

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BETWEEN:

MERIDIAN CREDIT UNION LIMITED

Applicant

- and -

260 HIGH PARK LP, TRAC DEVELOPMENTS INC., AND 2486357 ONTARIO INC.

Respondents

FACTUM OF THE APPLICANT

May 22, 2024

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TO: THE SERVICE LIST

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FACTUM OF THE APPLICANT

PART I. OVERVIEW

1. This Factum is filed in support of the Application by Meridian Credit Union Limited (“**Meridian**”) for:

- (a) an Order (the “**Appointment Order**”) substantially in the form of the Order attached Tab 3 of the Application Record, appointing Ernst & Young Inc. (“**EY**”) as receiver, manager, and construction lien trustee (in such capacity, the “**Receiver**”), without security, of the property, assets, and undertakings of the Respondents (collectively, the “**Property**”) including, in particular the lands municipally known as 248 and 260 High Park Avenue Toronto, Ontario, identified by PINs 21365-0346(LT) and 21365-0009(LT) (together, the “**Mortgaged Lands**”) pursuant to Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3,¹ as amended (the “**BIA**”), Section

¹ *Bankruptcy and Insolvency Act* (Canada), RSC 1985, c B-3 [“**BIA**”].

101 of the *Courts of Justice Act*, R.S.O. 1990, c. C43,² as amended (the "CJA"), and Section 68 of the *Construction Act*; and

- (b) Such further and other relief as may be just and equitable.

PART II. FACTS

2. The facts with respect to this Motion are only briefly recited herein and are set out in more detail in the Affidavit of Amber Waheed, Affirmed April 12, 2024.³ Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Affidavit of Amber Waheed.

BACKGROUND

3. 260 High Park Limited Partnership ("**260 High Park LP**") is a single-purpose real estate development company.⁴

4. TRAC Developments Inc. ("**TRAC**") is the general partner of 260 High Park LP and owns the lands municipally known as 260 High Park Avenue Toronto, Ontario, identified by PIN 21365-0346(LT).⁵

5. 2486357 Ontario Inc. ("**248 Ontario**", together with 260 High Park LP and TRAC, "**260 High Park**") owns the lands municipally known as 248 High Park Avenue Toronto, Ontario, identified by PIN 21365-0009(LT).⁶

² *Courts of Justice Act* (Ontario), RSO 1990, c C43 ["CJA"].

³ Affidavit of Amber Waheed [**Waheed Affidavit**], Application Record dated April 18, 2024 [**Application Record**], Tab 2, [[Master A18](#)].

⁴ **Waheed Affidavit**, para 13, Application Record, Tab 2, [[Master A22](#)].

⁵ **Waheed Affidavit**, para 13, Application Record, Tab 2, [[Master A22](#)].

⁶ **Waheed Affidavit**, para 13, Application Record, Tab 2, [[Master A22](#)].

6. 260 High Park LP and 248 Ontario are developing the Mortgaged Lands together as a single project which is planned as a 70-unit residential condominium complex (the “**260 High Park Project**”). 248 Ontario holds 248 High Park Avenue as nominee for High Park LP, which is the beneficial owner of the Mortgaged Lands.⁷

CREDIT AGREEMENT AND SECURITY

7. On July 4, 2022, Meridian, as lender, 260 High Park as borrowers, and Michael Giamou and Chris Giamou as “**Individual Guarantors**” (260 High Park and the Individual Guarantors collectively, the “**Meridian Credit Parties**”), entered into a demand credit agreement (the “**Original Credit Agreement**”), accepted by 260 High Park on July 12, 2022. The Original Credit Agreement was subsequently amended by letter agreement dated September 25, 2023 (the “**Amendment**”, and together with the Original Credit Agreement, the “**Credit Agreement**”).⁸

8. As of April 9, 2024, 260 High Park was indebted to Meridian in the approximate amount of \$42,252,410.97 (the “**Indebtedness**”) pursuant to a credit agreement accepted by 260 High Park on July 12, 2022 (the “**Original Credit Agreement**”), and subsequently amended on September 25, 2023 (the “**Amendment**”, and together with the Original Credit Agreement, the “**Credit Agreement**”).⁹

9. The Credit Agreement stipulates under the heading “**REPAYMENT**” that “All Credit Facilities are available on a demand basis only and Meridian may terminate the Credit Facilities

⁷ **Waheed Affidavit**, para 13, Application Record, Tab 2, [[Master A22](#)].

