

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended*

B E T W E E N:

PRICEWATERHOUSECOOPERS INC.

(solely in its capacity as court-appointed receiver and manager of
Bridging Finance Inc. and certain related entities and investment funds)

Applicant

- and -

SKYMARK FINANCE CORPORATION and MERK INVESTMENTS LTD.

Respondents

**FACTUM OF THE APPLICANT
(Application Returnable March 6, 2023)**

March 2, 2023

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PART I - OVERVIEW

1. PricewaterhouseCoopers Inc. (“**PwC**”), solely in its capacity as court-appointed receiver and manager of Bridging Finance Inc. and certain related entities and investment funds (in such capacity, the “**Applicant**” or the “**Bridging Receiver**”), seeks an order (the “**Receivership Order**”) appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as receiver and manager (in such capacity, the “**Receiver**”), without security, of all of the current and future assets, undertakings, and properties (the “**Property**”) of each of Skymark Finance Corporation (“**Skymark**”) and Merk Investments Ltd. (“**Merk**” and together with Skymark, the “**Respondents**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and section 101 of the *Courts of Justice Act* (the “**CJA**”).¹
2. The Applicant is the court-appointed receiver of Bridging, the senior secured creditor of each of the Respondents. Skymark is indebted to Bridging in the amount of approximately \$47 million under the Loans (as defined herein). Merk is indebted to Bridging in the amount of approximately \$1 million (plus accrued interest) under its secured guarantee of the Loans.
3. The Applicant issued Demand Letters and BIA Notices to each of the Respondents in October and November 2022. The statutory 10-day notice period has expired, and the Respondents have failed to fully repay their respective obligations.
4. The Respondents do not oppose this application or the terms of the proposed Receivership Order. The Applicant is unaware of any party that opposes the relief sought. The Loans are in default and past maturity. The Applicant has a contractual right under the applicable loan and security documents to appoint a receiver over each of the Respondents.
5. The Applicant is no longer prepared to support a continuation of the *status quo* and seeks the appointment of the Receiver over the Respondents to preserve the value of the Property and to implement an orderly sale or liquidation of such Property, or restructuring of the Respondents, for the benefit of all stakeholders.

¹ All capitalized terms not expressly defined herein are defined in the Affidavit of Christine Sinclair dated December 30, 2022 (the “**Sinclair Affidavit**”), located at Tab 2 of the Application Record of the Bridging Receiver.

6. The relief sought by the Applicant should be granted on the basis that it is “just or convenient” to appoint the proposed Receiver and therefore the applicable legal test set out under section 243 of the BIA and section 101 of the CJA has been satisfied. The proposed Receivership Order largely follows the model order and there are no terms that materially deviate from the model order.

PART II - THE FACTS

7. The facts relevant to the relief sought by the Applicant are set out in greater detail in the Affidavit of Christine Sinclair sworn December 30, 2022 (the “**Sinclair Affidavit**”) and are summarized below.

Background and Appointment of the Bridging Receiver

8. By orders of the Court dated April 30, 2021, May 3, 2021, and May 14, 2021 (the “**Bridging Appointment Orders**”), PwC was appointed as the Bridging Receiver pursuant to section 129 of the *Securities Act* upon application by the Ontario Securities Commission.²
9. Bridging is a privately held investment management firm that, prior to the appointment of the Bridging Receiver, offered alternative investment options to investors through the various Bridging investment funds. Bridging would raise capital from investors through its investment funds for the purpose of making private debt loans to third-party borrowers.³
10. The Bridging Receiver was appointed to protect the interests of, and maximize value for, Bridging’s investors and the other stakeholders. There are approximately 26,000 Bridging investors (both retail and institutional) primarily located across Canada. As detailed in the Bridging Receiver’s various reports to the Court, Bridging’s investors are facing significant losses on their investments in the Bridging Funds.⁴

² Sinclair Affidavit at para 4.

³ Sinclair Affidavit at para 6.

⁴ Sinclair Affidavit at para 7.

