



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-25-00736577-00CL

DATE: May 29, 2025

NO. ON LIST:4

TITLE OF PROCEEDING: FUKIAGE, MIZUE et. al. v. CLEARVIEW GARDEN ESTATES INC. et. al.

BEFORE: JUSTICE KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

| Name of Person Appearing | Name of Party               | Contact Info                |
|--------------------------|-----------------------------|-----------------------------|
| Amanda McLachlan         | FUKIAGE, MIZUE              | mclachlana@bennettjones.com |
|                          | KOBAYASHI, AKIKO            |                             |
|                          | FUKIAGE, YOSHIKI            |                             |
|                          | FUKIAGE, TORU               |                             |
|                          | KOBAYASHI KYOHODO CO., LTD. |                             |

**For Defendant, Respondent, Responding Party:**

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---------------|--------------|
|                          |               |              |
|                          |               |              |

**For Other, Self-Represented:**

| Name of Person Appearing        | Name of Party                              | Contact Info   |
|---------------------------------|--|--|
| Kyle Plunkett<br>Miranda Spence | For the Receiver- KSV<br>Restructuring Inc | <a href="mailto:kplunkett@airdberlis.com">kplunkett@airdberlis.com</a><br><a href="mailto:mspence@airdberlis.com">mspence@airdberlis.com</a> |
| Ryan shah                       | For TDB Restructuring Limited              | <a href="mailto:ryan.shah@paliarerland.com">ryan.shah@paliarerland.com</a>   |
| Jordan Wong                     | Receiver- KSV Restructuring Inc            | <a href="mailto:wong@ksvadvisory.com">wong@ksvadvisory.com</a>   |
|                                 |  |  |

## **ENDORSEMENT OF JUSTICE KIMMEL :**

- [1] KSV Restructuring Inc. ("KSV") was appointed by order dated March 6, 2025 (the "Appointment Order") as receiver and manager (the "Receiver") of the assets, undertakings and properties of various companies (the "Respondents"), pursuant to an application made by a group of investors (the "Applicants" or "investors") made under s. 101 of the *Courts of Justice Act*. These investors had invested in certain land banking projects in the Niagara and London region, and had brought a receivership application as a result of, amongst other things, the alleged improper transfer of certain real estate properties.
- [2] Since its appointment, the Receiver has taken steps to advance certain pending sale transactions, investigate the allegations raised in the receivership application and to further protect stakeholder interests. The Receiver is at this time seeking approval and vesting orders ("AVOs") in respect of the proposed sale of five properties ("Properties") held in the name of the Respondents (or one or some of them, as the case may be). Specifically, certain of the real estate properties owned by the respondents London Valley Inc. ("LV"), London Valley II Inc. ("LV II"), London Valley V Inc. ("LV V"), Niagara Estates of Chippawa II Inc. ("NEC II"), and Talbot Crossing Inc. ("Talbot").
- [3] These Properties had been subject to sale under agreements of purchase and sale entered into prior to the Appointment Order. Since the original offers were all submitted prior to the receivership proceedings, the Receiver negotiated revised agreements of purchase and sale with each of the selected purchasers to include standard terms and conditions typically included in transactions completed in receivership proceedings, after conducting its own due diligence and seeking advice from an independent national broker, Jones Lang Lasalle Real Estate Services, Inc. ("JLL"), regarding the marketing and sale process and the purchase price for each sale.
- [4] Based on its experience and discussions, JLL advised the Receiver that it was of the view the value of the prospective transactions were fair and reasonable. The purchase prices all fall within or exceed the JLL value ranges.
- [5] The sale of some of these Properties had been previously authorized by a court order dated October 31, 2024 in pre-receivership oppression remedy proceedings commenced in Hamilton (the "Hamilton Proceedings"). The sales authorized in the Hamilton Proceedings were not completed. The other parties to the Hamilton Proceedings are on notice of the Receiver's motion for approval and vesting orders in respect of the sales of the same properties, and they do not oppose this motion.
- [6] The extensive service list was served with this motion and no party appeared to oppose it or raise any concerns.