⁸ **Waheed Affidavit**, para 14, Application Record, Tab 2, [[Master A22](#)].

⁹ **Waheed Affidavit**, para 10, Application Record, Tab 2, [[Master A22](#)].

at any time”. Notwithstanding the demand character of the loan, all amounts were to be repaid by September 30, 2023.¹⁰

10. Pursuant to the Credit Agreement, Meridian agreed to advance up to forty-seven million thirty-nine thousand three hundred and thirty-eight dollars (\$47,039,338) plus a letter of credit facility to 260 High Park as follows:

- (a) Demand Loan (Construction) up to a maximum of forty-seven million thirty-nine thousand three hundred and thirty-eight dollars (\$47,039,338); and
- (b) Standby Letters of Credit facility up to a maximum amount of two million dollars (\$2,000,000).¹¹

11. As security for its indebtedness and liability to Meridian pursuant to the Credit Agreement, 260 High Park provided Meridian with broad security, including but not limited to the following:

- (a) a first charge/mortgage against the Mortgaged Lands dated March 6, 2020, in the principal amount of fifty million dollars (\$50,000,000) (the “**Meridian Mortgage**”);
- (b) a general assignment of leases and rents with respect to the Mortgaged Lands (the “**Assignment of Rents and Leases**”);
- (c) a general security agreement in respect of all of the personal property of 260 High Park LP and 2486357 Ontario Inc. both dated February 25, 2020 (the “**GSA**”);

¹⁰ **Waheed Affidavit**, para 15, Application Record, Tab 2, [[Master A23](#)].

¹¹ **Waheed Affidavit**, para 16, Application Record, Tab 2, [[Master A23](#)].

- (d) an assignment of 260 High Park’s rights and interests in all construction and related contracts (the “**Contract Assignment**”); and
- (e) a joint and several undertaking that the Meridian Credit Parties agree to complete the project and fund, from resources outside of the 260 High Park Project, all cost overruns in excess of the aggregate costs set out in the 260 High Park Project budget approved by Meridian as set out in the Credit Agreement.

(collectively, the “**Security**”).¹²

REGISTRATIONS AGAINST THE MORTGAGED LANDS

12. Meridian is the first ranking secured creditor of 260 High Park by reason of the Westmount Meridian Postponement (as defined below).¹³

13. Meridian registered both the Meridian Mortgage and a notice of the Assignment of Rents and Leases with the Land Registry Office in Ontario on March 6, 2020.¹⁴

14. At the time of registration of the Meridian Mortgage, a mortgage dated November 23, 2018, was registered against the Mortgaged Lands in favour of Westmount Guarantee Services Inc. (“**Westmount**”) in the principal amount of \$20,000,000 (the “**Westmount Mortgage**”).¹⁵

15. Meridian and Westmount entered into a postponement of interest in respect of the Mortgaged Lands pursuant to which Westmount postponed its mortgage in favour of Meridian, with the effect that the Meridian Mortgage ranks ahead of the Westmount Mortgage (the

¹² **Waheed Affidavit**, para 17, Application Record, Tab 2, [[Master A23](#)].

¹³ **Waheed Affidavit**, para 26, Application Record, Tab 2, [[Master A26](#)].

¹⁴ **Waheed Affidavit**, para 20, Application Record, Tab 2, [[Master A25](#)].

¹⁵ **Waheed Affidavit**, para 21, Application Record, Tab 2, [[Master A25](#)].

