureties and others and with the Property as the Mortgagee may see fit without prejudice to the liability of the Corporation to the Mortgagee or the Mortgagee's rights, remedies and powers under this debenture. No extension of time, forbearance, indulgence or other accommodation now, previously or hereafter given by the Mortgagee to the Corporation shall operate as a waiver, alteration or amendment of the Mortgagee's rights or to otherwise preclude the Mortgagee from enforcing such rights.

34. **Power of Attorney.** The Corporation hereby irrevocably constitutes and appoints each officer or director of the Mortgagee from time to time, or of any receiver appointed (as agent of the Corporation) as provided for in this debenture, as the true and lawful attorney of the Corporation with full power of substitution in the name of the Corporation to do all such acts and things and to execute and deliver all such deeds, transfers, leases, contracts, agreements and other documents or instruments on its behalf and in its place (and the same shall bind the Corporation and have the same effect as if such documents were executed by the Corporation) and with the right to use the name of the Corporation, whenever and wherever it may be deemed necessary or expedient in the sole discretion of the Mortgagee, upon and during the continuance of an Event of Default, in connection with carrying out the provisions of this debenture or the exercise of the rights and remedies set forth in this debenture. The Corporation hereby ratifies and agrees to ratify all acts of any such attorney taken or done in accordance with the terms hereof. The Corporation hereby declares that the irrevocable power of attorney granted hereby, being coupled with an interest in favour of the Mortgagee, is given for valuable

consideration and shall remain in full force and effect until this debenture is discharged in accordance with the terms of this debenture.

35. **Statutory Waivers**. To the fullest extent permitted by law, the Corporation waives all of the rights, benefits and protections given by the provisions of any existing or future statute which imposes limitations upon the powers, rights or remedies of a lender or upon the methods of realization of security, including any seize or sue or anti-deficiency statute or any similar provisions of any other statute.

36. **Provisions Reasonable**. The Corporation acknowledges that the provisions of this debenture, and in particular those respecting the rights, remedies and powers of the Mortgagee and any receiver which may be exercised against the Corporation, its business and any Property upon the security hereby constituted becoming enforceable, are commercially reasonable and not manifestly unreasonable.

37. **Further Assurances.** At any time and all times the Corporation will do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all such further acts, deeds, conveyances, mortgages, transfers and assurances in law as the Mortgagee shall reasonably require for the purpose of giving the Mortgagee a valid mortgage, charge or security of the nature herein specified upon all property intended to be covered hereby, and for the better assuring, conveying, mortgaging, assigning, confirmation or charging unto the Mortgagee all and singular the hereditament and premises, estates and property hereby mortgaged and charged, or intended so to be, in favour of the Mortgagee.

38. **Registration**. The Mortgagee shall have the right at any time and without notice to cause this debenture or notice thereof to be registered or filed in any office of public record where the Mortgagee considers it necessary.

39. **Demand or Notice**. Any demand or notice to be made or given in connection with this debenture shall be in writing and shall be duly made or be given if delivered in accordance with of the Credit Agreement at the addresses specified therein.

40. **References**. All references to articles, sections, subsections, paragraphs, subparagraphs, clauses and schedules unless otherwise specified are to articles, sections, subsections, paragraphs, subparagraphs and clauses of and schedules to this debenture.

41. **Headings**. The insertion of headings are for convenience of reference only and shall not affect the interpretation of this debenture.

42. **Number and Gender**. Words importing the singular include the plural and vice versa and words importing gender include all genders.

43. **Governing Law**. This debenture shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. The Corporation and the Mortgagee irrevocably submit to the non-exclusive jurisdiction of the courts of the Province of Ontario and of Canada sitting in Ontario in any action or proceeding arising out of or relating to this debenture and irrevocably agree that all such actions and

proceedings may be heard and determined in such courts. The Corporation and the Mortgagee irrevocably waive, to the fullest extent possible, the defence of an inconvenient forum. The Corporation and the Mortgagee agree that a judgment or order in any action or proceeding contemplated in this debenture may be enforced in any jurisdiction in any manner provided by law. For greater certainty, the Mortgagee may serve legal process in any manner permitted by law and may bring an action or proceeding against the Corporation or the property or assets of the Corporation in the courts of any jurisdiction. Notwithstanding the provision in this Section 43 providing for the governance by and construction and interpretation of this debenture in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein, it is acknowledged and agreed that if the Mortgaged Property which comprises real estate or real estate interests is situated in a province other than Ontario (the "**Other Province**") the laws of the Other Province and the laws of Canada applicable therein shall govern with respect to the security hereby constituted against the Mortgaged Property located in the Other Province which comprises real estate or real estate interests situated in the Other Province and with respect to the enforcement of the Mortgagee's rights and remedies under this debenture in respect thereof and that in construing and interpreting this debenture with respect to such security, the laws of the Other Province and the laws of Canada applicable therein shall apply. All terms, definitions and other provisions of the Credit Agreement incorporated by reference into this debenture shall be determined as if such terms, definitions and other provisions were interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

44. **Currency**. Except where otherwise expressly provided in this debenture, all amounts in this debenture are stated and shall be paid in the lawful currency of Canada.

45. **Amendment**. No amendment of this debenture shall be binding unless in writing and signed by the parties.

46. **Severable**. If any provision of this debenture is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected.

47. **Successors and Assigns**. This debenture shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and permitted assigns, all assignments to be in accordance with the provisions of the Credit Agreement. The Mortgagee may assign, transfer and deliver to any transferee of the obligations secured or any part thereof the liability of the Corporation under this debenture and any security, documents or instruments held by the Mortgagee in respect of this debenture and no such assignment, transfer or delivery shall release the Corporation from its liability; thereafter but subject to the provisions of the Credit Agreement, the Mortgagee shall be fully discharged from all responsibility with respect to this debenture and security, documents and instruments so assigned, transferred or delivered and the permitted transferee shall be vested with the powers and rights of the Mortgagee under this debenture and under the security, documents or instruments assigned, transferred or delivered. The Mortgagee, however, shall retain all powers and rights with respect to any security, documents or instruments not assigned, transferred or delivered.

48. **Receipt of Copy**. The Corporation acknowledges receipt of a copy of this debenture.

49. **Manitoba.**

The following shall apply with respect to any Mortgaged Property located in Manitoba:

(a) ***The Farm Lands Ownership Act*** **(Manitoba).** The registration of this debenture does not contravene the provisions of *The Farm Lands Ownership Act* (Manitoba) because the Mortgaged Property located in Manitoba is not farm land as defined in *The Farm Lands Ownership Act* (Manitoba).

(b) ***The Mortgage Act*** **(Manitoba).** *The Mortgage Act* (Manitoba) provides that the Corporation can obtain free of charge from the Mortgagee a Statement of Debts secured by this debenture once every twelve (12) months, or as needed for pay off or sale.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF the Corporation has caused this debenture to be executed by its duly authorized officers on December 30, 2019.

NYGARD PROPERTIES LTD.

By: _____
Name: James R. Bennett
Title: Authorized Signing Officer

By: _____
Name:
Title:

SCHEDULE "A"

OWNED REAL PROPERTY

1. 1 Niagara Street, Toronto, Ontario
   Legally described as:
   PIN 21240-0094 (LT); PT LT 18 SEC A PL MILITARY RESERVE TORONTO AS IN CT603366, EXCEPT THE EASEMENT THEREIN; CITY OF TORONTO

2. 1771 Inkster Boulevard, Winnipeg, Manitoba
   Title Number: 2286531/1
   Legally described as:
   FIRSTLY: SP LOT 6 PLAN 26533 WLTO IN OTM LOTS 2 AND 3 PARISH OF KILDONAN
   SECONDLY: PARCEL 3 PLAN 11773 WLTO EXC OUT OF SAID PARCEL ALL MINES AND MINERALS WHETHER SOLID LIQUID OR GASEOUS AND THE RIGHT TO WORK THE SAME IN SAID PARISH

3. 1300, 1302, 1340 Notre Dame Avenue, Winnipeg, Manitoba
   Title Number: 2983434/1
   Legally described as:
   PARCELS A, B AND C PLAN 64026 WLTO IN OTM LOTS 50 AND 51 PARISH OF ST JAMES

4. 702, 708 Broadway, Winnipeg, Manitoba
   Title Number: 2337279/1
   Legally described as:
   LOT 1 PLAN 48063 WLTO IN RL 79 PARISH OF ST JAMES

REAL PROPERTY LEASES

Nil

SCHEDULE "B"

DEFINITIONS

In the attached debenture:

(1) "**Business Day**" has the meaning given to it in the Credit Agreement.

(2) "**Canadian Holdings**" means Nygard Enterprises Ltd.

(3) "**Charged Property**" means the property subject to the floating charge contained in Section 4(4) of this debenture.

(4) "**Collateral Agent**" has the meaning given to it in the Credit Agreement.

(5) "**Corporation**" has the meaning given to it in Section 1 of this debenture.

(6) "**Credit Agreement**" means the Credit Agreement dated as of December [__], 2019 between U.S. Holdings, Canadian Holdings, certain subsidiaries of U.S. Holdings and Canadian Holdings as Loan Parties, the other Lenders from time to time party thereto, Second Avenue Capital Partners, LLC, as Documentation Agent and a Lender and the Mortgagee as Administrative Agent and Collateral Agent, as amended, assigned, assumed, extended, renewed, supplemented, restated, refinanced, replaced and/or modified from time to time.

(7) "**Credit Parties**" has the meaning given to it in the Credit Agreement.

(8) "**Documentation Agent**" has the meaning given to it in the Credit Agreement.

(9) "**Event of Default**" has the meaning given to it in the Credit Agreement.

(10) "**Guarantor**" has the meaning given to it in the Credit Agreement.

(11) "**Leased Real Property**" has the meaning given to it in Section 4(2) of this debenture.

(12) "**Leases**" has the meaning given to it in Section 4(2) of this debenture.

(13) "**Lender**" has the meaning given to it in the Credit Agreement.

(14) "**Loan Documents**" has the meaning given to it in the Credit Agreement.

(15) "**Loan Parties**" has the meaning given to it in the Credit Agreement.

(16) "**Mortgaged Property**" means the property and assets subject to the fixed and specific mortgage (including the mortgage by way of sublease) and charge contained in Sections 4(1), 4(2) and 4(3) of this debenture.

(17) "**Mortgagee**" means White Oak Commercial Finance, LLC, in its capacity as Collateral Agent, and its successors and assigns.

(18) "**Obligations**" means the Obligations of the Corporation pursuant to and as defined in the Credit Agreement, including the obligations of the Corporation pursuant to Article XI of the Credit Agreement.

(19) "**obligations secured**" has the meaning given to it in Section 3 of this debenture.

(20) "**Owned Real Property**" has the meaning given to it in Section 4(1) of this debenture.

(21) "**Principal Sum**" means $50,000,000 in United States Dollars.

(22) "**Property**" means the Charged Property and the Mortgaged Property.

(23) "**receiver's certificates**" has the meaning given to it in Section 17(7) of this debenture.

(24) "**Third Party Leases**" has the meaning given to it in Section 4(3) of this debenture.

(25) "**U.S. Holdings**" means Nygard Holdings (USA) Limited.

This is Exhibit "I" referred to in the Affidavit of Robert L. Dean affirmed March 9, 2020.

Mary E. Rushing

A Notary Public in and for the State of North Carolina in the United States of America

Mecklenburg County
Expires 12/10/2023

DEBENTURE

NYGARD PROPERTIES LTD.

Principal Sum: **USD $50,000,000**

1. **Acknowledgement and Promise to Pay.** Nygard Properties Ltd. (the "**Corporation**") for value received, hereby acknowledges itself indebted to the Mortgagee, the Lender, the Credit Parties and certain others from time to time as provided in Section 24 of this debenture, and promises to pay on demand the Principal Sum to or to the order of the Mortgagee, in lawful money of the United States. The Corporation hereby expressly waives presentment for payment, notice of non-payment and protest. The Corporation promises to pay, on demand, interest in like money on the amount of the Principal Sum outstanding from time to time and on all other amounts from time to time owing hereunder at the rate of twenty-five (25%) percent *per annum*, such interest to accrue on a daily basis and to be calculated and payable monthly on the first Business Day of each and every month, commencing on the first of the month following the date of this debenture. Such interest will be payable both before and after maturity, demand, default and judgment. The Corporation promises to pay interest, on demand, at the same rate, on overdue interest, calculated and payable monthly on the first Business Day of each and every month until paid.

2. **Place of Payment.** The Corporation promises to pay the Principal Sum, interest and all other amounts from time to time owing hereunder at the office of the Mortgagee at which any notice may be given to the Mortgagee in connection with this debenture or at such other place as the Mortgagee may designate by notice to the Corporation.

3. **Continuing Security.** This debenture secures: the Obligations, including without limitation, payment and performance by the Corporation to the Mortgagee of all debts, liabilities and obligations, including revolving indebtedness, present or future, direct or indirect, absolute or contingent, matured or not, whether from time to time reduced and thereafter increased, or entirely extinguished and thereafter incurred again, now or at any time and from time to time due or owing by the Corporation in any currency, whether arising from dealings between the Corporation and the Mortgagee or from any other dealings or proceedings by which the Mortgagee may be or become in any manner whatever a creditor of the Corporation and whenever incurred and whether incurred by the Corporation alone or with another or others and whether as principal or surety, in each case arising under or by virtue of or otherwise in connection with the Credit Agreement (all of the foregoing being herein collectively called the "**obligations secured**").