11. One group of loans in Bridging's portfolio are the Loans (as described below) that were made available to Skymark. Skymark is in default under the Loans, in respect of which approximately \$47 million remains outstanding. Merk is in default of its obligations under its secured guarantee of the Loans, which is limited to the principal amount of \$1,000,000.⁵

Corporate Information and Business of the Respondents

12. Each Respondent is a corporation incorporated under the laws of the Province of Ontario. The registered head office of each Respondent is located at 46 Village Centre Place, 3rd Floor, Mississauga, Ontario, L4Z 1V9. Paul Millar and Michael Slattery are listed as the directors of Skymark. Michael Slattery is listed as the director of Merk.⁶
13. Skymark was founded in 2011 and is in the business of providing construction and equipment financing to third-party consumers for both residential and commercial renovations and improvements. Skymark primarily finances home renovations, water systems, HVAC systems and smart home improvements.⁷
14. The Bridging Receiver does not have any information regarding the business carried on by Merk (if any) or whether Merk has meaningful assets or employees.⁸

The Loan Agreement and Advances

15. Pursuant to the Loan Agreement, the Lender made available to Skymark five separate credit facilities in the aggregate principal amount of \$35,170,000 (the "**Loans**"). As at November 30, 2022, the total amount owing by Skymark to the Lender under the Loans is \$47,378,007.95.⁹

⁵ Sinclair Affidavit at para 8.

⁶ Sinclair Affidavit at paras 12 & 14.

⁷ Sinclair Affidavit at para 13.

⁸ Sinclair Affidavit at para 15.

⁹ Sinclair Affidavit at paras 16-17.

16. Merk guaranteed the obligations of Skymark under the Loan Agreement up to the principal amount of \$1,000,000 plus interest pursuant to a guarantee agreement dated as of July 2015 (the “**Merk Guarantee**”). In addition, Paul Millar and Michael Slattery (together, the “**Personal Guarantors**”) personally guaranteed the obligations of Skymark to the Lender, in each case up to a maximum of \$1,500,000 plus interest, pursuant to separate guarantee agreements dated April 28, 2015 (together, the “**Personal Guarantees**”).¹⁰

Separate Loan to Skymark in 2017

17. In addition to the Loans, a separate loan in the aggregate principal amount of \$21,000,000 (the “**Additional Loan**”) was advanced by the Lender to Skymark pursuant to a term sheet dated July 7, 2017 (the “**Additional Loan Agreement**”).¹¹
18. The purpose of the Additional Loan was to fund Skymark’s loan extended to a third-party borrower to facilitate the acquisition of certain assets by the third party and to support its general working capital needs.¹²
19. As at November 30, 2022, the total amount outstanding under the Additional Loan was approximately \$23,306,371.30.¹³
20. The Applicant understands that it is Skymark’s position that Skymark’s loan to the third party and the corresponding security were intended to be assigned by Skymark to the Lender, with the result that the third party would be directly liable to the Lender and Skymark would no longer be indebted to the Lender under the Additional Loan.¹⁴
21. The books and records of Bridging do not include any written agreement that gives effect to this arrangement.¹⁵

¹⁰ Sinclair Affidavit at paras 38 & 42.

¹¹ Sinclair Affidavit at para 25.

¹² Sinclair Affidavit at para 26.

¹³ Sinclair Affidavit at para 27.

¹⁴ Sinclair Affidavit at para 30.

¹⁵ Sinclair Affidavit at para 30.

Security Held by Bridging for the Loans

22. As security for all of the present and future indebtedness and obligations of Skymark and Merk to the Lender, including under the Loan Agreement and the Merk Guarantee, each of the Respondents granted to the Lender security over all of their present and future personal property, as well as all of their present and future real and personal property located at 46 Village Centre Place, 3rd Floor, Mississauga, Ontario, L4Z 1V9 pursuant to the Skymark GSA.¹⁶
23. Skymark also granted to the Lender security over all of its present and future personal property pursuant to a separate general security agreement in connection with the Additional Loan Agreement.¹⁷
24. The Lender has made a registration against each of the Respondents pursuant to the *Personal Property Security Act* (Ontario). There are no registrations prior in time to the registrations made by the Lender.¹⁸
25. The Skymark GSA and the Merk GSA provide that the Lender may appoint a receiver upon the occurrence of a default thereunder, or upon the occurrence of an “Event of Default” under the Loan Agreement.¹⁹

Defaults and Demands for Payment

26. Pursuant to the Loan Agreement, each of the Loans has been made available to Skymark for a specified term subject to the right of the Lender to demand payment of the subject Loan. The term of each Loan has expired.²⁰

¹⁶ Sinclair Affidavit at paras 33 & 39.