“**Westmount Meridian Postponement**”). The Westmount Meridian Postponement was registered on title to the Mortgaged Lands on or about March 6, 2020.¹⁶

16. Subsequently, a third mortgage was registered in favour of Fiera FP Real Estate Financing Inc. and Fiera FP Real Estate Financing Fund, L.P. (together, “**Fiera**”) in the principal amount of \$14,300,000 (the “**Fiera Mortgage**”).¹⁷

17. Westmount and Fiera entered into a postponement of interest in respect of the Mortgaged Lands pursuant to which Westmount postponed its mortgage in favour of Fiera’s Mortgage, with the effect that the Fiera Mortgage ranks ahead of the Westmount Mortgage (the “**Westmount Fiera Postponement**”).¹⁸

18. Notwithstanding the Westmount Meridian Postponement and the Westmount Fiera Postponement, Westmount retains priority over deposits paid to 260 High Park by pre-sale purchasers of condominium units for so long as they remain in trust with counsel for 260 High Park.¹⁹

CONSTRUCTION LIENS

19. As of March 6, 2020, title searches indicate that construction liens totalling approximately \$14,069,187 were registered against the Mortgaged Lands.²⁰

¹⁶ **Waheed Affidavit**, para 22, Application Record, Tab 2, [[Master A25](#)].

¹⁷ **Waheed Affidavit**, para 23, Application Record, Tab 2, [[Master A25](#)].

¹⁸ **Waheed Affidavit**, para 24, Application Record, Tab 2, [[Master A25](#)].

¹⁹ **Waheed Affidavit**, para 27, Application Record, Tab 2, [[Master A26](#)].

²⁰ **Waheed Affidavit**, para 28, Application Record, Tab 2, [[Master A26](#)].

20. The registration of the Construction Liens against title to the Mortgaged Lands, and 260 High Park's failure to clear them from title immediately, is a breach of the terms of the Credit Agreement.²¹

BREACHES OF 260 HIGH PARK

21. Under the terms of the Credit Agreement, the Meridian Credit Parties are required to fund all cost overruns in excess of the aggregate costs set out in the project budget.²²

22. The Meridian Credit Parties have failed to fund the cost overruns, failed to complete the 260 High Park Project, and permitted the very significant construction liens to arise. As a result, Meridian has lost confidence in 260 High Park's ability to manage and complete the 260 High Park Project.²³

23. Based on the report prepared by Finnegan Marshall, Meridian and Fiera's Project Monitor, dated September 30, 2023, there is an increase in the overall project budget to \$95,485,182 (not including a mezzanine loan interest reserve of \$5,040,886). This is an increase of \$4,824,224. This is in addition to the unfunded cost overrun from Report No. 39 totalling \$3,716,364.²⁴

²¹ **Waheed Affidavit**, para 30, Application Record, Tab 2, [\[Master A28\]](#).

²² **Waheed Affidavit**, para 31, Application Record, Tab 2, [\[Master A28\]](#).

²³ **Waheed Affidavit**, para 32, Application Record, Tab 2, [\[Master A28\]](#).

²⁴ **Waheed Affidavit**, para 33, Application Record, Tab 2, [\[Master A28\]](#).

DEMAND UNDER THE CREDIT AGREEMENT

24. By letter dated September 25, 2023, Meridian provided a notice of default and reservation of rights to 260 High Park. This letter informed 260 High Park that they were in breach and default of the terms of the Credit Agreement.²⁵

25. Following the defaults by 260 High Park noted in the September 2023 letter from Meridian and the expiry of the credit facilities without repayment, Meridian offered to extend the facilities in order to provide 260 High Park the opportunity to rectify its defaults. 260 High Park failed to accept the terms of this extension offer and remained in default of its obligations.²⁶