4. **Security.** As continuing security for the due and punctual payment of the Principal Sum, interest overdue interest and all other obligations secured, the Corporation does hereby:

(1) create a security interest in and grant, mortgage, assign, transfer and charge as and by way of a fixed and specific mortgage and charge to and in favour of the Mortgagee, all the right, title, fee simple interest and benefit of the Corporation in, to, under or in respect of the real and immovable property described in Schedule "A" under the heading Owned Real Property (the "**Owned Real Property**") together with all rights and interest therein, now owned or hereafter

acquired by the Corporation including, without limitation, all licences, easements, rights-of-way, privileges, benefits, immunities, rights and options connected therewith and/or appertaining thereto and all amendments thereto, replacements thereof and substitutions therefor from time to time, and all buildings, erections, structures, improvements, fixtures, fixed plant, fixed machinery and fixed equipment at present situate thereon or therein or which may at any time hereafter be constructed or brought or placed thereon or therein or used in connection therewith, including in each and all cases any greater or other right, title and interest therein or in any part thereof which the Corporation may acquire and hold during the currency of this debenture;

(2) subject to the exception set out in Section 8 hereof, demise, sub-lease and charge as and by way of a fixed and specific mortgage by way of sublease and charge to and in favour of the Mortgagee, all the right, title, interest and benefit of the Corporation, in, to, under or in respect of all its leasehold interests in real and immovable property, including buildings and fixtures (the "**Leased Real Property**") now held or hereafter acquired by the Corporation including, without limitation, the leasehold interests in the lands and premises described in and demised by the real property leases described in Schedule "A" under the heading Real Property Leases and any modifications, amendments, restatements, assignments and renewals thereof from time to time and all leases and agreements entered into from time to time superseding or replacing such real property leases including in each and all cases any greater right, title and interest therein or in any part thereof which the Corporation may acquire and hold during the currency of this debenture, including, without limitation, any right or option to renew and any option or right of first refusal to lease or to purchase that may be contained therein and any rights acquired in connection therewith (collectively, the "**Leases**"); and

(3) create a security interest in, assign, transfer and set over unto and in favour of the Mortgagee, its successors and assigns, as and by way of a general assignment of all of its right, title, estate and interest present and future, in and to:

(i) any and all existing or future leases, subleases, agreements to lease or sublease or other occupancy or tenancy agreements relating to the whole or any part of the Owned Real Property or the Leased Real Property and all existing or future licenses or concessions whereby any person is given the right (other than an easement or a right in the nature of an easement) to use or occupy the whole or any part or parts of the Owned Real Property or the Leased Real Property and all extensions, amendments, renewals or substitutions thereof or therefor which may hereafter be effected or entered into (collectively the "**Third Party Leases**"), and all benefits, powers and advantages of the Corporation to be derived therefrom and all covenants, obligations and agreements of the tenants thereunder;

(ii) all rents and other moneys now due and payable or hereafter to become due and payable under the Third Party Leases, and each guarantee of or indemnity in respect of the obligations of the tenants thereunder with full power to demand, sue for recovery, receive and give receipts for all such rents and other moneys

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and otherwise to enforce the rights of the Corporation thereto in the name of the Corporation;

(iii) any and all existing or future agreements, contracts, licenses, permits, plans and specifications, bonds, letters of credit, letters of guarantee or other documents or instruments affecting or relating to the Owned Real Property or the Leased Real Property or any part or parts thereof or the construction, use, operation or maintenance of buildings, erections, structures, improvements and fixtures thereon and all extensions, amendments, renewals or substitutions thereof or therefor which may hereafter be effected or entered into and all benefit, power and advantage of the Corporation to be derived therefrom; and

(iv) all proceeds from any and all existing or future insurance policies in respect of property damage and business interruption insurance pertaining to the Mortgaged Property and all proceeds of expropriation or similar taking of the Owned Real Property or the Leased Real Property or any part or parts thereof and all benefit, power and advantage of the Corporation to be derived therefrom; and

(4) create a security interest in and grant, mortgage, assign, transfer, pledge and charge as and by way of a floating charge to and in favour of the Mortgagee all of its undertaking, property and assets, real and personal, immovable and movable (including, without limitation, all goods, intangibles, instruments, investment property, documents of title, chattel paper and money), located at, on or used in conjunction with, the Owned Real Property or the Leased Real Property including, without limitation, all inventories, and good-will, now owned or hereafter acquired by the Corporation, of whatsoever nature, kind or description and wherever situate (other than such thereof as may from time to time be validly and effectively subjected to the charges created under Sections 4(1), 4(2) and 4(3) of this debenture). The floating charge hereby created shall not hinder or prevent the Corporation, unless the security hereby constituted shall have become enforceable, from disposing of or dealing with the subject matter of the floating charge in the ordinary course of the business of the Corporation and for the purpose of carrying on the same; provided that such action is not in breach of any specific provision of or covenant in this debenture, the Credit Agreement or any other Loan Documents.

5. **Habendum**. To have and to hold the Property and all rights hereby conferred to the Mortgagee forever for the uses and purposes with the powers and authorities and subject to the terms and conditions herein set forth.

6. **Definitions**. Unless otherwise provided, the capitalized terms used in this debenture shall have the meanings ascribed to them in Schedule "B".

7. **Attachment**. Subject to Section 29, the security interests created by this debenture are intended to attach when this debenture is executed by the Corporation and delivered to the Mortgagee.

8. **Reservation of Last Day of Lease**. The last day of any term of years reserved by any lease or any extension or renewal thereof, oral or written, or any agreement therefor, now held or

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hereafter acquired by the Corporation, is hereby excepted out of the security created hereby or by any other instrument supplemental hereto and does not and shall not form part of the Property charged hereby or by any such other instrument, but the Corporation shall stand possessed of the reversion remaining in the Corporation of any leasehold interest for the time being demised as aforesaid, upon trust to assign and dispose thereof as the Mortgagee shall direct; and upon any sale of the leasehold interest, or any part thereof, the Mortgagee for the purpose of vesting the aforesaid reversion of any such term or any renewal thereof in any purchaser or purchasers thereof, shall be entitled by deed or other writing to appoint such purchaser or purchasers or any other person or persons a new trustee or trustees of the aforesaid reversion of any such term or renewal thereof in the place of the Corporation and to vest the same accordingly in the new trustee or trustees so appointed, freed and discharged from any obligation respecting the same.

9. **Consents.** Nothing herein shall constitute an assignment or attempted assignment of any contract, agreement, permit or license which by the provisions thereof or by law is not assignable or which requires the consent of a third party to its assignment unless such consent has been obtained or is deemed to have been obtained or has been dispensed with by court order. Upon such consent being obtained, being deemed to have been obtained or waived or having been dispensed with by court order, this debenture shall apply to the applicable contract, agreement, permit or license without regard to this section and without the necessity of any further assurance to effect the assignment thereof. Unless and until the consent to assignment is obtained or is deemed to have been obtained or is dispensed with by court order as provided above, the Corporation shall, to the extent it may do so by law or pursuant to the provisions of the document or interest referred to therein, hold all benefit to be derived from the applicable contracts, agreements, permits or licenses in trust for the Mortgagee, (including, without limitation, the Corporation's beneficial interest in any contract, agreement, permit or license which may be held in trust for the Corporation by a third party) as additional security for payment of the obligations secured and shall deliver up all such benefit to the Mortgagee, forthwith upon demand by the Mortgagee.

10. **Mortgagee Not To Be Obligated.**

(1) Nothing herein contained shall have the effect of making the Mortgagee responsible for the collection of any accounts or rents or any part thereof or for the performance of any obligations, covenants, terms or conditions in favour of any lessee or in favour of any party to any other agreement or contract with the Corporation or to whom the Corporation may be otherwise obligated. The Mortgagee shall be liable to account only for such moneys as may actually come into its hands, and any such moneys when received by it following an Event of Default and for so long as such Event of Default is continuing may be applied on account of any of the principal, interest and other amounts secured hereby. The Mortgagee shall not be deemed by virtue only of the grant of this debenture to be a mortgagee in possession of the Property or any portion thereof.

(2) Each of the protections, benefits, reliances, indemnities and immunities offered to the Mortgagee in accordance with and pursuant to the Credit Agreement or any other Loan

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Documents shall be afforded to, are extended to, and shall be enforceable by the Mortgagee in this debenture.

(3) White Oak Commercial Finance, LLC has been appointed the Collateral Agent for the other Credit Parties pursuant to Article IX of the Credit Agreement. It is expressly understood and agreed by the parties to this Debenture that any authority conferred upon the Collateral Agent hereunder is subject to the terms of the delegation of authority made by the Credit Parties to the Collateral Agent pursuant to the Credit Agreement, and that the Collateral Agent has agreed to act (and any successor the Collateral Agent shall act) as such hereunder only on the express conditions contained in such Article IX. Any successor the Collateral Agent appointed pursuant to Article IX of the Credit Agreement shall be entitled to all the rights, interests and benefits of the Collateral Agent hereunder.

11. **Covenants of the Corporation.** The Corporation hereby covenants and agrees with the Mortgagee as follows:

(1) **Payment and Performance** - The Corporation shall pay and perform the Obligations in full as and when the same shall become due under the Loan Documents and when they are required to be performed thereunder.

12. **Representations and Warranties.**

The Corporation represents, warrants, covenants and agrees that each of the representations, warranties, covenants and other agreements of the Corporation under and as contained in the Credit Agreement are hereby incorporated herein in their entirety by this reference.

13. **Events of Default.** The Principal Sum, interest and all other obligations secured shall become immediately payable and the security hereby constituted shall become enforceable upon the occurrence and continuation of an Event of Default.

14. **Waiver of Default.** The Mortgagee may by notice to the Corporation waive in whole or in part any default of the Corporation on such terms and conditions as the Mortgagee may determine, but no such waiver shall be taken to affect any subsequent default or the rights resulting therefrom. No delay by the Mortgagee in the enforcement of its rights under this debenture shall be deemed to constitute a waiver of a default.

15. **Remedies.** Whenever the security hereby constituted shall have become enforceable, the Mortgagee may proceed to realize the security hereby constituted and to enforce its rights:

(1) by entry, with the right to have, hold, use, occupy, possess and enjoy the Property or any part thereof without the let, suit, hindrance, interruption or denial of the Corporation, its successors or assigns;

(2) by entry, with the right to make such arrangements for completing the construction of, repairing or putting in order any buildings or other improvements on the Property or any part thereof, or for inspecting, taking care of, leasing, collecting the rents of and managing generally the Property or any part thereof as it may deem expedient, and all costs, charges and expenses,

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including allowances for the time and service of any employee of the Mortgagee or other person appointed for the above purposes shall be added to the Principal Sum and shall be secured hereby and payable forthwith together with interest thereon calculated at the rate and at the times and in the manner provided for herein for interest arrears on the Principal Sum;

(3) by the appointment, by an instrument in writing, of any person or persons, whether an officer or officers or an employee or employees of the Mortgagee or not, as a receiver (which term also includes an interim receiver and a receiver and manager) or receivers of all or any part of the Property, and the Mortgagee may remove any receiver or receivers so appointed and appoint another or others in his or their stead;

(4) under the provisions of Section 18 or other sale permitted at law;

(5) by proceedings in any court of competent jurisdiction for the appointment of one or more receivers, receivers and managers, or interim receivers under any applicable law;

(6) by proceeding in any court of competent jurisdiction for foreclosure and/or judicial sale;

(7) in such other manner as is permitted by the Credit Agreement; and

(8) by any other action, suit, proceeding or other remedy authorized or permitted by law or by equity.

16. **Remedies Cumulative.** No remedy for the realization of the security hereby constituted or for the enforcement of the rights of the Mortgagee shall be exclusive of or dependent upon any other such remedy but any one or more of such remedies may from time to time be exercised independently or in combination.

17. **Receiver.** Subject to the provisions of any instrument in writing appointing a receiver or receivers, upon the appointment hereunder of a receiver of the Property or any part thereof, the following provisions shall apply:

(1) Every such receiver shall have unlimited access to the Property as agent and attorney for the Corporation (which right of access shall not be revocable by the Corporation) and shall have full power and unlimited authority to, without limitation:

(i) take possession of the Property or any part thereof;

(ii) carry on or concur in carrying on the business of the Corporation;

(iii) collect the rents and profits from leases and tenancies whether created before or after these presents;

(iv) lease or concur in leasing any portion of the Property which may become vacant on such terms and conditions as he considers advisable and enter into and execute leases, accept surrenders and terminate leases;

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(v) complete the construction of any building or buildings or other erections or improvements on the Property left by the Corporation in an unfinished state or award the same to others to complete and purchase, repair and maintain any personal property including, without limitation, appliances and equipment, necessary or desirable to render the premises operable or rentable, and take possession of and use or permit others to use all or any part of the Corporation's materials, supplies, plans, tools, equipment (including appliances) and property of every kind and description;

(vi) insure, manage, operate, repair, alter or extend the Property; and

(vii) sell, lease or otherwise dispose of all or any part of the Property,

and the Corporation undertakes to ratify and confirm whatever any such receiver may do with respect to the Property.

(2) The Mortgagee may at its discretion vest the receiver with all or any of the rights and powers of the Mortgagee.

(3) The Mortgagee may fix the remuneration of the receiver who shall be entitled to deduct the same out of the revenue or the sale proceeds of the Property.

(4) Every such receiver shall be deemed the agent or attorney of the Corporation and, in no event, the agent of the Mortgagee and the Mortgagee shall not be in any way responsible for the acts or omissions of any such receiver except in the case of any gross negligence, wilful misconduct, dishonesty or fraud of such receiver.

(5) The appointment of any such receiver by the Mortgagee shall not, to the extent permitted by law, result in or create any liability or obligation on the part of the Mortgagee to the receiver or to the Corporation or to any other person and no appointment or removal of a receiver and no actions of a receiver shall constitute the Mortgagee a mortgagee in possession or responsible as such.

(6) No such receiver shall be liable to the Corporation to account for monies other than monies actually received by him in respect of the Property, or any part thereof, and out of such monies so received every such receiver shall, in the following order, pay:

(i) his remuneration as aforesaid;

(ii) all costs and expenses of every nature and kind incurred by him in connection with the exercise of his powers and authority hereby conferred;

(iii) interest, principal and other money which may, from time to time, be or become charged upon the Property in priority to these presents, including taxes;

(iv) to the Mortgagee all interest, principal and other monies due hereunder to be paid in such order as the Mortgagee in its discretion shall determine;

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(v) and thereafter, every such receiver shall be accountable to the Corporation for any surplus as required by applicable law.

The remuneration and expenses of the receiver shall be paid by the Corporation on demand and shall be a charge on the Property and shall bear interest from the date of demand at the same rate as applies to the principal hereby secured.

(7) Every such receiver may, with the consent in writing of the Mortgagee, borrow money for the purpose of maintaining, protecting or preserving the Property or any part thereof, or for the purpose of carrying on business of the Corporation, and any receiver may issue certificates (in this sub clause called "**receiver's certificates**") for such sums as will, in the opinion of the Mortgagee, be sufficient for obtaining security upon the Property or any part thereof for the amounts from time to time so required by the receiver, and such receiver's certificate may be payable either to order or to bearer and may be payable at such time or times, and shall bear such interest as the Mortgagee may approve and the receiver may sell, pledge or otherwise dispose of the receiver's certificates in such manner and may pay such commission on the sale thereof, as the Mortgagee may consider reasonable, and the amounts from time to time payable by virtue of such receiver's certificates shall form a charge upon the Property in priority to the amounts secured under this debenture;

(8) Save as to claims for accounting to which the Corporation is entitled under applicable law pursuant to clause (6) above, the Corporation hereby releases and discharges any such receiver from every claim of every nature, whether sounding in damages or not which may arise or be caused to the Corporation or any person claiming through or under him by reason or as a result of anything done by such receiver unless such claim be the direct and proximate result of gross negligence, wilful misconduct, dishonesty or fraud.

(9) The Mortgagee may, at any time and from time to time, terminate any such receivership by notice in writing to the Corporation and to any such receiver.

(10) The statutory declaration of an officer of the Mortgagee as to default under the provisions of these presents and as to the due appointment of the receiver pursuant to the terms hereof shall be sufficient proof thereof for the purposes of any person dealing with a receiver who is ostensibly exercising powers herein provided for and such dealing shall be deemed, as regards such person, to be valid and effectual.

(11) The rights and powers conferred herein in respect of the receiver are supplemental to and not in substitution of any other rights and powers which the Mortgagee may have.

18. **Sales.**

(1) **Method of Sale** - Upon the security hereby constituted becoming enforceable and the Mortgagee making demand hereunder, the Mortgagee may, upon the expiry of any applicable notice period, either before or after any entry, sell and dispose of the Property or any part thereof including, without limitation, any rents and profits thereof either as a whole or in separate parcels, at public auction or by tender or by private sale at such time or times as the Mortgagee may determine, and may make such sale either for cash or credit or part cash and

part credit, and with or without advertisement, and upon such conditions as to upset and price and with or without a reserve bid as the Mortgagee may deem proper.

(2) **Rescission and Resale** - The Mortgagee may also rescind or vary any contract of sale that may have been entered into and resell with or under any of the powers conferred hereunder and adjourn any such sale from time to time without being answerable for any loss occasioned by such sale or by any postponement thereof.

(3) **Deeds** - The Mortgagee may execute and deliver to the purchaser or purchasers of the Property or any part thereof good and sufficient deeds, assurances and conveyances for the same, the Mortgagee being hereby constituted the irrevocable attorney of the Corporation for the purpose of making such sale and executing such deeds, assurances and conveyances.

(4) **Sale, Bars, Claims through Corporation** - Any such sale made as aforesaid shall be a perpetual bar both in law and in equity against the Corporation and all other persons claiming the said property or any part thereof, by, from, through or under the Corporation.

