

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**HOME TRUST COMPANY**

Applicant

- and -

**58 KING STREET EAST HAMILTON LTD. and 2238394 ONTARIO LTD.**

Respondents

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE  
*COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

**FACTUM OF THE APPLICANT, HOME TRUST COMPANY  
(returnable January 21, 2025)**

January 3, 2025

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## **PART I – NATURE OF THE APPLICATION**

1. The Applicant, Home Trust Company (“**HTC**”), makes an application for an Order (the “**Receivership Order**”), in substance, appointing msi Spergel inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”), without security, of all the assets, properties and undertakings of 58 King Street East Hamilton Ltd. (“**58 King**”) and 2238394 Ontario Ltd. (“**223**” and together with 58 King, the “**Debtors**”) acquired for, or used in relation to the businesses carried on by the Debtors and all proceeds thereof (collectively, the “**Property**”), including, without limitation, the real property municipally known as 58 King Street East, Hamilton, Ontario, and legally described by PIN 17167-0087 (LT) (the “**King Real Property**”), and the real property municipally known as 31 John Street North, Hamilton, Ontario, and legally described by PIN 17167-0015 (LT) (the “**John Real Property**” and, together with the King Real Property, the “**Real Property**”).

2. The Debtors are each real property holding companies, which collectively owe HTC more than \$7.3 million. HTC holds security over the assets of the Debtors, including general security agreements and charges over the Real Property, which give HTC the right to apply to court for the appointment of a receiver.

3. Mr. Maciek Walicht (“**Mr. Walicht**”), a licenced mortgage broker, is the principal and guarantor of each of the Debtors.

4. HTC made formal demand on the Debtors and Mr. Walicht on March 20 and 21, 2024, which demand has not been honoured. Instead, HTC has been subjected to never-ending delay.

5. HTC is justified in having lost confidence in the Debtors and their management, and it is respectfully submitted that it is just and convenient for the Receiver to be appointed.

## PART II – SUMMARY OF FACTS

6. The Debtors are each a privately-owned Ontario corporation, with Mr. Walicht as the sole director and officer. 58 King is the registered owner of the King Real Property, and 223 is the registered owner of the John Real Property.

Affidavit of Sergiu Cosmin sworn November 18, 2024 [Cosmin Affidavit] at [paras. 3 and 5](#), Tab 4 of HTC's Application Record dated November 29, 2024 [Application Record].

7. According to the Financial Services Regulatory Authority of Ontario ("FSRA"), Mr. Walicht is a mortgage broker.

Cosmin Affidavit, *supra* at [para. 4](#).

8. The Debtors are indebted to HTC in connection with certain credit facilities (the "**Credit Facilities**") made available to the Debtors by HTC pursuant to and under the following agreements (the "**Credit Agreements**"):

- (a) the mortgage loan commitment letter dated July 7, 2023 between HTC and 58 King (the "**58 King Credit Agreement**"); and
- (b) the mortgage loan commitment letter dated April 6, 2022 between HTC and 223 (the "**223 Credit Agreement**").

Cosmin Affidavit, *supra* at [para. 6](#).

9. To secure their obligations to HTC, the Debtors provided security to HTC (the "**Security**"), including, without limitation:

- (a) in the case of 58 King:

- (i) the first charge/mortgage in the principal amount of \$3,400,000 in respect of the King Real Property, which was registered on title as Instrument No. WE1691086 on August 3, 2023 (the “**King Mortgage**”); and
  - (ii) the general security agreement dated July 14, 2023 (the “**58 King GSA**”), registration in respect of which was made under the Personal Property Security Act (Ontario) (the “**PPSA**”); and
- (b) in the case of 223:
- (i) the first charge/mortgage in the principal amount of \$3,800,000 in respect of the John Real Property, which was registered on title as Instrument No. WE1605924 on May 13, 2022 (the “**John Mortgage**” and, together with the King Mortgage, the “**Mortgages**”); and
  - (ii) the general security agreement dated April 18, 2022 (the “**223 GSA**” and, together with the 58 King GSA, the “**GSAs**”), registration in respect of which was made under the PPSA.

Cosmin Affidavit, *supra* at [para. 7](#).

10. Mr. Walicht also provided personal guarantees of the Mortgages (the “**Personal Guarantees**”).

Cosmin Affidavit, *supra* at [para. 9](#).

11. Other than the PPSA registrations made by HTC, the PPSA search results for the Debtors show no additional PPSA registration against either of the Debtors.

Cosmin Affidavit, *supra* at [para. 10](#).

12. In addition to HTC's Mortgages, which are first charges on the Real Property, the parcel registers for the Real Property reflect subsequent-ranking mortgages in favour of other stakeholders. All mortgagees registered on the Real Property have been served with this application.

**Cosmin Affidavit, *supra* at [paras. 11-12](#).**

**[Affidavit of Service of Calvin Horsten sworn December 2, 2024](#).**

13. Beginning in January 2024, the Debtors ceased to make regular payments as they became due under the Credit Agreements and the Mortgages (together, the "**Financing Agreements**"). These constituted default events under the Financing Agreements, as a result of which the total amounts owing under the Financing Agreements became due.