26. Meridian issued a demand letter on November 16, 2023, addressed to each of the Meridian Credit Parties resulting from ongoing breaches and defaults of the Credit Agreement (the “**Demand Letter**”). 260 High Park’s breaches and defaults included: (1) failure to fund cost-overs; and (2) delay of the project and failure to repay the Indebtedness.²⁷

27. The Demand Letter additionally enclosed notices of intention to enforce security on the property of 260 High Park (the “**260 High Park NITES**”) and each of the other Meridian Credit Parties pursuant to section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”) (collectively with the 260 High Park NITES, the “**NITES**”).²⁸

28. In addition to the forgoing defaults under the Credit Agreement, on April 11, 2024, Meridian received notice that the property insurers for the 260 High Park Project were cancelling

²⁵ **Waheed Affidavit**, para 34, Application Record, Tab 2, [[Master A29](#)].

²⁶ **Waheed Affidavit**, para 35, Application Record, Tab 2, [[Master A29](#)].

²⁷ **Waheed Affidavit**, para 36, Application Record, Tab 2, [[Master A29](#)].

²⁸ **Waheed Affidavit**, para 37, Application Record, Tab 2, [[Master A29](#)].

the insurance coverage for non-payment of premiums by 260 High Park. Based on the information obtained by Meridian, this cancellation was described as being effective on April 12, one day after Meridian learned of the issue. This significant failure by 260 High Park is yet another breach under the Credit Agreement and could potentially cause material prejudice to Meridian and other stakeholders. Meridian has made a protective disbursement under its mortgage to pay these premiums directly.²⁹

PART III. ISSUES

29. The sole issue to be determined by the Court in respect of this Application is whether it is just or convenient for the Court to appoint EY as Receiver over the Mortgaged Lands?

PART IV. THE LAW

THE TECHNICAL REQUIREMENTS TO APPOINT A RECEIVER HAVE BEEN MET

30. Meridian submits that the technical requirements for the appointment of a receiver under both the BIA and CJA have been met.

31. Meridian is a secured creditor of 260 High Park in respect of the Mortgaged Lands, and is therefore entitled to bring an application under section 243 of the BIA. As required under subsection 243(1.1) of the BIA, Meridian issued the NITES. The notice period under the NITES has expired.

32. EY is qualified to act as a Receiver in accordance with the requirements of subsection 243(4) of the BIA and has consented to serving as Receiver in these proceedings.³⁰

²⁹ **Waheed Affidavit**, para 38, Application Record, Tab 2, [[Master A30](#)].

³⁰ Ernst & Young Inc. Consent to Act, April 12, 2024, Application Record, Tab 2, Tab Q, [[Master A290](#)].

IT IS JUST AND CONVENIENT TO APPOINT THE RECEIVER

33. Pursuant to sub-section 243(1) of the BIA, the Court may, on application by a secured creditor, appoint a receiver where it considers it to be just or convenient to do so:

Court may appoint a 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.³¹

34. Sub-section 101(1) of the CJA similarly provides for the appointment of a receiver by interlocutory order where the appointment is "just and convenient":

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.³²

³¹ BIA, supra note 1, section 243

³² CJA, supra note 2, sub-section 101(1)

35. In *Freure Village*, Justice Blair (as he was then), found that, in deciding if the appointment of a receiver is just or convenient, the Court must have regard to *inter alia* the nature of the property and the rights and interest of all parties in relation thereto, which includes a secured creditor under its security.³³

36. Where a secured creditor is seeking the appointment of a receiver and its credit documents specifically afford it the right to appoint a receiver the appointment of a receiver is not an “extraordinary remedy”. The rationale for this standard is that, in such circumstances, as Justice Morawetz (as he then was), remarked in *Sherco Properties*: “the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties”.³⁴

37. Meridian’s Credit Agreement with 260 High Park explicitly provides for the appointment of a receiver, as does the Meridian Mortgage.