(5) **Sale Proceeds** - In the case of a sale for cash or credit, or part cash and part credit, the Mortgagee shall be bound to pay to the Corporation only such moneys as have been actually received from purchasers after the satisfaction of all claims of the Mortgagee including payment of any costs, charges and expenses (including without limitation all solicitors' fees as between a solicitor and his client) incurred by the Mortgagee in the taking, recovering, collecting, realising on, keeping possession of, and any sale of, the Property.

19. **Prior Encumbrances and Expenses.** The Mortgagee may pay the amount of any encumbrance, lien or charge now or hereafter existing, or to arise or to be claimed upon the Property having priority over this debenture, including any taxes, utility charges or other rates on the Property, or any of them, and may pay all costs, charges and expenses and all solicitors' fees as between a solicitor and his client, which may be incurred in taking, recovering and keeping possession of the Property, or in protecting, repairing, restoring or preserving the Property, and generally in any proceedings or steps of any nature whatever properly taken in connection with or to realize this security, or in respect of the collection of any overdue interest, principal, insurance premiums or any other monies whatsoever payable by the Corporation hereunder whether any action or any judicial proceedings to enforce such payments has been taken or not. The amount so paid shall be added to the debt hereby secured and be a charge on the Property and shall bear interest at the rate aforesaid, and shall be payable forthwith by the Corporation to the Mortgagee. Further, the non-payment of such amount shall entitle the Mortgagee to make demand hereunder and to exercise the remedies hereby given. In the event of the Mortgagee paying the amount of any such encumbrance, lien or charge, taxes or rates, either out of the monies advanced on the security or otherwise, the Mortgagee shall be entitled to all the rights, equities and securities of the person or persons, company, corporation, or Government so paid.

20. **No Set-Off, etc.** The Principal Sum, interest and other amounts hereby secured will be paid and shall be assignable free from any right of set-off or counterclaim or equities between the Corporation and the Mortgagee or any other person or persons.

Initials

21. **No Merger.** The taking of a judgment or judgments under any of the covenants in this debenture shall not operate as a merger of the covenant or affect any other right of the Mortgagee under this debenture or otherwise.

22. **Lien in Addition, etc.** This debenture is in addition to and not in substitution for any other security now or hereafter held by the Mortgagee or any other person. No payment to the Mortgagee shall constitute payment on account of any of the Principal Sum, interest or other amounts from time to time owing hereunder unless specifically so appropriated by the Mortgagee by notation of such payment on this debenture. The taking of any action or proceedings or refraining from so doing, or any other dealing with any other security for the monies secured hereby, shall not release or affect the charge of this debenture and the taking of the security hereby granted or any proceedings hereunder for the realization of the security hereby granted shall not release or affect any other security held by the Mortgagee for the monies hereby secured.

23. **Discharge of Debenture.** Upon the expiry of the obligations secured or termination of the Credit Agreement as provided therein, then this debenture and the rights hereby granted shall cease and be void and thereupon the Mortgagee shall at the request and at the expense of the Corporation, its successors or assigns, cancel and discharge the mortgage and charge of this debenture and execute and deliver to the Corporation, its successors or assigns, such deeds and other instruments as shall be requisite to cancel and discharge the mortgage and charge hereby constituted; provided however that this debenture shall not be deemed to have been discharged or redeemed by reason of the account of the Corporation having ceased to be in debit at any time or times prior to such cancellation and discharge. No postponement or partial release or discharge of the charge in respect of all or any part of the Property shall in any way operate or be construed so as to release and discharge the security hereby constituted in respect of the Property except as therein specifically provided, or so as to release or discharge the Corporation from its liability to the Mortgagee to fully pay and satisfy the Principal Sum, interest and all other monies due or remaining unpaid by the Corporation to the Mortgagee.

24. **Pledge of Debenture.** Notwithstanding the provisions of Section 23, this debenture at any time and from time to time may be assigned, transferred, pledged, hypothecated, lodged, deposited or delivered by the Corporation to the Mortgagee as security for advances or loans to or for indebtedness or other obligations or liabilities of the Corporation to the Mortgagee and/or such other parties as the Mortgagee and the Corporation may in writing agree and in such event this debenture shall not be deemed to have been discharged or redeemed or the amounts payable hereunder to have been satisfied or reduced by reason of the account of the Corporation having ceased to be in debit while this debenture remained so assigned, transferred, pledged, hypothecated, lodged, deposited or delivered.

25. **Demand Debenture.** For greater certainty all amounts payable under this debenture are payable on demand, it being understood that demand may be made only in accordance with the terms and conditions of the Credit Agreement.

26. **Quiet Possession.** Subject to the provisions of the Credit Agreement, until an Event of Default has occurred, it shall be lawful for the Corporation to peaceably and quietly have, hold, use, occupy, possess and enjoy the Property, and receive and take the rents and profits thereof to its

own use and benefit, without let, suit, hindrance, interruption or denial by the Mortgagee, or any other person or persons whomsoever lawfully claiming, or who shall, or may lawfully claim by, from, under or in trust for it, them or any or either of them. If any Event of Default has occurred and is continuing, the Mortgagee may peaceably and quietly enter into and hold and occupy the Property without hindrance, interference or denial of the Corporation or of anyone claiming under it or of any prior encumbrances whatsoever.

27. **Deemed Covenants Excluded.** The covenants deemed to be included in a charge by subsection 7(1) of the *Land Registration Reform Act* (Ontario) shall be and are hereby expressly excluded from the terms of this debenture.

28. **No Obligation to Advance.** Neither the execution and delivery nor the registration of this debenture shall for any reason whatsoever obligate or bind the Mortgagee to advance any monies, or, having advanced a portion, obligate the Mortgagee in any way to advance the balance thereof; but nevertheless the charge shall take effect forthwith upon execution of this debenture and shall operate as security for the actual amount of all the debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Corporation to the Mortgagee or the Lender or any other Credit Party including without limitation those at any time owing under the Credit Agreement, the other Loan Documents and otherwise owing under this debenture.

29. **After Acquired Property.** The Corporation covenants and agrees that if and to the extent that any of its right, title and interest in any of the Property is not acquired until after delivery of this debenture, this debenture shall nonetheless apply thereto and the mortgages, charges, assignments, transfers, pledges and security interests in favour of the Mortgagee hereby created shall attach to such Property, subject to Sections 8 and 9, at the same time as the Corporation acquires rights therein, without the necessity of any further mortgage, charge, pledge, assignment, transfer, grant of security interest or assurance. The Corporation covenants and agrees to execute such further and other documentation and/or instruments in respect of any after-acquired property, at such time or times and in such form and manner as the Mortgagee may reasonably request.

30. **Greater Estate.** The Corporation expressly covenants and agrees that if the Corporation either alone or together with any co-owners of interests in any of the Leased Real Property described in Section 4(2) shall acquire fee title or any other greater estate to such leasehold land and premises, then, to the extent that the leasehold estate and fee title or such other greater estate merge, the lien of this debenture shall attach, extend to, cover and be a lien upon the Corporation's interest in such fee simple title or other greater estate.

31. **Conflicts.** This debenture is being entered into pursuant to the Credit Agreement. In the event of any conflict, inconsistency, ambiguity or difference between the terms of this debenture and the terms of the Credit Agreement, the terms of the Credit Agreement shall govern and be paramount and any such provision in this debenture shall be deemed to be amended to the extent necessary to eliminate any such conflict, inconsistency, ambiguity or difference. Notwithstanding the foregoing, if there is any right or remedy of the Mortgagee set out in this debenture or any part hereof which is not set out or provided for in the Credit Agreement, such additional right or remedy shall not constitute a conflict or inconsistency and the Mortgagee

Initials

shall, notwithstanding this Section 31, be entitled to exercise such rights and enforce such remedies.

32. **Amalgamation**. The Corporation acknowledges and agrees that in the event it amalgamates with any other company or companies it is the intention of the parties hereto that the term "Corporation" when used herein shall apply to each of the amalgamating companies and to the amalgamated company, such that the mortgages, charges, assignments, transfers, pledges and security interests granted hereby: (i) shall extend to the "Property" (as that term is defined herein) owned by each of the amalgamating companies and the amalgamated company at the time of amalgamation and to any "Property" thereafter owned or acquired by the amalgamated company; and (ii) shall secure the amounts due and owing under the Credit Agreement from each of the amalgamating companies and the amalgamated company at the time of amalgamation and any amounts due and owing under the Credit Agreement by the amalgamated company thereafter arising. The mortgages, charges, assignments, transfers, pledges and security interests granted hereby shall attach to the "Property" owned by each company amalgamating with the Corporation and by the amalgamated company, at the time of the amalgamation, and shall attach to any "Property" thereafter owned or acquired by the amalgamated company when such becomes owned or is acquired. For greater certainty, nothing in this Section 32 shall be interpreted or deemed to permit the Corporation to merge, combine, consolidate or amalgamate in any manner whatsoever with any other person or entity, except as permitted by the terms of the Credit Agreement.

33. **Extension of Time/Forbearance**. The Mortgagee may grant extensions of time and other indulgences, take and give up securities, accept compositions, grant releases and discharges, release the Property to third parties and otherwise deal with the Corporation's guarantors or sureties and others and with the Property as the Mortgagee may see fit without prejudice to the liability of the Corporation to the Mortgagee or the Mortgagee's rights, remedies and powers under this debenture. No extension of time, forbearance, indulgence or other accommodation now, previously or hereafter given by the Mortgagee to the Corporation shall operate as a waiver, alteration or amendment of the Mortgagee's rights or to otherwise preclude the Mortgagee from enforcing such rights.

34. **Power of Attorney**. The Corporation hereby irrevocably constitutes and appoints each officer or director of the Mortgagee from time to time, or of any receiver appointed (as agent of the Corporation) as provided for in this debenture, as the true and lawful attorney of the Corporation with full power of substitution in the name of the Corporation to do all such acts and things and to execute and deliver all such deeds, transfers, leases, contracts, agreements and other documents or instruments on its behalf and in its place (and the same shall bind the Corporation and have the same effect as if such documents were executed by the Corporation) and with the right to use the name of the Corporation, whenever and wherever it may be deemed necessary or expedient in the sole discretion of the Mortgagee, upon and during the continuance of an Event of Default, in connection with carrying out the provisions of this debenture or the exercise of the rights and remedies set forth in this debenture. The Corporation hereby ratifies and agrees to ratify all acts of any such attorney taken or done in accordance with the terms hereof. The Corporation hereby declares that the irrevocable power of attorney granted hereby, being coupled with an interest in favour of the Mortgagee, is given for valuable

consideration and shall remain in full force and effect until this debenture is discharged in accordance with the terms of this debenture.

35. **Statutory Waivers**. To the fullest extent permitted by law, the Corporation waives all of the rights, benefits and protections given by the provisions of any existing or future statute which imposes limitations upon the powers, rights or remedies of a lender or upon the methods of realization of security, including any seize or sue or anti-deficiency statute or any similar provisions of any other statute.

36. **Provisions Reasonable**. The Corporation acknowledges that the provisions of this debenture, and in particular those respecting the rights, remedies and powers of the Mortgagee and any receiver which may be exercised against the Corporation, its business and any Property upon the security hereby constituted becoming enforceable, are commercially reasonable and not manifestly unreasonable.

37. **Further Assurances**. At any time and all times the Corporation will do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all such further acts, deeds, conveyances, mortgages, transfers and assurances in law as the Mortgagee shall reasonably require for the purpose of giving the Mortgagee a valid mortgage, charge or security of the nature herein specified upon all property intended to be covered hereby, and for the better assuring, conveying, mortgaging, assigning, confirmation or charging unto the Mortgagee all and singular the hereditament and premises, estates and property hereby mortgaged and charged, or intended so to be, in favour of the Mortgagee.

38. **Registration**. The Mortgagee shall have the right at any time and without notice to cause this debenture or notice thereof to be registered or filed in any office of public record where the Mortgagee considers it necessary.

39. **Demand or Notice**. Any demand or notice to be made or given in connection with this debenture shall be in writing and shall be duly made or be given if delivered in accordance with of the Credit Agreement at the addresses specified therein.

40. **References**. All references to articles, sections, subsections, paragraphs, subparagraphs, clauses and schedules unless otherwise specified are to articles, sections, subsections, paragraphs, subparagraphs and clauses of and schedules to this debenture.

41. **Headings**. The insertion of headings are for convenience of reference only and shall not affect the interpretation of this debenture.

42. **Number and Gender**. Words importing the singular include the plural and vice versa and words importing gender include all genders.

43. **Governing Law**. This debenture shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. The Corporation and the Mortgagee irrevocably submit to the non-exclusive jurisdiction of the courts of the Province of Ontario and of Canada sitting in Ontario in any action or proceeding arising out of or relating to this debenture and irrevocably agree that all such actions and

Initials _____

proceedings may be heard and determined in such courts. The Corporation and the Mortgagee irrevocably waive, to the fullest extent possible, the defence of an inconvenient forum. The Corporation and the Mortgagee agree that a judgment or order in any action or proceeding contemplated in this debenture may be enforced in any jurisdiction in any manner provided by law. For greater certainty, the Mortgagee may serve legal process in any manner permitted by law and may bring an action or proceeding against the Corporation or the property or assets of the Corporation in the courts of any jurisdiction. Notwithstanding the provision in this Section 43 providing for the governance by and construction and interpretation of this debenture in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein, it is acknowledged and agreed that if the Mortgaged Property which comprises real estate or real estate interests is situated in a province other than Ontario (the "**Other Province**") the laws of the Other Province and the laws of Canada applicable therein shall govern with respect to the security hereby constituted against the Mortgaged Property located in the Other Province which comprises real estate or real estate interests situated in the Other Province and with respect to the enforcement of the Mortgagee's rights and remedies under this debenture in respect thereof and that in construing and interpreting this debenture with respect to such security, the laws of the Other Province and the laws of Canada applicable therein shall apply. All terms, definitions and other provisions of the Credit Agreement incorporated by reference into this debenture shall be determined as if such terms, definitions and other provisions were interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

44. **Currency**. Except where otherwise expressly provided in this debenture, all amounts in this debenture are stated and shall be paid in the lawful currency of Canada.

45. **Amendment**. No amendment of this debenture shall be binding unless in writing and signed by the parties.

46. **Severable**. If any provision of this debenture is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected.

47. **Successors and Assigns**. This debenture shall be binding upon and enure to the benefit of the parties and their respective heirs, executors, administrators, successors and permitted assigns, all assignments to be in accordance with the provisions of the Credit Agreement. The Mortgagee may assign, transfer and deliver to any transferee of the obligations secured or any part thereof the liability of the Corporation under this debenture and any security, documents or instruments held by the Mortgagee in respect of this debenture and no such assignment, transfer or delivery shall release the Corporation from its liability; thereafter but subject to the provisions of the Credit Agreement, the Mortgagee shall be fully discharged from all responsibility with respect to this debenture and security, documents and instruments so assigned, transferred or delivered and the permitted transferee shall be vested with the powers and rights of the Mortgagee under this debenture and under the security, documents or instruments assigned, transferred or delivered. The Mortgagee, however, shall retain all powers and rights with respect to any security, documents or instruments not assigned, transferred or delivered.

48. **Receipt of Copy**. The Corporation acknowledges receipt of a copy of this debenture.

Initials

49. **Manitoba.**

The following shall apply with respect to any Mortgaged Property located in Manitoba:

(a) ***The Farm Lands Ownership Act*** **(Manitoba).** The registration of this debenture does not contravene the provisions of *The Farm Lands Ownership Act* (Manitoba) because the Mortgaged Property located in Manitoba is not farm land as defined in *The Farm Lands Ownership Act* (Manitoba).