- [7] The Receiver advises that if court approval is granted and the transactions close, the Receiver will terminate the previously entered into agreements of purchase and sale. The Receiver or Remax (the original broker on the pre-receivership sales) are in receipt of each of the deposits. The Receiver intends to pay a commission of 5% between Remax and the co-operating broker.
- [8] The Receiver continues to take steps to identify parties that may have an interest in these Properties as Co-Owners. As these efforts are ongoing, the Receiver is not recommending that the Court approve any distributions at this time. Accordingly, should the proposed transactions be approved and close, the Receiver only intends to pay costs secured by the Receiver's charge (as set out in the Appointment Order). The balance of the net sale proceeds will be held by the Receiver pending further Court order. The parties to the Hamilton Proceedings are not objecting to this, even though the prior order had contemplated sale proceeds being held in trust by their counsel. Any fees paid from the proceeds of the Proposed Transactions will be allocated amongst the Property. Approval of the Receiver's fee allocation will be sought at a later date.
- [9] The Receiver is also seeking, by way of an Ancillary Order, the approval of the First Report of the Receiver dated April 9, 2025 ("First Report") and the Second Report of the Receiver dated May 20, 2025 (the "Second Report"), and the Supplement to the Second Report of the Receiver dated May 26, 2025 (together, the "Reports") and the actions of the Receiver and its counsel as described therein, approval of the fees and disbursements of the Receiver and its counsel and a sealing order in respect of certain confidential appendices to the Second Report.
- [10] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Receiver's factum filed for this motion.

#### AVO and Sealing of Confidential Appendices to the Second Report

- [11] The test that the court must apply in determining whether to grant the AVO is that which the Court of Appeal set out in *Royal Bank of Canada v. Soundair Corp.*, 4 O.R. (3d) 1 (C.A.) (1991), at p. 6, which requires the court to consider:
- a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
  - b. the interests of all parties;
  - c. the efficacy and integrity of the process by which the party obtained offers; and
  - d. whether the working out of the process was unfair.

- [12] I am satisfied that the listing for sale by Remax and eventual APSs entered into by the Receiver are consistent with the *Soundair* principles, and that they are fair and reasonable in the circumstances. These factors are met in this case for the reasons summarized in paragraph 33 of the Receiver's factum and based upon the Receiver's recommendation.
- [13] The *Soundair* principles can be satisfied where the marketing process was conducted by a party other than the receiver where the process was fair and reasonable and where the court is of the view that no purpose would be served by a further marketing process: see *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911, at paras. 48-49. That is the situation here, where the Receiver has conducted an investigation and sought the advice of an independent professional broker, and is satisfied that the marketing process undertaken by Remax before the Appointment Order met the *Soundair* principles.
- [14] I am mindful of the deference that the court affords to the business judgment and recommendations of a court appointed Receiver in cases such as this, such as the examples cited by the Receiver in footnotes 37 and 38 of its factum: see *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15 citing *Regal Constellation Hotel Ltd., Re.*, 2004 CanLII 206 (ONCA), at para. 23. See also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857, at paras. 43-45 and *Bank of Montreal v. Dedicated National Pharmacies Inc. et al.*, 2011 ONSC 4634, at para. 43.
- [15] Vesting orders are a routine part of insolvency practice. The court will adopt a rigorous cascade analysis. It will consider the nature and strength of the interest that is proposed to be extinguished as well as the lack of any opposition: see *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at 13-106, 110.
- [16] While certain interests (encumbrances) are being extinguished in the Properties, the rights of those stakeholders are not being determined at this time. The distributions from the sale proceeds will be determined at a later date. No stakeholder identified by the Receiver to have a potential interest in the Properties is opposing this motion.
- [17] The provisions of the proposed forms of AVOs are consistent with the Commercial List model AVO.
- [18] For the forgoing reasons, the five requested AVOs are granted based on the exercise my jurisdiction and discretion under s. 100 of the *Courts of Justice Act*, RSO 1990, c. C-43.
- [19] The Receiver is of the view that the information and documentation contained in the Confidential Appendices is commercially sensitive information and should be sealed in order to avoid the negative impact that its dissemination would have if the sales of the Properties are not completed and other alternatives need to be explored for value maximization for the stakeholders.