38. In *Atlas Healthcare*, the Court held that where a secured creditor has bargained for the contractual right to have a receiver and manager appointed, there must be a good reason to deprive the creditor of that contractual right.³⁵

39. In *Freure Village*, the Court held that an important consideration in deciding whether or not to appoint a receiver is whether an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.³⁶

³³ **Bank of Nova Scotia v. Freure Village on Clair Creek**, [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List)), [paras 10-12](#) [“*Freure Village*”].

³⁴ **Bank of Montreal v. Sherco Properties Inc.**, 2013 ONSC 7023 (Commercial List), para 42; **Elleway Acquisitions Limited v. The Cruise Professionals Limited**, 2013 ONSC 6866 (Commercial List), at para [27](#).

³⁵ **Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al** 2018 ONSC 7382 (Commercial List), at para 100.

³⁶ **Freure Village**, at [para 11](#).

40. A receiver is in the best position to develop a strategy to realize value on the project through a Court-supervised sale process. Further, given the substantial construction liens and defaults by 260 High Park, allowing the project to remain under the control of the borrower threatens continuing prejudice to Meridian and the other creditors.

41. Meridian also notes that any dealing with the 260 High Park Project will require a mechanism for addressing the construction liens that have been registered. The receivership will provide a forum for this as the receiver will be able to regularize such a process.

42. Meridian submits that in accordance with the test and factors outlined above, it is both just and convenient to appoint EY as receiver over the Mortgaged Lands, as:

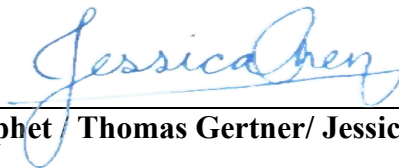
- (a) Meridian has at all times acted reasonably, including by offering to extend the facilities in order to provide 260 High Park the opportunity to rectify its defaults;
- (b) Meridian has lost faith in the ability of 260 High Park to repay the Indebtedness in light of 260 High Park's failure to fund the cost overruns, failure to repay the Indebtedness following demand, the ten construction liens totalling \$14,069,187 that 260 High Park has allowed to be registered on the Mortgaged Lands, and failure to pay insurance coverage premiums;
- (c) The Indebtedness is due and owing to Meridian;
- (d) Meridian's Credit Agreement specifically provide it with the right to seek the appointment of a Receiver; and

- (e) Appointment of a receiver will create a transparent and objective marketing process for the sale of the Mortgaged Lands.

PART V. CONCLUSION AND RELIEF SOUGHT

43. For the reasons set out above, Meridian requests that the Court grant the Appointment Order, substantially in the form included at Tab 3 of the Application Record.

RESPECTFULLY SUBMITTED this 27th day of May, 2024.



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SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), [1996] OJ No 5088 (QL), 40 CBR (3d) 274 (ONSC (Commercial List))
2. [*Bank of Montreal v. Sherco Properties Inc.*](#), 2013 ONSC 7023 (Commercial List)
3. [*Elleway Acquisitions Limited v. The Cruise Professionals Limited*](#), 2013 ONSC 6866 (Commercial List))
4. [*Romspen Investment Corporation v. Atlas Healthcare \(Richmond Hill\) Ltd. et al*](#) 2018 ONSC 7382 (Commercial List),

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC, 1985, c B-3

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

243 (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

243 (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)

243 (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

243 (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

243 (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

243(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

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

Courts of Justice Act, RSO 1990, c C43

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.

Terms

101 (2) An order under subsection (1) may include such terms as are considered just.

Construction Act, R.S.O. 1990, c. C.30

Application for appointment of trustee

68 (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Powers of trustee

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,

(a) act as a receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;

(b) complete or partially complete the improvement;

(c) take appropriate steps for the preservation of the premises; and

(d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.

Liens a charge on amounts recovered

(3) Subject to subsection 78 (7), all liens shall be a charge upon any amount recovered by the

trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2

Sale subject to encumbrances

(4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, interest or other encumbrance that the court directs.

Orders for completion of sale, etc.

(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section.

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PROCEEDING COMMENCED AT TORONTO

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