(b) ***The Mortgage Act*** **(Manitoba).** *The Mortgage Act* (Manitoba) provides that the Corporation can obtain free of charge from the Mortgagee a Statement of Debts secured by this debenture once every twelve (12) months, or as needed for pay off or sale.

Initials

IN WITNESS WHEREOF the Corporation has caused this debenture to be executed by its duly authorized officers on December 25, 2019.

Witness:

Per: _____
Rebecca Jennings
Ontario Practicing Lawyer
40 King Street West, Suite 5800
Toronto, Ontario M5H 3S1

NYGARD PROPERTIES LTD.

By: _____
Name: James Bennett
Title: Authorized Signing Officer

By: _____
Name:
Title:

I am the Director of the Corporation and have the authority to bind same.

Initials _____

SCHEDULE "A"

Attached to and forming part of a Debenture dated December 25 2019 issued by Nygard Properties Ltd. in favour of White Oak Commercial Finance, LLC

OWNED REAL PROPERTY

1. 1 Niagara Street, Toronto, Ontario
   Legally described as:
   PIN 21240-0094 (LT); PT LT 18 SEC A PL MILITARY RESERVE TORONTO AS IN CT603366, EXCEPT THE EASEMENT THEREIN; CITY OF TORONTO

2. 1771 Inkster Boulevard, Winnipeg, Manitoba
   Title Number: 2286531/1
   Legally described as:
   FIRSTLY: SP LOT 6 PLAN 26533 WLTO IN OTM LOTS 2 AND 3 PARISH OF KILDONAN
   SECONDLY: PARCEL 3 PLAN 11773 WLTO EXC OUT OF SAID PARCEL ALL MINES AND MINERALS WHETHER SOLID LIQUID OR GASEOUS AND THE RIGHT TO WORK THE SAME IN SAID PARISH
   Registered Encumbrances:
   - Caveat No. 228203/1
   - Caveat No. 228344/1
   - Caveat No. 5015790/1
   - Mortgage No. 5016790/1

3. 1300, 1302, 1340 Notre Dame Avenue, Winnipeg, Manitoba
   Title Number: 2983434/1
   Legally described as:
   PARCELS A, B AND C PLAN 64026 WLTO IN OTM LOTS 50 AND 51 PARISH OF ST JAMES
   Registered Encumbrances:
   - Caveat No. 190940/1
   - Caveat No. 191006/1
   - Easement No. 5022170/1
   - Caveat No. 5015790/1
   - Mortgage No. 5016790/1

4. 702, 708 Broadway, Winnipeg, Manitoba
   Title Number: 2337279/1
   Legally described as:
   LOT 1 PLAN 48063 WLTO IN RL 79 PARISH OF ST JAMES
   Registered Encumbrances:
   - Caveat No. 5015790/1
   - Mortgage No. 5016790/1

Initials

REAL PROPERTY LEASES

Nil

ADDRESS FOR SERVICE:

Nygard Properties Ltd.
1771 Inkster Boulevard
Winnipeg, Manitoba R2X 1R3

Attention: _____

White Oaks Commercial Finance, LLC
1155 Avenue of the Americas, 15th Floor
New York, New York 10036

Attention: Glenn Schwartz

FARM LAND OWNERSHIP DECLARATION (MANITOBA)

Province of Ontario

To Wit:

I, James Bennett, of the City of Toronto, in the Province of Ontario, DO SOLEMNLY DECLARE AS FOLLOWS:

1. I, James Bennett, am the Director of Nygard Properties Ltd., the issuer under the Debenture to which this declaration is attached and as such have knowledge of the matters herein declared by me

2. I am of the full age of majority.

3. The registration of this instrument does not contravene the provisions of *The Farm Lands Ownership Act* (Manitoba) because the within Land is not farm land as defined in *The Farm Lands Ownership Act*.

DECLARED BEFORE me at the City of Toronto, in the Province of Ontario, this 25 day of December, 2019.

_____
A Notary Public in and for the Province of Ontario

_____
James Bennett
I am a Director of the corporation and have authority to bind same.

Initials _____

This Schedule "A" is attached to and forms part of a Debenture dated December 25 2019, as issued by Nygard Properties Ltd. in favour of White Oak Commercial Finance, LLC.

Witness:

Per: _____
Rebecca Jennings
Ontario Practicing Lawyer
40 King Street West, Suite 5800
Toronto, Ontario M5H 3S1

NYGARD PROPERTIES LTD.

Per: _____
Name: James Bennett
Title: Authorized Signing Officer
I am the Director of the Corporation and have the authority to bind same.

Initials _____

SCHEDULE "B"

Attached to and forming part of a Debenture dated December 25 2019 issued by Nygard Properties Ltd. in favour of White Oak Commercial Finance, LLC

DEFINITIONS

In the attached debenture:

(1) "**Business Day**" has the meaning given to it in the Credit Agreement.

(2) "**Canadian Holdings**" means Nygard Enterprises Ltd.

(3) "**Charged Property**" means the property subject to the floating charge contained in Section 4(4) of this debenture.

(4) "**Collateral Agent**" has the meaning given to it in the Credit Agreement.

(5) "**Corporation**" has the meaning given to it in Section 1 of this debenture.

(6) "**Credit Agreement**" means the Credit Agreement dated as of December [__], 2019 between U.S. Holdings, Canadian Holdings, certain subsidiaries of U.S. Holdings and Canadian Holdings as Loan Parties, the other Lenders from time to time party thereto, Second Avenue Capital Partners, LLC, as Documentation Agent and a Lender and the Mortgagee as Administrative Agent and Collateral Agent, as amended, assigned, assumed, extended, renewed, supplemented, restated, refinanced, replaced and/or modified from time to time.

(7) "**Credit Parties**" has the meaning given to it in the Credit Agreement.

(8) "**Documentation Agent**" has the meaning given to it in the Credit Agreement.

(9) "**Event of Default**" has the meaning given to it in the Credit Agreement.

(10) "**Guarantor**" has the meaning given to it in the Credit Agreement.

(11) "**Leased Real Property**" has the meaning given to it in Section 4(2) of this debenture.

(12) "**Leases**" has the meaning given to it in Section 4(2) of this debenture.

(13) "**Lender**" has the meaning given to it in the Credit Agreement.

(14) "**Loan Documents**" has the meaning given to it in the Credit Agreement.

(15) "**Loan Parties**" has the meaning given to it in the Credit Agreement.

(16) "**Mortgaged Property**" means the property and assets subject to the fixed and specific mortgage (including the mortgage by way of sublease) and charge contained in Sections 4(1), 4(2) and 4(3) of this debenture.

Initials _____

(17) "**Mortgagee**" means White Oak Commercial Finance, LLC, in its capacity as Collateral Agent, and its successors and assigns.

(18) "**Obligations**" means the Obligations of the Corporation pursuant to and as defined in the Credit Agreement, including the obligations of the Corporation pursuant to Article XI of the Credit Agreement.

(19) "**obligations secured**" has the meaning given to it in Section 3 of this debenture.

(20) "**Owned Real Property**" has the meaning given to it in Section 4(1) of this debenture.

(21) "**Principal Sum**" means $50,000,000 in United States Dollars.

(22) "**Property**" means the Charged Property and the Mortgaged Property.

(23) "**receiver's certificates**" has the meaning given to it in Section 17(7) of this debenture.

(24) "**Third Party Leases**" has the meaning given to it in Section 4(3) of this debenture.

(25) "**U.S. Holdings**" means Nygard Holdings (USA) Limited.

This Schedule "B" is attached to and forms part of a Debenture dated December 23 2019, as issued by Nygard Properties Ltd. in favour of White Oak Commercial Finance, LLC.

Witness:

Per: _____
Rebecca Jennings
Ontario Practicing Lawyer
40 King Street West, Suite 5800
Toronto, Ontario M5H 3S1

NYGARD PROPERTIES LTD.

Per: _____
Name: James Bennett
Title: Authorized Signing Officer
I am the Director of the Corporation and have the authority to bind same.

Initials _____

FillmoreRiley

MEMORANDUM

TO: **District Registrar**
The Property Registry

FROM: **Doug E. Fawcett ***
Fillmore Riley LLP

DATE: **December 30, 2019**

RE: **USD$50,000,000.00 Debenture from Nygard Properties Ltd. to White Oak Commercial Finance, LLC**
408223-122

* Services provided by D. E. Fawcett Law Corporation

Please find attached a Debenture of Nygard Properties Ltd. dated December 25, 2019 issued to White Oak Commercial Finance, LLC in the amount of USD$50,000,000.00.

We would appreciate your review of the Debenture, and if satisfactory to you, to receive your fiat for registration as a mortgage. In the event that the Debenture is acceptable to you, kindly proceed with registration.

Should you have any questions or concerns with respect to the foregoing, please do not hesitate to contact Doug Fawcett at 204-957-8354 immediately.

Thank you for your assistance with this matter.

Sarah Zaborniak

From: Sarah Zaborniak
Sent: January 2, 2020 12:54 PM
To: 'lthielmann@fillmoreriley.com'
Subject: 408223-122/DEF/lct

Date: January 2, 2020

Please be advised that a registration filed by your office at the Land Titles Office has been examined and has been found to contain errors or deficiencies that prevent the completion of the registration process.

You will find below full particulars of the document in question, the nature of the problem or problems, an explanation of what will be required to fix the problem(s), together with land titles contact information.

Particulars of Defective Instrument(s)

INSTRUMENT NUMBER:	REGISTRATION	5140960/1
INSTRUMENT TYPE:		Debenture
FROM/BY:		Nygard Properties Ltd.
TO:		White Oaks Commercial Finance LLC

Nature of the Defect(s):

Evidence is required that White Oak Commercial Finance LLC is in good standing in their jurisdiction.

Please provide correction letter by e-mail to sarah.zaborniak@teranet.ca or via fax 204-948-2492

To correct the above, please submit a correction letter following the guidelines within our Correction Policy along with the required evidence.

https://teranetmanitoba.ca/wp-content/uploads/2019/11/correction_policy.pdf

Please make sure that the correction is:

1) **Signed by a Manitoba Practicing Lawyer**
2) **State that you have the authority from all parties to make this change**

As per our correction policy you will have 10 business days to send a correction, or your document(s) will be rejected.

FillmoreRiley

DOUG E. FAWCETT
Direct Tel (204) 957-8354
Direct Fax (204) 954-0354
dfawcett@fillmoreriley.com

January 2, 2020

LEGAL ASSISTANT
Shaunna Banta
Tel (204) 956-2970 ext. 219
sbanta@fillmoreriley.com
Our File Number: 408223-122/DEF
FRDOCS_9696833.1

Via Email: sarah.zaborniak@teranet.ca

Teranet Manitoba
Winnipeg Land Titles Office
276 Portage Avenue
Winnipeg, MB R3C 0B6

Attention: Sarah Zaborniak

Dear Sirs:

Re: Registration of Debenture No. 5140960/1
From Nygard Properties Ltd. to White Oak Commercial Finance, LLC
Affected Titles No. 2286531/1, No. 2983434/1 and No. 2337279/1

Further with respect to the above referenced Debenture, we enclose herewith the Certificate of Good Standing dated December 30, 2019 certifying that "**White Oak Commercial Finance, LLC**" is duly formed under the laws of the State of Delaware and is in good standing.

I confirm that I am the solicitor and agent for the Mortgagor, Nygard Properties Ltd., and have its authorization to provide the foregoing, and have received authorization to provide the foregoing from Osler, Hoskin & Harcourt LLP, as counsel for White Oak Commercial Finance, LLC.

Should you have any questions or concerns with respect to the foregoing, please do not hesitate to contact the undersigned.

Yours truly,

FILLMORE RILEY LLP

Per:

DOUG E. FAWCETT *

DEF/lct
Encls.

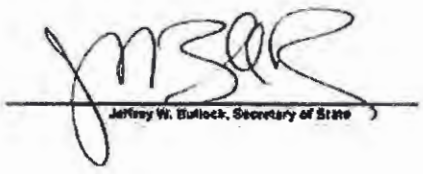
*Services provided by D. E. Fawcett Law Corporation

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "WHITE OAK COMMERCIAL FINANCE, LLC" IS DULY FORMED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTIETH DAY OF DECEMBER, A.D. 2019.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE BEEN PAID TO DATE.



3947727 8300

SR# 20198918602

Authentication: 204319261

Date: 12-30-19

You may verify this certificate online at corp.delaware.gov/authver.shtml

Document Review

The Property Registry
A Service Provider for the Province of Manitoba

Registration #	Type	New Titles
5140960/1	Mortgage	

Notes

1	2020-1-2	Katherine Jones	Pursuant to Section 66(5) of The Real Property Act, this instrument is approved as to form for registration under the said Act as a Mortgage in the principal sum of $50,000,000.00 USD against the Manitoba lands set out in Schedule A

File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

GENERAL ORDER

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
1700 – 242 Hargrave Street
Winnipeg, MB R3C 0V1
(Matter No. 0173004 GBT)
(G. Bruce Taylor: 204-934-2566)
(Ross A. McFadyen: 204-934-2378)
(Email: gbt@tdslaw.com / ram@tdslaw.com)

THE QUEEN'S BENCH

WINNIPEG CENTRE

THE HONOURABLE MR. JUSTICE EDMOND	)))	Wednesday, the 29th day of April, 2020

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

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Respondents.

GENERAL ORDER

THIS MOTION, made by Richter Advisory Group Inc. in its capacity as court-appointed Receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**", or any one of them, a "**Debtor**") for an Order, among other things, providing for the sealing of certain Confidential Appendices filed by

the Receiver, and certain other relief, was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Notice of Motion of the Receiver, the Notices of Motion of Peter Nygard and the Respondents filed April 8 and 24, 2020, the Affidavits of Greg Fenske affirmed April 8 and 23, 2020, the First Report of the Receiver dated April 20, 2020 (the "**First Report**"), the Supplementary First Report of the Receiver dated April 27, 2020 (the "**Supplementary First Report**"), including the Confidential Appendices referenced in the First Report and the Supplementary First Report, and on hearing the submissions of counsel for the Receiver, counsel for the Applicant, counsel for the Respondents and Peter Nygard, counsel for Overseas Express Consolidators Inc. and CRSA Global Logistics Inc., counsel for Tiina Tulikorpi, counsel for Doral Holdings Limited, KCAP Kingston Inc. and 2023011 Ontario Limited, counsel for Kingsway Garden Holdings Inc., Upper Canada Mall Limited and Crombie Developments Limited, and counsel for the interested retail landlord entities of Cushman & Wakefield Asset Services ULC, Morguard Investments Limited, Ivanhoe Cambridge Inc., SmartCentres Management Services Inc., RioCan REIT, Cominar REIT, Blackwood Partners Management Corporation, Choice Properties Limited Partnership and Springwood Land Corporation, no one appearing for any other person, although properly served as appears from the Affidavit of Service of Barbara Allan sworn April 27, 2020, and the Supplementary Affidavit of Service of Barbara Allan sworn April 28, 2020, filed herein:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Motion, the First

Report and the Supplementary First Report is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

AMENDMENTS TO RECEIVERSHIP ORDER

2. THIS COURT ORDERS that in relation to the Respondents Nygard Enterprises Ltd. ("**NEL**") and Nygard Properties Ltd. ("**NPL**") as Limited Recourse Guarantors, for the purposes of the Receivership Order dated March 18, 2020 (the "**Receivership Order**") made in these proceedings, "Property" shall include only such property, undertakings, and assets of NEL and NPL in which the Applicants have an interest pursuant to the Credit Agreement made among the Applicant, Second Avenue Capital Partners LLC and the Respondents dated as of December 30, 2019 (as defined in the Affidavit of Robert Dean affirmed March 9, 2020 in this proceeding) and the Loan Documents (as defined in the Credit Agreement) executed and delivered in connection therewith.