**Cosmin Affidavit, *supra* at [para. 13](#).**

14. On March 20 and 21, 2024, HTC made formal written demand on the Debtors and Mr. Walicht for the payment of the amounts owed to HTC under the Financing Agreements and the Personal Guarantees (collectively, the "**Demand Letters**"). Notices of intention to enforce security (the "**BIA Notices**") pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) accompanied the Demand Letters sent to the Debtors.

**Cosmin Affidavit, *supra* at [para. 14](#).**

***Bankruptcy and Insolvency Act* (Canada) [BIA], [s. 244\(1\)](#).**

15. As particularized in more detail in the Demand Letters, as of March 15, 2024, \$3,528,639.15 was owing by 58 King and \$3,789,495.86 was owing by 223 to HTC for principal, interest and costs, plus accruing interest and costs (collectively, the "**Demanded Indebtedness**").

**Cosmin Affidavit, *supra* at [para. 15](#).**

16. Following issuance of the Demand Letters and the BIA Notices, HTC offered the Debtors the possibility of entering into forbearance agreements, but the Debtors failed to sign them (whether by the sign-back deadline of April 24, 2024 or at all). After missing the sign-back deadline, Mr. Walicht advised HTC's counsel on May 1, 2024 that "*final takeout financing*" would not be ready until "*September or October in a worst case scenario*," and that in the interim, he was "*awaiting confirmation of funds to bring the arrears up to date and when that can be done by.*"

Cosmin Affidavit, *supra* at [para. 16](#).

17. By the summer of 2024, none of the Demanded Indebtedness had been repaid, nor any arrangements satisfactory to HTC put in place.

Cosmin Affidavit, *supra* at [para. 17](#).

18. On June 25, 2024, HTC commenced a claim for judgment against 58 King and Mr. Walicht in respect of his Personal Guarantee of the 58 King Mortgage (collectively, the "**Claim**"). Mr. Walicht served a defence to the Claim dated August 1, 2024, and then failed to provide any substantive response to timetabling requests for a summary judgment motion.

Cosmin Affidavit, *supra* at [para. 18](#).

19. Despite Mr. Walicht's assurances over eight months ago that "*final takeout financing*" would be ready by "*September or October in a worst case scenario*," the Demanded Indebtedness, which exceeds \$7.3 million, has still not been repaid, whether in full or in part.

Cosmin Affidavit, *supra* at [para. 19](#).

20. In addition, as of the date of the Cosmin Affidavit, the Debtors owed approximately \$35,000 in overdue property taxes to the City of Hamilton in respect of the Real Property.

*Cosmin Affidavit, supra at [para. 20](#).*

21. Based on the foregoing, HTC has lost confidence in the Debtors' management to make the necessary arrangements to repay HTC (and the property tax amounts ranking in priority thereto). At this stage, HTC believes that the only reasonable and prudent path forward is to take any and all steps necessary to protect the Property by having a receiver appointed. It is within HTC's rights under its security to do so.

*Cosmin Affidavit, supra at [paras. 21-22](#).*

22. The Debtors were served with HTC's receivership application on November 29, 2024, and no responding materials have been received as of the time of finalizing this factum on January 3, 2025. application.

*Rules of Civil Procedure (Ontario), [r 16.03](#).*

[Affidavit of Service of Neil Markowski sworn December 4, 2024 re: 58 King](#).

[Affidavit of Service of Neil Markowski sworn December 4, 2024 re: 223](#).

### **PART III – ISSUE**

23. The sole issue to be determined on this application is whether it is just and convenient for this Court to appoint Spergel as receiver over the Property.

## PART IV – LAW AND ARGUMENT

### *The Test for Appointing a Receiver*

24. HTC seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the CJA. Both statutes enable the Court to appoint a receiver and manager where such appointment is “*just or convenient*.”

**BIA, *supra* s. 243(1).**

***Courts of Justice Act (Ontario)* [CJA], [s. 101](#).**

25. In determining whether it is “*just or convenient*” to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of The Honourable Mr. Justice Blair in *Freure Village*. In that case, His Honour confirmed that, in deciding whether the appointment of a receiver is just or convenient, the court “*must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto,*” which includes the rights of the secured creditor under its security.

***Bank of Nova Scotia v. Freure Village on Clair Creek*, [40 C.B.R. \(3d\) 274](#), [1996] O.J. No. 5088 at [para. 10](#) (Gen. Div. [Comm. List]) [*Freure Village*].**

26. When the rights of the secured creditor under its security include a specific right to the appointment of a receiver (as in the present case), the burden on the applicant seeking the relief is relaxed. Indeed, The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that:

... while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

***Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013 ONSC 6866](#) at [para. 27](#) [*Elleway Acquisitions*].**



27. More recently, The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed in *iSpan Systems* by The Honourable Mr. Justice Osborne:

Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].

*iSpan Systems LP*, [2023 ONSC 6912](#) at [para. 31](#) [*iSpan Systems*].

28. Furthermore, the appointment of a receiver becomes less extraordinary still when dealing with a default under a mortgage, as in the present case.

*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*,  
[2020 ONSC 1953](#) at [paras. 43-44](#).