¹⁷ Sinclair Affidavit at para 35.

¹⁸ Sinclair Affidavit at paras 34 & 40.

¹⁹ Sinclair Affidavit at paras 37 & 41.

²⁰ Sinclair Affidavit at para 45.

27. By letters dated October 17, 2022, the Bridging Receiver demanded payment from Skymark, Merk, and each of the Personal Guarantors of their respective obligations (collectively, the “**Demand Letters**”).²¹
28. The Demand Letters addressed to the Respondents also enclosed Notices of Intention to Enforce Security pursuant to section 244 of the BIA (“**BIA Notices**”). The BIA Notices were subsequently withdrawn to accommodate ongoing discussions between the Bridging Receiver and Skymark regarding the Loans. After these discussions, fresh BIA Notices were re-issued to each of the Respondents by letters dated November 4, 2022.²²
29. By letter dated December 22, 2022, the Bridging Receiver also demanded payment from Skymark of the amounts owing under the Additional Loan.²³
30. Despite the demands for payment, the Respondents and the Personal Guarantors have failed to satisfy their respective obligations under the Loan Agreement and/or the Guarantees, as applicable.²⁴
31. Skymark has also failed to provide the reporting required under the Loan Agreement since the demands for payment were made in October 2022. As such, the Applicant currently has little to no insight into the activities and financial position of Skymark.²⁵

Deterioration in Security Position

32. As detailed in the Sinclair Affidavit, the value of the collateral subject to the Lender’s security has steadily declined since the appointment of the Bridging Receiver (including as a result of Skymark’s failure to apply certain payments received from its consumer borrowers in reduction of the Core Facility). This decline in value has not been matched

²¹ Sinclair Affidavit at para 46.

²² Sinclair Affidavit at para 47.

²³ Sinclair Affidavit at para 51.

²⁴ Sinclair Affidavit at para 49.

²⁵ Sinclair Affidavit at paras 73-75.

by a reduction in the amount outstanding under the Loans, with the result that the Lender's security position has deteriorated.²⁶

33. The Bridging Receiver is concerned that the Lender's security position will further deteriorate unless steps are taken to ensure that the proceeds of all collateral subject to the Lender's security are applied in reduction of the Loans.²⁷
34. In addition, the Bridging Receiver has become aware that Skymark has collected, but failed to remit, HST since approximately February 2022. Based on reporting provided by Skymark on October 12, 2022, the unremitted HST up to August 31, 2022 was in excess of \$214,000, resulting in a liability that further erodes the Lender's security position.²⁸

PART III - THE ISSUE

35. The sole issue on this application is whether it is just or convenient for the Court to appoint A&M as Receiver on the terms of the proposed Receivership Order.

PART IV - LAW & ANALYSIS

A. THE RECEIVER SHOULD BE APPOINTED

(i) Jurisdiction to Appoint the Receiver

36. Pursuant to section 243 of the BIA, the Court may, on application by a secured creditor, appoint a receiver to take control of an insolvent person's property if it is "just or convenient" to do so:

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

²⁶ Sinclair Affidavit at paras 58-72.

²⁷ Sinclair Affidavit at para 10.

²⁸ Sinclair Affidavit at para 76.

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.

36. Section 101 of the CJA similarly provides that a receiver may be appointed where it is “just or convenient” to do so:

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.