3. THIS COURT ORDERS that, for greater certainty, for the purposes of the Receivership Order, "Property" shall exclude any of NEL's right and interest in the directors' and officers' insurance policies bearing policy numbers 01-173-52-10 and TDO1007769 provided by AIG Insurance Company of Canada and Trisura Guarantee Insurance Company, respectively, (the "**D&O Policies**"). Further, the Receiver and representatives of NEL shall cooperate reasonably to extend runoff coverages on the D&O Policies, it being expressly understood that such cooperation does not require the Receiver to pay any portion of the premium or additional premium payable to extend said coverage(s).

GARDENA ACCESS

4. THIS COURT ORDERS that, as to access by landlords to properties leased to the Respondent Nygard, Inc. located in Gardena, California:

"**Gardena Properties**" shall mean the properties in Gardena, California, the municipal addresses of which are:

(a) 14702 South Maple Ave.,

(b) 14421 S. San Pedro Street,

(c) 14401 S. San Pedro Street;

each of which is leased by Edson's Investments Inc. ("**Edson's**") to Nygard, Inc., and

(d) 332 E. Rosecrans Ave., and

(e) 312 E. Rosecrans Ave.

both of which are leased by Brause Investments Inc. ("**Brause**") to Nygard, Inc. (Edson's and Brause are each a "**Landlord**").

5. Access to the Gardena Properties will be arranged on 48 hours prior written notice, from legal counsel representing Edson's or Brause, as the case may be, to legal counsel representing the Receiver, which request will describe the general purpose of the access and the names of the persons who will attend on behalf of the Landlord.

6. No property is to be removed from the Gardena Properties at such attendances, provided that this provision is without prejudice to Edson's or Brause asserting a property claim over assets at the Gardena Properties and, if such property claim is either admitted by the Receiver, or alternatively, adjudicated by the Court to be property of Edson's or Brause's, as the case may be, Edson's or Brause is entitled to pick up such property from the Gardena Properties on the same basis for access to do so as is set out in this Order.

7. Access to the Gardena Properties for Landlord purposes hereunder is not intended as access to review, copy or remove documents or to access correspondence, files or other data from the electronic system, which matters are to be conducted in accordance with the Documents and Electronic Files Access Order made April 29, 2020 in these proceedings.

8. A representative of the Receiver will be present during each attendance at the Gardena Properties pursuant to this Order, and the Receiver and the Landlord reserve the right to record (including by video) the attendance.

9. Any attendance at the Gardena Properties pursuant to this Order must not violate "COVID-related" sheltering/business closure/social distancing orders and guidelines applicable in Gardena at the time of the attendance, including those of the State of California and/or the City of Gardena, and all social distancing protocols must be maintained.

FIRST REPORT AND ACTIVITIES OF RECEIVER

10. THIS COURT APPROVES the First Report and the Supplementary First Report and the activities of the Receiver and its counsel as described therein, including the Receiver's Interim Statement of Receipts and Disbursements and the interim accounts of the Receiver and its counsel as reflected in the First Report.

SEALING

11. THIS COURT ORDERS that the Confidential Appendices to the First Report and Supplementary First Report shall be sealed, kept confidential and not form part of the public record and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge and shall only be made accessible or form part of the public record upon further Order of this Court.

12. THIS COURT ORDERS that the Receiver shall attach to a subsequent report a copy of Confidential Appendix 3 to the First Report, edited so as to redact privileged information contained therein.

GENERAL

13. THIS COURT ORDERS that the Respondents shall immediately comply with the previous Order issued by this Court requiring the Respondents to pay to the Applicant (or as the Applicant may direct) the full amount advanced by the Applicant to the Respondents on March 12, 2020 for the Respondents' payroll.

14. THIS COURT HEREBY REQUESTS the aid and recognition of any Court,

tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Consultant, the Receiver and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Consultant and the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Consultant and the Receiver and their respective agents in carrying out the terms of this Order.

April 29, 2020

J.G. Edmond, J. Digitally signed by J.G. Edmond, J. Date: 2020.05.15 09:35:39 -05'00'

I, G. BRUCE TAYLOR OF THE FIRM THOMPSON DORFMAN SWEATMAN LLP, HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: THE APPLICANT, THE RESPONDENTS AND MR. PETER NYGARD, OVERSEAS EXPRESS CONSOLIDATORS INC., CRSA GLOBAL LOGISTICS INC., TIINA TULIKORPI, DORAL HOLDINGS LIMITED, KCAP KINGSTON INC., 2023011 ONTARIO LIMITED, KINGSWAY GARDEN HOLDINGS INC., UPPER CANADA MALL LIMITED, CROMBIE DEVELOPMENTS LIMITED, AND THE INTERESTED RETAIL LANDLORD ENTITIES OF CUSHMAN & WAKEFIELD ASSET SERVICES ULC, MORGUARD INVESTMENTS LIMITED, IVANHOE CAMBRIDGE INC., SMARTCENTRES MANAGEMENT SERVICES INC., RIOCAN REIT, COMINAR REIT, BLACKWOOD PARTNERS MANAGEMENT CORPORATION, CHOICE PROPERTIES LIMITED PARTNERSHIP AND SPRINGWOOD LAND CORPORATION

AS DIRECTED BY THE HONOURABLE MR. JUSTICE J.G. EDMOND

RICHTER

(24)

File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF THE RECEIVERSHIP OF
NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC.,
FASHION VENTURES, INC., NYGARD NY RETAIL, LLC,
NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD.
4093879 CANADA LTD., 4093887 CANADA LTD., AND
NYGARD INTERNATIONAL PARTNERSHIP

RICHTER ADVISORY GROUP INC.
SEVENTH REPORT OF THE RECEIVER

SEPTEMBER 10, 2020

Pursuant to the provisions of the Credit Agreement, the Lenders are entitled to a recovery of any professional fees and expenses incurred relating to monitoring and enforcement activities;

(e) the USD$1.2 million of the Credit Facility Indebtedness resulted from early termination fees (the "**Termination Fees**") charged by the Lenders to the Debtors, which Termination Fees represent 3% of the Aggregate Revolving Commitment and were due and payable on February 26, 2020 when the Lenders delivered to the Debtors a demand for repayment and Notice of Intention to Enforce Security pursuant to the BIA for repayment of the Credit Facility Indebtedness. TDS has reviewed the Credit Agreement and confirmed that the Termination Fees were charged in accordance with the terms of the Credit Agreement;

(f) approximately USD$0.5 million in interest incurred on the outstanding balances under the Credit Facility. The Receiver notes interest was charged at a variable interest rates ranging from 7.328% to 9.236% per annum in accordance with the provisions of the Credit Agreement; and

(g) the USD$20.6 million in Paydowns represents the aggregate of the cash receipts received by the Debtors between January 3, 2020 and March 18, 2020 and swept to the Lenders' accounts as part of the Cash Management System.

39. The Receiver has reviewed the Nygard Group's internal, unaudited financial statements and confirms that the amounts claimed to be owed by the Lenders are consistent with the Debtors' internal financial records. The Receiver also performed certain limited testing procedures on the amounts comprising the Credit Facility Indebtedness and, based on the Recevier's review, it appears that the amounts owing under that Credit Facility have been properly charged in accordance with the Credit Agreement.

40. As noted in the First Report, TDS has undertaken a review of the Credit Agreement and other associated documents (collectively, the **"Lenders' Security"**) in the jurisdictions in which the Nygard Group has retail operations or other Property and has provided the Receiver with a legal opinion in respect of the Province of Manitoba and agent opinions from local counsel in the Provinces of British Columbia, Alberta, Saskatchewan, Ontario, Quebec, Prince Edward Island, Nova Scotia, New Brunswick, and Newfoundland & Labrador, which conclude, subject to the standard qualifications and limitations, that the Lenders' Security is valid and registered in all such Provinces, which are the Provinces in which the Nygard Group has retail operations or other Property known to the Receiver. The Receiver has also received a legal opinion from Katten similarly concluding that the Lenders' Security is valid and registered in the states of New York, Delaware, and California.

41. Pursuant to the terms of the Receivership Order and the Receiver Term Sheet, and consistent with the operation of the Credit Facility before the commencement of the Receivership Proceedings, proceeds from the Property were distributed to the Lenders subsequent to the Appointment Date on a regular basis as repayment of the Credit Facility,

and subsequently as repayment of the Receiver's Borrowings. On or about July 27, 2020, Credit Facility Indebtedness, plus accrued interest, was paid in full.

42. The Receiver notes the Agent has claimed an additional USD$0.7 million may still be owing by the Debtors under the Credit Facility for foreign exchange rate inconsistencies and "ledger debt" which, in the Lenders' view, would fall within the scope of "Obligations" as defined in the Credit Agreement. The Receiver has requested the supporting documentation from the Agent and will report further to the Manitoba Court once it has completed its review on these residual amounts.

43. As noted above, upon closing of the Toronto Property sale, the Receiver used a portion of the net proceeds to repay all of the outstanding amounts owing to the Lenders under the Receiver's Borrowings. Due to the timing of receipts, the Receiver notes the Lenders are in receipt of approximately USD$1.0 million in excess funds and the Receiver and Lenders are currently in discussions on a final reconciliation of the Receiver's Borrowings (including accrued interest, fees, etc). The Lenders have advised the Receiver that any excess funds in their possession, subject to retaining a reserve for the Lenders' ongoing legal costs, will be promptly repaid to the Receiver.

44. Subject to the foregoing, the Receiver notes that all outstanding amounts owing to the Lenders pursuant to the Credit Agreement or Receiver Term Sheet, other than the Lenders' ongoing legal costs and expenses, have been repaid, in full.

Funding of Receivership

45. Subsequent to the date of the Sixth Report, the Receiver and the Lenders reached an agreement regarding the distribution and use of the proceeds generated from the Toronto Property and remaining Property, as follows:

    (a) the Receiver would withhold a total of $6.1 million from the net proceeds received from the Toronto Property sale to address such matters as (i) potential claims that could rank in priority to the secured claims of the Lenders as against the Property, or the proceeds therefrom, and (ii) the ongoing funding of the expenses and obligations of the receivership after completion of the Liquidation Sale. The balance of the proceeds from the Toronto Property sale would be remitted to the Lenders to repay the Receiver's Borrowings;

    (b) the Cash Management System, and specifically the cash sweep mechanism to the Lenders, would remain in place until repayment of the Receiver's Borrowings;

    (c) upon repayment of the Credit Facility and the Receiver's Borrowings, (i) the Receiver would terminate the cash sweep such that all proceeds from the Property would accumulate in the Receivership Accounts and

(25)

File No. CI 20-01-26627

IN THE COURT OF QUEEN'S BENCH FOR MANITOBA
JUDICIAL CENTRE OF WINNIPEG

BETWEEN

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant

and

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD INTERNATIONAL PARTNERSHIP, NYGARD PROPERTIES LTD., AND NYGARD ENTERPRISES LTD.,

Respondents

REASONS FOR JUDGMENT
(Excerpt)
(Pages T1 - T11)

June 2, 2020
Winnipeg, Manitoba

Royal Reporting, A Veritext Company
120 - 330 St. Mary Avenue
Winnipeg, Manitoba
R3C 3Z5
Phone: 204-306-9149
Fax: 204-306-9154

Reviewed – Release authorized by Edmond, J.

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Proceedings taken in the Court of Queen's Bench, Winnipeg, Manitoba

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June 2, 2020	Afternoon Session
The Honourable Mr. Justice J. Edmond	The Court of Queen's Bench for Manitoba
J. Dacks (by telephone)	For the Applicant
C. Howden (by telephone)	For the Applicant
W. Onchulenko (by telephone)	For the Respondents
D. Magisano (by telephone)	For the Respondents
B. Taylor (by telephone)	For Richter Advisory Group Inc.
R. McFadyen (by telephone)	For Richter Advisory Group Inc.
M. LaBossiere (by telephone) (Articling Student-at-Law)	For Richter Advisory Group Inc.
P. Patel (by telephone)	For Richter Advisory Group Inc.
A. Sherman (by telephone)	For Richter Advisory Group Inc.
E. Finley (by telephone)	For Richter Advisory Group Inc.
L. Galessiere (by telephone)	For various Landlords
J. Wuthmann (by telephone)	For various Landlords
M. Citak (by telephone)	For Oxford Properties Group and Crombie REITT
V. DaRe (by telephone)	For Doral Holdings Limited and KCAP Kingston Inc.
J. Sokal (by telephone)	For MLT Aikins LLP
D. Ulmann (by telephone)	For Tiina Tulikorpi
K. Pohorily	Court Clerk

Reasons for Judgment

THE COURT: All right. Well, I Am prepared to give my reasons for decision orally today with respect to the motion. I reserve the right to -- if a copy of the transcript is ordered, reserve the right to make some edits to the oral decision for grammatical or clarification purposes but not anything substantive.

So just by way of background, the terms that will be used in these reasons for decision are as defined in the receivership order which was granted March 18, 2020, and the sale approval order.

Richter Advisory Group Inc. is the court-appointed receiver (the "Receiver") pursuant to the receivership order. On April 29, 2020, the Court granted the Sale Approval Order.

Paragraph 10 of the Sale Approval Order provides that the sale of merchandise and furniture, fixtures, and equipment ("FF&E") in stores as defined in the sale approval order shall not commence until further order of the Court. The Receiver filed a motion returnable June 1st, 2020, seeking an order substantially in the form attached as Schedule A to the notice of motion (the "Landlord Terms Order").

The Landlord Terms Order sets out specific agreed terms that have been negotiated with numerous landlords of the stores that were occupied by one or more of the respondents. The terms address the sale of the retail inventory and FF&E at the store locations leased to one or more of the respondents.

The Receiver seeks an order granting a charge (the "landlords' charge") over the property as defined in the receivership order in favour of the landlords to secure the payment of monies for any unpaid rent for the period commencing March 18, 2020, up to and including the repudiation date of a lease. I reserved my decision on this issue because the briefs were received on Sunday, May 31st, 2020, the day before the hearing, and I required additional time to review the authorities before ruling on the Receiver's request.

The Sale Approval Order approved the liquidation process generally. Paragraph 10 provides that the sale of merchandise and the FF&E in the store shall not commence until further order of the Court as to:

> (a) the sale commencement date, the sale termination date, and/or the duration of the sale;
> (b) the payment of rent in respect of the sale term;
> (c) the payment of rent, if any, in respect of the period from March 18, 2020, to the sale commencement date;
> (d) the timing of delivery and period of notice of repudiation in relation to the store leases;
> (e) the prescription, if any, of limits on the augmentation of merchandise to the stores for the purpose of the sale; and (f) such other matters as may be required. (the "Landlord Terms")

The Receiver's second report provides details of the steps taken to work with the consultant to develop the landlord terms which address the realities being experienced by Canadian tenants and landlords as a result of the COVID-19 pandemic. The landlord terms reflect the fact that government regulations differ

across Canada and some of the stores will be allowed to reopen at different times in different provinces. I agree that the proposed landlord terms reflect the flexibility that is required in the circumstances.

The Receiver states that the proposed landlord terms will assist in maximizing the value of the merchandise and the FF&E for the benefit of all stakeholders. The Receiver states that it is crucial to commence the sale process as soon as reasonably possible in each jurisdiction in order to bring certainty to these proceedings for the landlords, the respondents, and the respondents' employees.

The landlord developed the proposed Landlord Terms Order in consultation with counsel for the landlords for more than 60 (out of a total 167) retail store locations leased by one or more of the respondents.