*It is Just and Convenient to Appoint the Receiver*

29. HTC submits that the test for the appointment of a receiver is met. HTC is contractually entitled to have a receiver appointed over the Debtors upon default. Such default has occurred and the appointment of Spergel as receiver is not an extraordinary remedy; it is simply the result of enforcing a contractual term that was mutually assented to by the Debtors and HTC.

Cosmin Affidavit, *supra* at Exhibit "E", Standard Charge Terms 201902,  
[s. 10.5\(a\)\(vi\)](#).

Cosmin Affidavit, *supra* at Exhibit "E", 58 King GSA, [s. 12.0\(1\)](#).

Cosmin Affidavit, *supra* at Exhibit "E", 223 GSA, [s. 12.0\(1\)](#).

30. HTC has been extremely patient in dealing with these Debtors. It has been a full year since the Debtors defaulted in respect of their obligations to HTC.

Cosmin Affidavit, *supra* at [para. 13](#).

31. HTC wishes to take any and all steps necessary to enforce its security and realize on same, and the appointment of Spergel as receiver is necessary for the protection of the Debtors' estate and the interests of HTC as a secured creditor. The Debtors have had ample time to address their defaults with HTC, but have instead perpetuated never-ending delay.

**Cosmin Affidavit, *supra* at [paras. 23-24](#).**

32. Spergel is a licensed insolvency trustee and is familiar with the circumstances of the Debtors and their arrangements with HTC. Spergel has consented to act as the Receiver should the Court so appoint it.

**Cosmin Affidavit, *supra* at [para. 25](#).**

#### **PART V – RELIEF REQUESTED**

33. In light of the foregoing, it is respectfully submitted that this Court should grant the Receivership Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3rd day of January, 2025.




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**SCHEDULE “A”  
AUTHORITIES CITED**

Jurisprudence

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [40 C.B.R. \(3d\) 274](#), [\[1996\] O.J. No. 5088](#) (Gen. Div. [Comm. List]).
2. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, [2020 ONSC 1953](#).
3. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013 ONSC 6866](#).
4. *iSpan Systems LP*, [2023 ONSC 6212](#).

**SCHEDULE “B”  
TEXT OF STATUTES, REGULATIONS & BY-LAWS**

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, s. 243**

**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.

**Restriction on appointment of receiver**

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

**Definition of receiver**

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

**Definition of receiver — subsection 248(2)**

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

**Trustee to be appointed**

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

**Place of filing**

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

**Orders respecting fees and disbursements**

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

**Meaning of disbursements**

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

**Advance notice**

**244** (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

**Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, s. 101****Injunctions and receivers**

**101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

**Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, r. 16.03**

**16.03** (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule. R.R.O. 1990, Reg. 194, r. 16.03 (1).

**Acceptance of Service by Lawyer**

(2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance. O. Reg. 575/07, s. 17.

(3) By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service. R.R.O. 1990, Reg. 194, r. 16.03 (3); O. Reg. 575/07, s. 1.

**Service by Mail to Last Known Address**

(4) Service of a document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16A) by mail to the last known address of the person to be served, but service by mail under this subrule is only effective as of the date the sender receives the card. O. Reg. 24/00, s. 3.

**Service at Place of Residence**

(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

and service in this manner is effective on the fifth day after the document is mailed. R.R.O. 1990, Reg. 194, r. 16.03 (5).

**Service on a Corporation**

(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Public and Business Service Delivery, service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address. R.R.O. 1990, Reg. 194, r. 16.03 (6); O. Reg. 170/14, s. 4; O. Reg. 520/22, s. 2.

**Crown in Right of Ontario, Attorney General**

(7) Service of a document on the Crown in right of Ontario or on the Attorney General of Ontario may be made by e-mailing a copy of the document in accordance with subrule 16.06.1 (1) to the e-mail address for service specified for the Crown or the Attorney General, as the case may be, on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

### **Children's Lawyer**

(8) Service of a document on the Children's Lawyer, and any service of a document that involves leaving a copy with the Children's Lawyer, may be made with respect to the Children's Lawyer by e-mailing a copy of the document in accordance with subrule 16.06.1 (1) to the e-mail address for service specified for the Children's Lawyer on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

### **Public Guardian and Trustee**

(9) Service of a document on the Public Guardian and Trustee, and any service of a document that involves leaving a copy with the Public Guardian and Trustee, may be made with respect to the Public Guardian and Trustee by e-mailing a copy of the document in accordance with subrule 16.06.1 (1) to the e-mail address for service specified for the Public Guardian and Trustee on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

### **Deemed Service, E-mail**

(10) Where service is made by e-mail under subrule (7), (8) or (9) between 4 p.m. and midnight, it is deemed to have been made on the following day. O. Reg. 107/21, s. 2.

HOME TRUST COMPANY

- and -

58 KING STREET EAST HAMILTON LTD. and 2238394  
ONTARIO LTD.

Applicant

Respondents

Court File No. CV-24-00088153-0000

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**Proceedings commenced at Hamilton**

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**FACTUM OF THE APPLICANT**  
**(returnable January 21, 2025)**

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