- [20] The requested partial sealing order is limited in its scope (only the specifically identified Confidential Appendices, or parts of them) and in time (until the contemplated sale transactions close). Only the purchase price has been redacted (and sealed) on the five APSs. There is an email with the original broker and an appraisal summary by JLL that are both fully redacted given the commercially sensitive information contained in them.
- [21] The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the Properties, and any prejudice that might be caused by publicly disclosing confidential and commercially sensitive information prior to the completion of the now approved sale transactions. These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings.
- [22] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders. See for example, *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, 2014 ONSC 1173, at para. 34, in which the court held that the "integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place" in the insolvency context. See also *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009, at paras. 47-48; *Stelco Inc, Re*, 2006 CanLII 1772 (ONSC), at paras. 2-5; *Re Canwest Publishing Inc.*, 2010 ONSC 222, at paras. 63-65; and *Ontario Securities Commission v Bridging Finance Inc.*, 2021 ONSC 4347, at paras. 23-27.
- [23] It is just, appropriate and necessary to the integrity of this receivership proceeding that the Confidential Appendices be sealed.
- [24] **The Receiver is directed to ensure that the sealed Confidential Appendices are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. The Receiver is further directed to ensure that the confidential exhibits are "unsealed" at an appropriate time upon the earlier of the closing of the sale transactions contemplated by the AVOs, or further order of this court.**

#### Approval of the Receiver's Reports and the Activities and Fees of the Receiver and its Counsel

- [25] The proposed form of order contains the appropriate qualification regarding the approval of the Receiver's activities detailed in its First Report, Second Report, and Supplement to the Second Report, in accordance with the court's practice.

- [26] The activities of the Receiver as outlined in the Reports were (i) carried out in accordance with the Appointment Order, (ii) consistent with the Receiver's mandate, (iii) and were done to further the objectives of this receivership for the benefit of stakeholders.
- [27] The court encourages interim approval of the activities of court officers: see *Re Target Canada Co.*, 2015 ONSC 7574, at paras. 2, 22-23; *Laurentian University of Sudbury*, 2022 ONSC 2927, at paras. 13-14; and 41 *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161 at para 15. Among other things, this enhances and encourages transparency.
- [28] The fees and disbursements of the Receiver and its counsel were incurred at each party's standard (or in one case, discounted) rates and charges as set out in their respective fee affidavits. The fees of the Receiver and its counsel for which approval is sought are supported by fee affidavits and the time and hourly rates that correspond with the fees appear to be reasonable having regard to the work that was done.
- [29] I am satisfied that they are fair and reasonable having regard to the relevant factors that the Court of Appeal identified in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), at paras. 33 and 45, including: (a) the nature and extent of the value of the assets handled; (b) the complications and difficulties encountered; (c) the degree of assistance provided by the company, its officers or employees; (d) the time spent; (e) the receiver's knowledge, experience and skill; (f) the diligence and thoroughness displayed by the receiver; (g) the responsibilities assumed; (h) results of the receiver's efforts; and (i) the cost of comparable services.
- [30] The Receiver and its counsel have had to do a significant amount of work since the Appointment Order because of the underlying rationale for this receivership and the need for extensive investigation and tracing. The Receiver was involved in litigation to obtain a certificate of pending litigation.
- [31] Should the proposed sale transactions be approved, the Receiver will have realized on all known real estate properties still owned by the Respondents and subject to these proceedings, with the exception of one property. The nature of the interests, including with respect to property no longer owned by the Respondents, are complex. The Receiver has taken substantial efforts to obtain information regarding the Respondents, including with respect to other receivership proceedings and the Hamilton Proceedings.
- [32] Although the fees are significant, and the work of the Receiver and its counsel is not complete, "the focus of the fair and reasonable assessment should be on what was accomplished, and not on how much time it took." See *Bank of Nova Scotia v. Diemer*, at para. 45. Much has indeed been accomplished.

Orders

[33] The AVOs and Ancillary Relief Order signed by me today shall have immediate effect without the necessity of formal issuance and entry.

A handwritten signature in cursive script, appearing to read "Kimmel J.", written in dark ink.

KIMMEL J.