The landlords that made submissions advise the Court that they did not oppose the Landlord Terms Order. In fact, the Landlord Terms Order was negotiated and deemed as acceptable by the landlords to recoup what is appropriate and fair in the circumstances. Ideally, the landlords would be demanding payment of rent and failure to pay may result in termination of the lease and steps taken to attempt to re-enter and take possession of the leased premises. Litigating each of the landlord and tenant disputes would be time consuming and would probably interfere with the sale process. All landlords have accepted as a second best alternative to the payment of rent receiving a landlords' charge as security for payment of monies for any unpaid rent for the period commencing March 18, 2020, up to and including the repudiation date of a lease as defined in the landlord terms order or otherwise referred to as the post-filing rent. The landlords' charge shall form a charge on the property in priority to all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any person but subordinate to:

> (a) the Receiver's charge and the Receiver's borrowing charge, both as defined in the receivership order;
> (b) any encumbrance in favour of the applicant;
> (c) any encumbrance in favour of a secured creditor who would be materially affected by this order and was not given notice of this motion;
> (d) the charges set out in Sections 14.06(7), 81.4(4), and 81.6(2) of the *Bankruptcy and Insolvency Act Canada*, R.S.C., 1985, c. B-3, ("*BIA*");
> (e) any valid claims to the property of the debtors as asserted pursuant to Section 81.1 of the *BIA*; and
> (f) any priority charges which exist in relation to provincial sales tax and taxes pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15.

Paragraph 9 of the proposed Landlord Terms Order provides that the landlords' charge shall be shared by affected landlords rateably in accordance with the amounts of their respective unpaid post-filing rent and allows for any dispute between the landlord and the Receiver to be dealt with by this court on a motion made by the Receiver or the applicable landlord. Paragraph 10 of the proposed Landlord Terms Order provides that the landlords' charge shall not be enforced without the written consent of the Receiver or leave of this court.

The respondents, Nygard Properties Ltd. ("NPL") and Nygard Enterprises Ltd. ("NEL") oppose the Receiver's request that the court grant a landlords' charge.

The grounds for opposing the creation of a landlords' charge include:

> (a) NEL and NPL are limited recourse guarantors under the credit agreement. They submit that NEL did not pledge its equity interest in NPL to the lenders and the credit agreement limits NPL's guarantee for the debtor's obligations to 20 million U.S. plus costs. This is referenced in paragraph 2 of the receivership order as amended pursuant to the general order. NPL and NEL submit that the landlords' charge may revise the limited recourse guarantor's potential liability and provide the applicant with more than is set forth in the credit agreement;
> (b) the Receiver has provided insufficient information to the stakeholders and the court regarding the possible impact of the landlords' charge on the respondents and the stakeholders; and
> (c) there is no legal basis nor need for the court to create a landlords' charge. The landlords and Receiver have their rights and obligations as set out in the receivership order and long-standing case law. To the extent that the Receiver has occupied the stores, it is responsible to pay rent to the landlords.

The Receiver relies on Section 243 of the *BIA* which it submits confers broad power on the Court to make wide-ranging orders as the Court considers just and convenient. Section 243(1) of the *BIA* provides:

> **Court may appoint receiver**
> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an

> insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> (c) take any other action that the court considers advisable.

Section 243(1)(c) has been judicially considered in *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019, ONCA, 508, 435 D.L.R. (4th) 416. The Ontario Court of Appeal interpreted the broad wording of subsection 243(1)(c) as "permitting the court to do what justice dictates and practicality demands". (See *Third Eye Capital Corporation* at paragraphs 57 and 72)

Further, statements made by the Ontario Court of Appeal in *Third Eye Capital* apply in this case as stated in paragraphs 43 and 52:

> **43** The *BIA* is remedial legislation and should be given a liberal interpretation to facilitate its objectives ...
>
> .....
>
> **52** Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh, Inc.*, 1994, 114, D.L.R., (4th), 176 (Ont. Ct. (Gen. Div.)) Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver ... to ... take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:
>
> > It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands". It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly

> organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability, and instability.

The Receiver also relies on relevant sections found in the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"), which expressly deals with granting a charge on a debtor's property in favour of third parties deemed to be "critical suppliers".

The *BIA* has no express provision granting a charge in favour of critical suppliers. However, the Receiver submits that it is fair, reasonable, and in the general interest of stakeholders to invoke the broad jurisdiction under Section 243 to grant the requested landlords' charge. The Receiver submits that the same consideration examined by the courts in *CCAA* proceedings ought to apply in this case.

Specifically, the Receiver says that the landlords are a critical supplier as the landlords are required in order to facilitate the sale process and maximize the return for all stakeholders.

The Receiver submits that the criteria set forth in a recent decision, *Soccer Express Trading Corp. (Re)*, 2020 BCSC, 749, [2020] B.C.J. No. 812, at paragraphs 65 and 66, apply equally in this case.

Analysis and decision

It is unnecessary to make a determination as to whether the landlords are a "critical supplier" in order to grant the relief sought in this case. The *BIA* is remedial legislation, and it is clear that the court should give it a liberal interpretation to facilitate its objectives. I agree with the submission of the Receiver that the purpose of Section 243(1)(c) of the *BIA* is to permit the court to do what justice dictates and practicality demands. The court has inherent jurisdiction to make orders in the course of a receivership to do what is fair, reasonable, and just in the circumstances. As referenced and cited with approval in *Third Eye Capital Corporation* at paragraph 52, "the condition of insolvency usually carries its own internal seeds of chaos, unpredictability, and instability".

Further, I note the statements of the court in *Residential Warranty Company of Canada Inc. (Re)*, 2006 ABQB, 236, 393 A.R. at paragraph 27, as follows:

> **27** Solutions to *BIA* concerns require consideration of the

> realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with the unanticipated problems, often on a case-by-case basis.

The court went on to cite with approval the statements of Mr. Justice Farley in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* which support the submission that s. 243 of the BIA must be interpreted to do not only what "justice dictates", but also what "practicality demands".

In my view, the proposed landlord terms are sensitive to the claims being advanced by landlords as a result of the COVID-19 pandemic. Government regulations across Canada dictate that retail locations will be opening at different times depending on the nature and location of the store.

The landlords' charge would entitle the landlord to security for the payment of monies for unpaid post-filing rent.

I am satisfied that the proposed landlords' charge is fair and just in the circumstances based on the following:

> (a) the landlords' charge provides some protection to the landlords who are currently stayed from prosecuting claims against the respondents or the property of the respondents pursuant to the receivership order;
> (b) the landlords continuing to lease the retail store locations to the respondents is critical to the liquidation sale process and the ability of the Receiver and the consultant to carry out the process in an effective and efficient manner pursuant to the sale approval order;
> (c) an interruption in the tenancy at the retail stores will, in all probability, interfere with the liquidation sale process;
> (d) the landlords' charge may eliminate the prospect of the Receiver having to respond to motions brought by numerous landlords seeking to lift the stay and take steps to terminate leases and/or seek immediate recovery of post-filing rent; and
> (e) the applicant, Receiver, consultant and many of the landlords approve the landlords' charge and the Landlord Terms Order.

The Receiver submits, and I agree, that the Landlord Terms Order:

> (a) is commercially reasonable and fair;

(b) offers a level of protection to the landlords in relation to securing payment of post-filing rent; and

(c) assists in maximizing the value of the retail inventory and the FF&E for the benefit of all stakeholders during the sale process.

In response to the submissions made by the respondents, I do not agree that granting the landlords' charge would change the terms of the credit agreement or the lenders' recourse to U.S. 20 million dollars "after all costs and expenses including enforcement costs". The provisions of the credit agreement limit the priority of the lenders to proceeds of realization of NPL assets. If amounts in excess of U.S. $20 million plus costs are collected as a result of the sale of real property and the liquidation process, the funds realized would be available for other creditors of NPL in accordance with the receivership order. If the proceeds exceed the limited recourse amount, the Receiver must determine what other debts and obligations are owed by the debtor, consider the priority of those claims, and seek further court authorization to use the balance of the proceeds of realization towards the satisfaction of the other debts and obligations.

I am not satisfied that there is a lack of information to assess and grant the landlords' charge. Taking some of the steps suggested by the respondents including seeking government relief under various federal and provincially sponsored COVID-19 programs designed for commercial landlords should not delay this process. While certain government relief may be available, the landlords will not be in a position to make the premises available for the liquidation process without an agreement that is commercially reasonable.

Had the respondents not defaulted in payment of their obligations pursuant to the credit agreement and remained in occupation of the leased premises, it is possible that landlords may have negotiated agreements to defer a payment of rent to be paid once the government regulations permitted retail premises to re-open. However, that did not occur, and the landlords are owed rent, and their cooperation is required and crucial in these circumstances. In my view, the proposed landlords' charge provides a mechanism, while not perfect, to allow the liquidation process to proceed with the cooperation of the landlords.

I do not accept the submission of the respondents that there is no legal basis for a landlords' charge in this case. I agree the circumstances are unique at this time. However, as stated above, I am satisfied that Section 243 of the *BIA* provides the Court with the necessary authority to grant an order that the Court considers advisable in the circumstances.

The alternative suggested by the respondents is to have the Receiver seek additional funding from the lenders to pay the landlords or dispute the landlords' claims. I am not satisfied that the Receiver should be required to proceed in that fashion. The Receiver is working cooperatively with the landlords on a solution which balances the competing interests in an effort to proceed with the sale process fairly and without delay. I am satisfied the Receiver and the landlords have agreed in the unique circumstances of the COVID-19 pandemic to a form of security, the landlords' charge, to address post-filing rent. This will allow the retail inventory sale and the FF&E sale to proceed as soon as is reasonably possible which, in my view, will benefit all stakeholders including the respondents.

Conclusion

Accordingly, the motion made by the Receiver and specifically the landlord terms order is approved in the form attached to the notice of motion, document 59 on the court file.

That concludes my reasons for decision.

Any questions?

MR. TAYLOR: Taylor, My Lord. Thank you, and thank you for your decision.

I wonder if in the circumstances of this order, since you've approved it in the form that's attached to the notice of motion, if we could waive the process of obtaining consent, as the form, from the various parties that participated in the hearing?

THE COURT: Ordinarily, that is still required, but I will hear from others. Given that they had notice already of the form of the order, they have made submissions on it, and they know what I granted, perhaps that is appropriate in this case. I will hear from the respondents or from others that may oppose that if they have an opposition to that point.

MR. PATEL: My Lord, it's Mr. Patel here. I don't believe the form of order was -- was circulated by the Receiver, and -- and it appears that the Court has ordered that it proceed in the form as attached, so I don't -- I don't believe there's need for further debate on the issue.

THE COURT: All right. Well, I would not have thought so either, but anyone else have a submission to make on that point? If not, then, Mr.

Taylor and Mr. McFadyen, if you could electronically submit the order in the appropriate way, I will arrange to have it signed and returned to you through Ms. Laniuk.

MR. PATEL: Okay. Thank you for your response, My Lord.

MR. MCFADYEN: It's Mr. McFadyen, My Lord. Thank you for that. I'll submit the order right away. Just for clarity, the only change that I'd actually make to the form of order is to the preambles to properly reference the affidavits of service that were filed.

THE COURT: All right. And you might also add that it was heard yesterday, but it was put over until today for decision just so that it is accurate, but that is fine.

MR. MCFADYEN: Correct. I actually --

THE COURT: Yes.

MR. MCFADYEN: Yes, I've made that change to the preamble too. Thank you, My Lord.

THE COURT: All right. Good enough. Thank you very much. Good afternoon.

EXCERPT CONCLUDED

IN THE MATTER OF WHITE OAK COMMERCIAL FINANCE, LLC V. NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, 4093879 CANADA LTD., 4093887 CANADA LTD., NYGARD PROPERTIES LTD. AND NYGARD ENTERPRISES LTD.

I, KARI SHORT, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Ten (T10), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

_____

COURT TRANSCRIBER

(26)

Doc No. 102

File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

NOTRE DAME APPROVAL AND VESTING ORDER

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
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Winnipeg, MB R3C 0V1
(Matter No. 0173004 GBT)
(G. Bruce Taylor: 204-934-2566)
(Ross A. McFadyen: 204-934-2378)
(Email: gbt@tdslaw.com / ram@tdslaw.com)

THE QUEEN'S BENCH

WINNIPEG CENTRE

THE HONOURABLE MR. JUSTICE EDMOND	)))	Tuesday, the 30th day of June, 2020

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

NOTRE DAME APPROVAL AND VESTING ORDER

THIS MOTION, made by Richter Advisory Group Inc. in its capacity as court-appointed Receiver (in such capacity, the "**Receiver**") without security, of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc.,

Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**", or any one of them, a "**Debtor**") as provided for in the Order of this Court pronounced on March 18, 2020 (the "**Receivership Order**") (and as further amended by the General Order of this Court pronounced April 29, 2020), for, *inter alia*, an Order approving the sale transaction (the "**Transaction**") contemplated by an accepted offer to purchase (the "**Sale Agreement**") between the Receiver, as vendor, and Mist Holdings Inc. (or such nominee as may be designated by Mist Holdings Inc.), as purchaser (the "**Purchaser**") as referenced in the Third Report of the Receiver dated June 22, 2020 (the "**Third Report**"), and vesting in the Purchaser all of the right, title and interest of the Debtor Nygard Properties Ltd. ("**NPL**") to the assets described in the Sale Agreement, namely the land and premises (including, without limitation, buildings and fixtures) located at 1300, 1302 and 1340 Notre Dame Avenue and 1440 Clifton Street in Winnipeg, Manitoba (the "**Notre Dame Property**"), was heard on June 25, 2020 at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Notice of Motion of the Receiver, the First Report of the Receiver dated April 20, 2020, the Second Report of the Receiver dated May 27, 2020 the Third Report of the Receiver dated June 22, 2020, including the Confidential Appendices threreto, the Supplementary Third Report of the Receiver dated June 27, 2020 (the "**Supplementary Third Report**"), the Affidavit of Greg Fenske, affirmed June 24, 2020, the Affidavit of Peter Nygard, sworn June 25, 2020, and on hearing the submissions of counsel for the Receiver, counsel for the Applicant and counsel for Peter Nygard and counsel for the Respondents, no one appearing for any other person,

although properly served as appears from the Affidavit of Service of Barbara Allan sworn June 23, 2020, filed herein:

1. THIS COURT ORDERS that the time for service of the Notice of Motion of the Receiver and the Third Report and the Supplementary Third Report is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL AND VESTING

2. THIS COURT ORDERS that the Transaction is hereby approved, and the completion of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Notre Dame Property to the Purchaser.

3. THIS COURT ORDERS AND DECLARES that, upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Receiver's Certificate**"), all of NPL's right, title and interest in and to the Notre Dame Property described in the Sale Agreement shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecations, mortgages, assignments, deposit arrangements, leases, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, rights of others, including, without limitation, rights of first refusal or purchase options, or other financial or monetary claims, whether or not they have

attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the **"Claims"**), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Receivership Order, as amended, and the Landlord Terms Order made in this proceeding on June 2, 2020; and (ii) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act* (Manitoba) or any other personal property registry system; and (iii) those Claims listed on Schedule "B" hereto (all of which Claims and the charges and encumbrances referenced in subparagraphs (i), (ii) and (iii), are collectively referred to herein as the **"Encumbrances"**, which term shall not include the permitted encumbrances and easements listed on Schedule "C" hereto (the **"Permitted Encumbrances"**)) and, for greater certainty, this Court orders that, upon the delivery of the said Receiver's Certificate, all of the Claims and Encumbrances affecting or relating to the Notre Dame Property are hereby expunged and discharged as against the Notre Dame Property.