37. The GSAs granted by the Respondents in favour of the Lender charge the Property as security for the Respondents' obligations under the Loans and/or the applicable Guarantee. The Applicant, on behalf of the Lender, is therefore a “secured creditor” within the meaning of the BIA.
38. The Respondents have failed to repay the Loans notwithstanding the maturity of the Loans and the issuance of the Demand Letters and the BIA Notices. The Respondents are unable to meet their obligations generally as they become due and are therefore “insolvent persons” within the meaning of the BIA.
39. Courts have considered the following factors, among others, in determining whether it is just or convenient to appoint a receiver: (i) the existence of a debt and a default; (ii) the quality of the security; (iii) the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan; (iv) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the

debtor and others; (v) the likelihood of maximizing the return to the parties; and (vi) the risk to the security holder.²⁹

40. The fact that a secured creditor has a right under its security documentation to appoint a receiver is of central importance. In cases where the security documentation provides for the appointment of a receiver (as in the present case), the analysis is focused on a consideration of whether it is in the interests of all concerned to have the receiver appointed by the court. As noted by Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

...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 (emphasis added).³⁰

41. It is not necessary for a creditor whose security documentation provides for the appointment of a receiver to demonstrate that it will suffer irreparable harm if the appointment is not granted by the court.³¹

(ii) *It is Just and Convenient to Appoint the Receiver*

42. The Bridging Receiver submits that it is both just and convenient to appoint the Receiver in the circumstances and therefore the statutory test for the appointment of a receiver is satisfied for the following reasons:

- (a) pursuant to the Loan Agreement and the Merk Guarantee, the Respondents were required to fully repay their respective obligations to the Lender upon demand. The

²⁹ See for example: [Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.](#), 2011 ONSC 5612 (Commercial List) at para 22; [RMB Australia Holdings Limited v. Seafeld Resources Ltd.](#), 2014 ONSC 5205 (Commercial List) at para 28; [Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited](#), 2011 ONSC 1007 (Commercial List) at paras 24 and 27 [*Carnival Leasing*]; and [Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.](#), 2009 BCSC 1527 at para 25.

³⁰ [Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.](#), 2013 ONSC 6866 (Commercial List) at para 27.

³¹ [Carnival Leasing](#), *supra* note 29 at paras 24-28.

Respondents have failed to do so notwithstanding the delivery of the Demand Letters and BIA Notices;

- (b) the statutory 10-day notice period set out in the BIA Notices has expired;
 - (c) Skymark has failed to provide the reporting required under the Loan Agreement since October 2022;
 - (d) as a result of the defaults described herein, the Applicant, on behalf of the Lender, is contractually entitled under the Skymark GSA and the Merk GSA to seek the appointment of a receiver over the Respondents;
 - (e) the books and records of Bridging and the financial reporting provided to Bridging to date indicate that Skymark is unable to satisfy its indebtedness to the Lender and other creditors and is insolvent;
 - (f) based on the reporting provided by Skymark to the Bridging Receiver, the Lender's security position is deteriorating as a result of, among other things, the failure by Skymark to apply certain payments from consumer borrowers in reduction of the Loans and through the failure to pay HST when due;
 - (g) given the defaults that have occurred under the Loan Agreement, in particular the deterioration in the Lender's security position, the Bridging Receiver has lost confidence in Skymark's management; and
 - (h) the Bridging Receiver does not support any continuation of the *status quo*, which may further erode the Lender's security position and jeopardize recoveries for Bridging's investors and other stakeholders.
43. A&M has consented to act as Receiver, subject to obtaining a Receivership Order on terms that are satisfactory to A&M.

PART V - RELIEF REQUESTED

44. For all of the foregoing reasons, the Bridging Receiver requests that this Court grant an Order substantially in the form of the draft Receivership Order located at Tab 3 of its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2023.



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**SCHEDULE “A”
LIST OF AUTHORITIES**

No.	Case Law
1.	<u><i>Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.</i>, 2011 ONSC 5612</u>
2.	<u><i>RMB Australia Holdings Limited v. Seafield Resources Ltd.</i>, 2014 ONSC 5205</u>
3.	<u><i>Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited</i>, 2011 ONSC 1007</u>
4.	<u><i>Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.</i>, 2009 BCSC 1527</u>
5.	<u><i>Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.</i>, 2013 ONSC 6866</u>

**SCHEDULE “B”
RELEVANT STATUTES**

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

Definitions

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

- (a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or
- (b) any of

- (i) the vendor of any property sold to the debtor under a conditional or instalment sale,

- (ii) the purchaser of any property from the debtor subject to a right of redemption, or

- (iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person’s rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights

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.

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-43, as amended

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

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

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

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