4. THIS COURT ORDERS AND DIRECTS that upon delivery of the Receiver's Certificate to the Purchaser, the District Registrar of the Winnipeg Land Titles Office in the Province of Manitoba shall immediately cancel Certificate of Title No. 2983434/1 now standing in the name of NPL and shall immediately thereafter issue a new Certificate of Title in respect of the same land in the name of the Purchaser, free and clear from any and all Claims and Encumbrances except those Permitted Encumbrances identified in Schedule "C" hereto, notwithstanding that the time for appeal of this Notre Dame Approval and Vesting Order has not expired and notwithstanding that all interested parties may not have consented to this Notre Dame Approval and Vesting Order.

5. THIS COURT ORDERS that, for the purposes of determining the nature and priority of Claims and Encumbrances, the net proceeds from the sale of the Notre Dame Property shall stand in the place and stead of the Notre Dame Property, and that from and after the delivery of the Receiver's Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Notre Dame Property with the same priority as they had with respect to the Notre Dame Property immediately prior to the sale, as if the Notre Dame Property had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. THIS COURT ORDER AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof to the Purchaser.

7. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors, including, without limitation, NPL, and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtors, including, without limitation, NPL

the vesting of the Notre Dame Property in the Purchaser pursuant to this Order shall be binding on any licensed insolvency trustee of the bankruptcy estate that may be appointed in respect of any of the Debtors and shall not be void or voidable by creditors of the

Debtors, nor shall it constitute nor be deemed a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada), or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

SEALING

8. THIS COURT ORDERS that the Confidential Appendices to the Third Report shall be sealed, kept confidential and not form part of the public record and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge and shall only be made accessible or form part of the public record upon further Order of this Court.

THIRD REPORT AND ACTIVITIES OF RECEIVER

9. THIS COURT APPROVES the Third Report and the Supplementary Third Report and the activities of the Receiver and its counsel as described therein, including the Receiver's Interim Statement of Receipts and Disbursements and the interim accounts of the Receiver and its counsel as reflected in the Third Report.

GENERAL

10. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Consultant, the Receiver and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such

orders and to provide such assistance to the Consultant and the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Consultant and the Receiver and their respective agents in carrying out the terms of this Order.

June 30, 2020

J.G. Edmond, J Digitally signed by J.G. Edmond, J Date: 2020.07.02 17:00:55 -05'00'

SCHEDULE A
FORM OF RECEIVER'S CERTIFICATE

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to the Order of the Honourable Mr. Justice Edmond of the Manitoba Court of Queen's Bench (the **"Court"**) dated March 18, 2020 (and as further amended by the General Order of this Court pronounced April 29, 2020), Richter Advisory Group Inc.. was appointed as the receiver (the **"Receiver"**) of the undertaking, property and assets of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**", or any one of them, a "**Debtor**").

B. Pursuant to an Order of the Court dated June 30, 2020, the Court approved the transaction (the "**Transaction**") contemplated by the accepted Offer to Purchase dated

May 22, 2020 (the **"Sale Agreement"**) between the Receiver and Mist Holdings Inc. (the **"Purchaser"**) as described in the Third Report of the Receiver dated June 22, 2020, and provided for the vesting in the Purchaser of the right, title and interest of the Debtor Nygard Properties Inc. in and to the assets as described in the Sale Agreement, namely the land and premises (including, without limitation, buildings and fixtures) located at 1300, 1302 and 1340 Notre Dame Avenue and 1440 Clifton Street in Winnipeg, Manitoba (the "**Notre Dame Property**"), which vesting is to be effective with respect to the Notre Dame Property upon the delivery by the Receiver to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the purchase price for the Notre Dame Property; (ii) that the conditions to closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to closing as set in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at the City of Winnipeg, in Manitoba on the day of , 2020.

Richter Advisor Group Inc.., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity

per:_____
Name:

Title:

SCHEDULE "B"

REAL PROPERTY TO BE VESTED – ENCUMBRANCES TO BE EXPUNGED

Title No. 2983434/1 –

PARCELS A, B AND C PLAN 64026 WLTO
IN OTM LOTS 50 AND 51 PARISH OF ST JAMES

Encumbrances to be Expunged from Title No. 2983434/1

Mortgage No. 5140960/1 from Nygard Properties Ltd.to White Oak Commercial Finance, LLC

Notice of Appointment of a Receiver/Mgr No. 5166008/1 in favour of White Oak Commercial Finance, LLC

SCHEDULE "C"

PERMITTED ENCUMBRANCES

Caveat No. 190940/1 in favour of The City of Winnipeg

Caveat No. 191006/1 in favour of Metro Corp. of Greater Winnipeg

Easement No. 5022170/1 in favour of The Manitoba Hydro-Electric Board

(27)

Doc No. 112

File No. CI 20-01-26627

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

NIAGARA APPROVAL AND VESTING ORDER

Thompson Dorfman Sweatman LLP
Barristers and Solicitors
1700 – 242 Hargrave Street
Winnipeg, MB R3C 0V1
(Matter No. 0173004 GBT)
(G. Bruce Taylor: 204-934-2566)
(Ross A. McFadyen: 204-934-2378)
(Email: gbt@tdslaw.com / ram@tdslaw.com)

THE QUEEN'S BENCH

WINNIPEG CENTRE

THE HONOURABLE MR. JUSTICE EDMOND	)))	Monday, the 10th day of August, 2020

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

NIAGARA APPROVAL AND VESTING ORDER

THIS MOTION, made by Richter Advisory Group Inc. in its capacity as court-appointed Receiver (in such capacity, the "**Receiver**") without security, of the assets, undertakings and properties of Nygård Holdings (USA) Limited, Nygard Inc.,

Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**", or any one of them, a "**Debtor**") as provided for in the Order of this Court pronounced on March 18, 2020 (the "**Receivership Order**") (and as further amended by the General Order of this Court pronounced April 29, 2020), for, *inter alia*, an Order approving the sale transaction (the "**Transaction**") contemplated by the Agreement of Purchase and Sale, as amended (the "**Sale Agreement**") between the Receiver, as vendor, and NY Brand Studio Inc. and 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership (together, the "**Purchaser**") as referenced in the Sixth Report of the Receiver dated August 3, 2020 (the "**Sixth Report**"), and vesting in 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership all of the right, title and interest of the Debtors Nygard Properties Ltd. ("**NPL**") and Nygard International Partnership ("**NIP**") in and to the assets described in the Sale Agreement, namely the land and premises (including, without limitation, buildings and fixtures) located at 1 Niagara Street in Toronto, Ontario and certain chattels used in connection with the operation of that property as described in the Sale Agreement (collectively, the "**Niagara Property**"), was heard this day at the Law Courts Building, 408 York Avenue, Winnipeg, Manitoba.

ON READING the Notice of Motion of the Receiver, the First Report of the Receiver dated April 20, 2020, the Second Report of the Receiver dated May 27, 2020 the Third Report of the Receiver dated June 22, 2020, and the Sixth Report of the Receiver dated August 3, 2020, including the Confidential Appendices thereto, and on hearing the submissions of counsel for the Receiver, counsel for the Applicant, counsel

for the Respondents and Peter Nygard, counsel for Edson's Investments Inc. and Brause Investments Inc. and counsel for Renae Palet, no one appearing for any other person, although properly served as appears from the Affidavit of Service of Barbara Allan sworn August 4, 2020, filed herein:

1. THIS COURT ORDERS that the time for service of the Notice of Motion of the Receiver and the Sixth Report is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL AND VESTING

2. THIS COURT ORDERS that the Transaction is hereby approved, and the completion of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Niagara Property to the Purchaser.

3. THIS COURT ORDERS AND DECLARES that, upon the delivery of a Receiver's Certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Receiver's Certificate**"), all of NPL's and NIP's right, title and interest in and to the Niagara Property described in the Sale Agreement shall vest absolutely in 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecations, mortgages, assignments, deposit arrangements, leases, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies,

charges, rights of others, including, without limitation, rights of first refusal or purchase options, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the **"Claims"**), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Receivership Order, as amended, and the Landlord Terms Order made in this proceeding on June 2, 2020; and (ii) all charges, security interests or claims evidenced by registrations pursuant to *The Personal Property Security Act* (Manitoba) or any other personal property registry system, including the *Personal Property Security Act* (Ontario); and (iii) those Claims listed on Schedule "B" hereto (all of which Claims and the charges and encumbrances referenced in subparagraphs (i), (ii) and (iii), are collectively referred to herein as the **"Encumbrances"**, which term shall not include the permitted encumbrances and easements listed on Schedule "C" hereto (the "**Permitted Encumbrances**")) and, for greater certainty, this Court orders that, upon the delivery of the said Receiver's Certificate, all of the Claims and Encumbrances affecting or relating to the Niagara Property are hereby expunged and discharged as against the Niagara Property.

4. THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Titles Division of Toronto (No. 66) of an Application for Vesting Order in the form prescribed by the *Land Titles Act* and/or the *Land Registration Reform Act*, the Land Registrar is hereby directed to enter 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership as the owner of the Niagara Property, as more particularly described in Schedule "B" hereto, in fee simple, and is hereby directed to delete and expunge from title to the Niagara Property all of the Claims and Encumbrances listed in

Schedule "B" hereto.

5. THIS COURT ORDERS that, for the purposes of determining the nature and priority of Claims and Encumbrances, the net proceeds from the sale of the Niagara Property shall stand in the place and stead of the Niagara Property, and that from and after the delivery of the Receiver's Certificate, all Claims and Encumbrances shall attach to the net proceeds from the sale of the Niagara Property with the same priority as they had with respect to the Niagara Property immediately prior to the sale, as if the Niagara Property had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. THIS COURT ORDER AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof to the Purchaser.

7. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the BIA in respect of any of the Debtors, including, without limitation, NPL and NIP, and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the Debtors, including, without limitation, NPL and NIP

the vesting of the Niagara Property in 1 Niagara GP Inc. for and on behalf of 1 Niagara

Street Limited Partnership pursuant to this Order shall be binding on any licensed insolvency trustee of the bankruptcy estate that may be appointed in respect of any of the Debtors and shall not be void or voidable by creditors of the Debtors, nor shall it constitute nor be deemed a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the BIA, or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

SEALING

8. THIS COURT ORDERS that the Confidential Appendices to the Sixth Report shall be sealed, kept confidential and not form part of the public record and shall remain stored electronically with this Court on an encrypted basis limiting access to only the Registrar of this Court and the presiding Judge and shall only be made accessible or form part of the public record upon further Order of this Court.

SIXTH REPORT AND ACTIVITIES OF RECEIVER

9. THIS COURT APPROVES the Sixth Report and the activities of the Receiver and its counsel as described therein, including the Receiver's Interim Statement of Receipts and Disbursements and the interim accounts of the Receiver and its counsel as reflected in the Sixth Report.

GENERAL

10. THIS COURT HEREBY REQUESTS the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist the Consultant, the Receiver

and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Consultant and the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Consultant and the Receiver and their respective agents in carrying out the terms of this Order.

August , 2020

J.G. Edmond, J Digitally signed by J.G. Edmond, J Date: 2020.08.13 13:59:00 -05'00'

I, MELANIE M. LABOSSIERE OF THE FIRM OF THOMPSON DORFMAN SWEATMAN LLP HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: THE APPLICANT, THE RESPONDENTS, EDSON'S INVESTMENTS INC. and BRAUSE INVESTMENTS INC., AS DIRECTED BY THE HONOURABLE MR. JUSTICE EDMOND.

SCHEDULE A
FORM OF RECEIVER'S CERTIFICATE

THE QUEEN'S BENCH
WINNIPEG CENTRE

IN THE MATTER OF: **THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., c. C280**

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGÅRD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC, NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to the Order of the Honourable Mr. Justice Edmond of the Manitoba Court of Queen's Bench (the "**Court**") dated March 18, 2020 (and as further amended by the General Order of this Court pronounced April 29, 2020), Richter Advisory Group Inc.. was appointed as the receiver (the "**Receiver**") of the undertaking, property and assets of Nygård Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Debtors**", or any one of them, a "**Debtor**").

B. Pursuant to an Order of the Court dated August 10, 2020, the Court approved the transaction (the "**Transaction**") contemplated by the Agreement of Purchase and Sale

dated May 15, 2020, as amended (the "**Sale Agreement**") between the Receiver and NY Brand Studio Inc. and 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership (together, the "**Purchaser**") as described in the Sixth Report of the Receiver dated August 3, 2020, and provided for the vesting in 1 Niagara GP Inc. for and on behalf of 1 Niagara Street Limited Partnership of all of the right, title and interest of the Debtors Nygard Properties Inc. and Nygard International Partnership in and to the assets as described in the Sale Agreement, namely the land and premises (including, without limitation, buildings and fixtures) located at 1 Niagara Street in Toronto, Ontario and certain chattels used in connection with the operation of that property as described in the Sale Agreement (the "**Niagara Property**"), which vesting is to be effective with respect to the Niagara Property upon the delivery by the Receiver to the Purchaser of a certificate confirming: (i) the payment by the Purchaser of the purchase price for the Niagara Property; (ii) that the conditions to closing as set out in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Niagara Property payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to closing as set in the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at the City of Winnipeg, in Manitoba on the day of , 2020.

Richter Advisor Group Inc.., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity

per:_____
Name:

Title:

SCHEDULE "B"

REAL PROPERTY TO BE VESTED – ENCUMBRANCES TO BE EXPUNGED

Title No. 21240-0094 (LT)

PT LT 18 SEC A PL MILITARY RESERVE TORONTO AS IN CT603366, EXCEPT THE EASEMENT THEREIN; CITY OF TORONTO

Encumbrances to be Expunged

AT5331325, registered on December 30, 2019, being a charge in favour of White Oak Commercial Finance, LLC in the amount of $50,000,000

AT5391584, registered on March 19, 2020, being a registration relating to a Court Order providing for an interest on the part of Richter Advisory Group Inc.

SCHEDULE "C"

PERMITTED ENCUMBRANCES

Any reservations, restrictions, rights of way, easements or covenants that run with the land;

Any registered agreements with a municipality or a supplier of utility service including, without limitation, electricity, water, sewage, gas, telephone or cable television or other telecommunications service;

All laws, by-laws and regulations and all outstanding work orders, deficiency notices and notices of violation affecting the Niagara Property;

Any minor easements for the supply of utility service to the Niagara Property or adjacent properties;

Encroachments disclosed by any errors or omissions in existing surveys of the Niagara Property or neighbouring properties and any title defect, encroachment or breach of a zoning or building by-law or any other applicable law, by-law or regulation which might be disclosed by a more up-to-date survey of the Niagara Property and survey matters generally;

The exceptions and qualifications set forth in the *Land Titles Act* (Ontario);

The reservations contained in the original grant from the Crown;

Instrument No. CT603366, registered on June 30, 1983, being a Transfer in the thumbnail description of the Niagara Property;

Instrument No. CT669565, registered on June 27, 1984, being an encroachment agreement with the City of Toronto (the "**City**");

Instrument No. CT728591, registered on July 8, 1985, being a development agreement with the City (the "**Development Agreement**");

Instrument No. CT728592, registered on July 8, 1985, being a collateral agreement with the City;

Instrument No. CT862028, registered on April 15, 1987, being an amendment to the Development Agreement;

Instrument No. CT902110, registered on September 29, 1987, being an encroachment agreement with the City; and

Instrument No. AT1720669, registered on February 28, 2008, being an application to change name owner.

FILE NO. AI20-30-09537
FILE NO. CI20-01-26627

IN THE COURT OF APPEAL

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC

Applicant (Respondent)

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP

Respondents (Appellants)

CROSS-EXAMINATION ON AFFIDAVIT of

ADAM DANIEL SHERMAN

December 14, 2020

FOUR SEASONS REPORTING

91 Ashford Drive

Winnipeg, Manitoba

(204) 256-2343

This is the cross-examination on affidavit of Adam Daniel Sherman, a representative of the receiver herein, viva voce, on affirmation, had and taken via zoom hearing by Jeff Bruce, Court Reporter, in the City of Winnipeg, Province of Manitoba, on the 14th day of December, 2020, at the hour of 3:00 in the afternoon.

APPEARANCES:

Mr. F. Tayar and
Mr. C. Linthwaite, appearing for the appellants,

Mr. R. McFadyen and
Ms. M. LaBossiere, appearing for the receiver.

(No other appearances)

ADAM DANIEL SHERMAN: Affirmed

CROSS-EXAMINED BY MR. TAYAR:

1 Q Okay. Good afternoon, Mr. Sherman.

A Good afternoon.

2 Q You are, sir, a licenced insolvency trustee?

A Yes.

3 Q And you have sworn today to tell the whole truth?

A Correct, yes.

4 Q And you understand the consequences of swearing to tell the whole truth, sir?

A Yes.

5 Q How long have you been a licenced insolvency trustee?

A I believe I was granted my licence in 2009. I'm not exactly certain of the date, but that sounds about correct.

6 Q Do you also hold a designation of, the CA designation, sir?

A No.

7 Q Do you have any expertise in tax accounting?

MR. McFADYEN: Excuse me, what is the relevance of that question?

MR. TAYAR: I think it should have been obvious

from some of the statements that he has made in his reports.

MR. McFADYEN: He's not being cross-examined on his reports.

MR. TAYAR: Well, he's being cross-examined on the attachments to his affidavit.

MR. McFADYEN: Yes, but as you know, Mr. Tayar, I think a receiver is not typically subject to cross-examination on their reports. The only reason that the reports are in an affidavit is to provide the Court of Appeal with a record of what was decided in the court below.

MR. TAYAR: Well, I don't necessarily support your submission about what trustees or receivers are normally examined on. I didn't draft the affidavit, you did, and you attached certain documents to it.

If you are going to preclude me from examining on it you can state your objection, and the Court of Appeal will have to deal with it at the appropriate time, sir.

MR. McFADYEN: Yes, we are objecting to any questions based on the reports that are found in the affidavit.

BY MR. TAYAR:

8 Q Do you have, sir, any expertise in matters of

audit?

MR. McFADYEN: I object to that question also.

BY MR. TAYAR:

9 Q Do you have any skills in relation to tax matters?

MR. McFADYEN: We object to that question also.

BY MR. TAYAR:

10 Q When did you swear your affidavit, Mr. Sherman? I notice it's dated December 10th, which is last Thursday. Do you recall what time of the day you swore it?

A I believe it was in the afternoon. I can check the exact time.

11 Q Please.

A It was approximately 4:00 p.m.

12 Q Any reason why that affidavit wasn't served before the passage of 24 hours, until late Friday afternoon, sir?

MR. McFADYEN: What is the relevance of that question, Mr. Tayar?

BY MR. TAYAR:

13 Q I think it would be rather obvious. I want to know why the affidavit was held back on a motion that you scheduled without conferring with the other parties to the lawsuit, at least not with my clients, that next --

MR. McFADYEN: Well, we simply wanted to --

BY MR. TAYAR:

14 Q -- excuse me, excuse me, next Thursday, on relatively short notice. You have an affidavit sworn on the 10th, and you don't serve it until late Friday afternoon, which for in my case meant that I didn't read it until this morning, on Monday, and I would like to know why that was done?

MR. McFADYEN: Well, obviously we have no control over your weekend schedule, Mr. Tayar, but we simply wanted to serve all the materials at the same time.

BY MR. TAYAR:

15 Q And why didn't you just serve the affidavit first?

MR. McFADYEN: There was no motion that had been filed yet at that point in time. The question is not relevant to the merits of the motion that's before the court, so we're objecting.

BY MR. TAYAR:

16 Q Now, Mr. Sherman, the receiver enters into an agreement of purchase and sale for the Inkster property back in May of 2020, correct?

A Somewhere about that time, yes, I believe so.

17 Q I'm sorry, I didn't hear that. Could you state it again, please?

A Yes, I believe so.

18 Q And that was a contract that you entered into on an as-is, where-is basis, correct?

A I believe at that time there were various conditions that still needed to be satisfied by the purchaser.

19 Q Can you open up the agreement of purchase and sale for a moment, please.

MR. McFADYEN: Sorry, Mr. Tayar, again, the agreement of purchase and sale, the details are something that's still within the report, and we're not here to be cross-examining Mr. Sherman on the reports of the receiver.

MR. TAYAR: You're seeking, asking the court to set aside the stay so that you can complete a transaction. Are you going to say, are you going to take the position I can't examine him concerning that transaction, Mr. McFadyen?

It's your motion. You want to argue it this Thursday. If you want me to bring a motion on refusals or deal with it in that fashion that's your prerogative, but how can you possibly suggest that the very transaction you're asking a court to be able to close before the appeal is heard cannot be examined on?

MR. McFADYEN: Well, I'm not going to let you go very far with this, because he is not subject to cross-examination on the reports.

MR. TAYAR: All right.

MR. McFADYEN: If you have specific questions about the transactions we can take them under consideration, but --

BY MR. TAYAR:

20 Q I'm not asking you to take anything under consideration, I want the questions answered, but if you want to object, by a11 means state your objection and I'll move on.

Do you have the agreement handy, Mr. Sherman?

A I don't have it handy, but give me a few minutes here to get it.

MR. McFADYEN: For everyone's benefit, the agreement of purchase and sale is at Appendix "B" to the ninth report of the receiver, which is Exhibit 9 of the affidavit, and the relevant conditions to the sale are set out in writing at Appendix "B".

MR. TAYAR: Let me ask the questions, please, counsel, if you don't mind.

MR. McFADYEN: I'm not asking any questions. I'm just pointing out where the answer to your questions is.

MR. TAYAR: I don't want you to point to where the answers are, let the witness give me the answers, please.

MR. McFADYEN: Well, it's not a memory test. The actual written agreement of offer and purchase is part of Appendix "B" to the ninth report, so you can read it the same as everyone else can.

MR. TAYAR: Mr. McFadyen, I don't want to argue with you. If you want to state an objection, do so. Otherwise, let me conduct the examination. I'm not going to have you comment on each one of my questions or tip off the witness with respect to an answer, please.

THE WITNESS: Okay, I have the agreement in front of me.

BY MR. TAYAR:

21 Q All right.

A At least what I believe it to be, correct.

22 Q Now was this form of agreement one that was prepared by the receiver for the benefit with respect to the purchasers?

MR. McFADYEN: I will object to that question, it's not relevant.

BY MR. TAYAR:

23 Q Turn to paragraph 7 of the agreement of purchase and sale, sir.

A I'm there.

24 Q Do you have that, sir?

A I believe I'm looking at it, yes.

25 Q Okay. So I ask again what I asked you earlier, and I would like you to give me a different answer this time. Was this agreement done on an as-is, where-is sale basis?

MR. McFADYEN: I object to that question, it's not relevant.

BY MR. TAYAR:

26 Q Within that paragraph, Mr. Sherman, can I ask you to look at subparagraph (b). Take a moment to read that to yourself, please.

A Okay, I've read paragraph 7(b).

27 Q And do you agree with me, sir, that the tenure, or the thrust of this agreement of purchase and sale is such that the receiver sells without providing any representations or warrantees with respect to the property that is being sold?

MR. McFADYEN: We're not having our client answer any questions about what the tenure of the agreement is. It speaks for itself, and it's not relevant, Mr. Tayar.

BY MR. TAYAR:

28 Q Do you know, sir, whether the purchaser examined the property before entering into this agreement of purchase and sale?

MR. McFADYEN: We're objecting to that

question, it's not relevant.

BY MR. TAYAR:

29 Q You make reference in your report, sir, to a tracking system within the premises. Do you recall that?

MR. McFADYEN: I'll stop you there. We're objecting to any questions about the tracking system, it's not relevant.

BY MR. TAYAR:

30 Q Was the purchaser aware that the tracking system was in the premises before submitting an offer to purchase the property?

MR. McFADYEN: We're objecting to that question, it's not relevant.

BY MR. TAYAR:

31 Q Did the receiver give an abatement in the purchase price as a result of the fact that there was a tracking system in the premises?

MR. McFADYEN: We're objecting to that question.

BY MR. TAYAR:

32 Q Was the ultimate sale price that was agreed to by the receiver less than or greater than or equal to the appraised value of the property as determined by the receiver?

MR. McFADYEN: We are objecting to that

question.

BY MR. TAYAR:

33 Q Has the receiver had any communications with the purchaser or its representatives since the decision of Justice Edmond on November 19th?

A I understand that certain members of my team have had discussions with the purchaser following that.

34 Q And which members of your team?

A Eric Finley.

35 Q Does he report to you, sir?

A Yes, he does.

36 Q And was it he who advised the purchaser of the order that was made by the court?

A I believe so.

37 Q Well, why don't you tell me what it is that he reported to you, because your beliefs may be sort of irrelevant. What exactly did he tell you he disclosed, if anything, to the purchaser?

A It's my understanding that he advised the purchaser that the transaction that had been approved by the court was subsequently appealed, and that we're working through a process to try and accelerate the hearing of that appeal.

38 Q And is there anything else that he relayed to you? I take it that's what Mr. Finley told you?

A Yes.

39 Q Is there anything else that he told you about his conversations with the purchaser?

A That there is the --

40 Q Sorry?

A There's the potential for, you know, a, essentially a limited extension of the closing date.

41 Q I'm trying to understand, sir, precisely the language that you learned, or what you were told by Mr. Finley. So tell me precisely what were the words that he used when he communicated his discussion with the purchaser?

So in other words, and I don't mean to be disrespectful, I don't want your spin on it, I want to know precisely what he told you, since you were not privy to the conversation?

A I don't have the precise words, but from the best of my recollection it was explained what happened with let's say the appeal, and that we were trying to accelerate that process, and as part of that there was a dialogue around a potential extension of the closing date, but that it wasn't further discussed beyond that, because we didn't have any certainty around timing, and that the purchasers were expressing concern around incurring costs around an unknown closing date.

42 Q What costs did the purchasers suggest that they might incur with an unknown closing date?

A I'm not aware.

43 Q If there's a postponement -- sorry, let me withdraw the question and ask it to you this way, do you know what the purchasers intend to do with the property after they close the purchase?

A I do not.

44 Q Do you know whether they intend to use it, rent it out, any idea?

MR. McFADYEN: I think you have asked the question already and he's answered it.

BY MR. TAYAR:

45 Q Do you know, Mr. Sherman?

MR. McFADYEN: He said he doesn't know.

BY MR. TAYAR:

46 Q Would you agree, sir, that if the transaction is extended for a period of time until the Court of Appeal has disposed of the appeal, that the purchaser would not have to advance the balance of the purchase price until then, correct?

A Can you ask the question again? I'm sorry, I'm not sure I understood what you were asking.

47 Q Yes. I said if the agreement is, closes after the Court of Appeal deals with the appeal itself, that the

purchaser will not have to advance or pay the purchase price until the appeal has been disposed of and the transaction closes, correct?

A Correct, the balance isn't due until closing.

48 Q So that there will be a savings by the purchaser of the value of that money if the transaction is postponed for a month or two or three, correct?

A I'm not sure I would call them savings.

49 Q What would you call them?

A Talking about a delay in transaction costs.

50 Q Well, you don't have to advance the money. There's a value to having money, is there not?

A Again, I don't understand that question, in terms of --

51 Q Well, isn't there a cost value to having the money? If they don't have to pay for another three months haven't they effectively saved the cost associated with three months of having that amount of money in their pocket, rather than having to advance it now, three months earlier?

A In the manner that you have described, yes.

52 Q Right. Now, so you said a moment ago that you understood from Mr. Finley that there was some discussion about extending the agreement, and that the purchaser apparently said something about potential costs associated

with a delay, correct? Did I understand you correctly?

A Yes.

53 Q Yes. And what cost did the purchaser say they would incur by this delay?

A I'm not certain.

54 Q You're not certain, or you don't know?

A I don't know.

55 Q Do you know whether Mr. Finley knows?

A I can't answer for Mr. Finley.

56 Q Did you ask him?

A From what I understand, the discussion did not let's say evolve into a discussion around a potential extension and what might be involved in that.

57 Q Any reason for that?

A We don't know at this point how long an extension we're talking about.

58 Q Is that the reason?

A We don't know exactly at this point in time how long we're asking, and we don't know what additional, what, you know, conditions might be attached to that ask.

59 Q So I take it you --

A A short ask --

60 Q Sorry?

A Sorry, a short ask might not come with significant conditions on their side.

61 Q Which --
A The longer delay of months might come with significant conditions.
62 Q It might come? It might come, is that based on speculation, or were you told that by someone?
A I haven't been told that by anybody.
63 Q All right, so that's your conjecture. Did you have anything in writing that you received from Finley about his conversation with the purchaser?
A No.
64 Q Is there anything in writing, to your knowledge?
A No.
65 Q So just so we're not talking in double negatives, there is nothing in writing that you are aware of, correct?
A Correct.
66 Q Incidentally, who was it that Mr. Finley was speaking with on behalf of the purchaser?
A That I'm not certain of.
67 Q Have you ever dealt with the purchaser directly yourself?
A Not directly, no.
68 Q How about through the purchaser's lawyer?
A I didn't have direct involvement in connection

with the purchaser of this property.

69 Q So as you're sitting here today, Mr. Sherman, I take it you don't have any knowledge of whether the purchaser has any immediate plans for the property itself, correct?

A I don't know the purchaser's plans.

70 Q What do you propose to do with the proceeds of the sale of the Inkster property if the court is inclined to allow you to complete the transaction, sir?

MR. McFADYEN: How is that relevant, Mr. Tayar?

MR. TAYAR: I'm not here to explain and to tip off -- please don't tip off your witness, Mr. McFadyen.

MR. McFADYEN: I'm not tipping off my witness.

MR. TAYAR: Well, to me it appears that you are, okay?

MR. McFADYEN: No.

MR. TAYAR: I'm not here to explain my questions. If you want to object, you go ahead and object. You have made a series of objections already, we will deal with that at the appropriate time. You can object.

MR. McFADYEN: I'm trying to understand what possible relevance that question might have. Obviously if a receiver takes in funds and proceeds before it pays them out to anybody it needs to go back to court and get a distribution order.

BY MR. TAYAR:

71 Q I repeat the question for the witness, not for you, Mr. McFadyen. What does the receiver propose to do with the proceeds of the sale?

MR. McFADYEN: No, we're objecting to that question, it's not relevant.

BY MR. TAYAR:

72 Q There's, the company that's referred to in the materials from time to time is the debtor, the NIP Partnership. Do you propose, sir, with the proceeds of the sale of Inkster, to pay any of the creditors of NIP with those proceeds?

MR. McFADYEN: We object to that question, it's not relevant.

MR. TAYAR: Subject to the refusals, those are my questions, thank you very much, Mr. Sherman.

(PROCEEDINGS CONCLUDED SUBJECT TO ABOVE AT 3:30 P.M.)

CERTIFICATE OF REPORTER

I, JEFF BRUCE, Court Reporter, do hereby certify that the foregoing pages, numbered 1 to 19, are a true and accurate transcript of the proceedings herein as recorded by me to the best of my skill and ability.

Jeff Bruce

Court Reporter