

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

B E T W E E N:

KSV KOFMAN INC. IN ITS CAPACITY AS RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

Plaintiff

- and -

JOHN DAVIES AND AEOLIAN INVESTMENTS LTD.

Defendants

**NOTICE OF MOTION
(Motion for *Mareva* Injunction – Returnable June 7, 2017)**

The moving party, KSV Kofman Inc. (“**KSV**”), solely in its capacity as receiver and manager of certain property of Scollard Development Corporation (“**Scollard**”), Memory Care Investments (Kitchener) Ltd. (“**Kitchener**”), Memory Care Investments (Oakville) Ltd. (“**Oakville**”), 1703858 Ontario Inc. (“**Burlington**”), Legacy Lane Investments Ltd. (“**Legacy Lane**”), Textbook (525 Princess Street) Inc. (“**525 Princess**”) and Textbook (555 Princess Street) Inc. (“**555 Princess**”) (collectively, the “**Receivership Companies**”), and not in its personal capacity or in any other capacity, will make an urgent motion, if necessary on an *ex parte* basis, to a judge presiding over the Commercial List on June 7, 2017, at 10:00 a.m., or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

1. **THE MOTION IS FOR:**

- (a) an interim order restraining the defendants, John Davies (“**Davies**”) and Aeolian Investments Ltd. (“**Aeolian**” and, together with Davies, the “**Defendants**”), and, as applicable, their respective servants, employees, agents, assigns, officers, directors and anyone else acting on their behalf or in conjunction with any of them, from selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any of their assets, wherever situate worldwide;
- (b) an interim order requiring third parties, including Royal Bank of Canada, The Toronto-Dominion Bank, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Bank of Montreal, National Bank of Canada, Laurentian Bank of Canada, Tangerine Bank, President’s Choice Bank, and all other banks, credit unions, trusts, financial institutions and financial services companies, whether in Canada or elsewhere, including all of their respective affiliates and branches, to forthwith freeze and prevent any removal or transfer of monies or assets of the Defendants held in any account or on credit on their behalf;
- (c) an order requiring Davies and Aeolian’s authorized representatives to forthwith prepare and provide to the plaintiff sworn statements describing the nature, value, and location of their assets worldwide;

- (d) an order requiring Davies and Aeolian's authorized representatives to forthwith submit to examinations under oath following delivery of the aforementioned sworn statements;
- (e) an order dispensing with the requirements of rule 40.03 of the *Rules of Civil Procedure*;
- (f) an Order dispensing with service of this notice of motion on the Defendants and permitting the matter to be heard *ex parte*, or alternatively, abridging the time for service of the notice of motion, motion record, factum and/or book of authorities; and
- (g) such further and other relief as this Honourable Court may deem just.

2. **THE GROUNDS FOR THE MOTION ARE:**

Overview

- (a) The plaintiff, KSV, is the court-appointed receiver and manager of certain property of the Receivership Companies appointed pursuant to orders of the Ontario Superior Court of Justice (Commercial List) dated February 2, 2017, April 28, 2017 and May 2, 2017;
- (b) Each of the Receivership Companies in respect of which KSV has been appointed receiver and manager was advanced monies on a secured basis by various trust corporations (collectively, the "**Trust Companies**" and, individually, a "**Trust Company**"), which monies had been raised from investors through syndicated

mortgages for particular real estate development projects specific to the respective Receivership Companies;

- (c) The within action, commenced by way of notice of action issued on June 6, 2017, alleges that the Defendants perpetrated a fraudulent scheme whereby they misappropriated millions of dollars from the investing public by diverting funds from the Receivership Companies (and the respective real estate development projects in which the funds were required to be invested) through corporate structures Davies controlled to, *inter alia*, himself, his family members and other parties related to him, including Aeolian;

The Loan Agreements

- (d) Each of the Receivership Companies entered into a loan agreement (the “**Loan Agreements**”) with a Trust Company pursuant to which the funds advanced by the Trust Companies were required to be used by the Receivership Companies to purchase real property and to pay the soft costs associated with the specific real estate development projects (the “**Projects**”) for which the funds were invested by the public and advanced to the Receivership Companies;
- (e) In raising the monies from investors, the Receivership Companies covenanted that they would not, without the consent of the applicable Trust Company (subject to certain limited exceptions), “use the proceeds of any Loan Instalment for any purposes other than the development and construction of the project on the Property”;

Prohibited Management Fees

- (f) Contrary to the Loan Agreements and the Receivership Companies' contractual and other legal obligations, Davies caused the Receivership Companies to improperly pay millions of dollars in management fees to his family members and other related parties, notwithstanding that the Receivership Companies never entered into any management services agreements with these parties;
- (g) Specifically, Davies caused Scollard, Oakville, Kitchener, Burlington, Legacy Lane, and a non-Receivership Company that he controls, McMurray Street Investments Inc. ("**McMurray**"), to transfer \$4.069 million in prohibited management fees to Aeolian, the defendant company owned directly by his spouse and daughters:
 - (i) Scollard transferred \$1,244,000 to Aeolian;
 - (ii) Oakville transferred \$1,112,000 to Aeolian;
 - (iii) Kitchener transferred \$506,000 to Aeolian;
 - (iv) Burlington transferred \$592,000 to Aeolian;
 - (v) Legacy Lane transferred \$341,000 to Aeolian; and
 - (vi) McMurray transferred \$274,000 to Aeolian;
- (h) These payments are all prohibited under the Loan Agreements;

Further Potentially Improper Management Fees

- (i) Pursuant to Section 7.02(c) of the Loan Agreements with 525 Princess and 555 Princess, ordinary course payments to shareholders for amounts related to the management, development and operation of the applicable property are permitted, provided such payments are reasonable in relation to the services rendered;
- (j) Davies caused 525 Princess and 555 Princess to transfer to Aeolian (purportedly in respect of management fees) amounts that appear to be unreasonable, particularly given that these Receivership Companies never entered into any management agreements with Aeolian and the Projects for which the funds were advanced have achieved very limited progress (they both remain in the pre-construction phase);

Improper Transfers to TSI, TSSI and MCIL

- (k) Contrary to the Loan Agreements and the Receivership Companies' contractual and other legal obligations, Davies caused certain of the Receivership Companies to improperly transfer millions of dollars to Textbook Suites Inc. ("**TSI**"), Textbook Student Suites Inc. ("**TSSI**") and Memory Care Investments Ltd. ("**MCIL**") – the parent companies of Kitchener, Oakville, Burlington, 525 Princess and 555 Princess, all three of which are owned, in part, by Aeolian;
- (l) These funds were transferred to TSI, TSSI and MCIL by cheque. The memo line on each of the cheques indicated that payment was a "loan", notwithstanding that:
 - (i) none of these "loans" were documented;

- (ii) no interest has been received by any of the applicable Receivership Companies on account of any such “loan”; and
- (iii) the relevant Loan Agreements do not permit the applicable Receivership Companies to make these loans;

Improper Dividends

- (m) Davies also caused certain Receivership Companies to improperly pay significant dividends to Aeolian. Specifically, Davies caused 525 Princess and 555 Princess to each pay \$250,000 in dividends to Aeolian;
- (n) While the payment of dividends is permitted under the Loan Agreements in certain circumstances, they are only to be paid from the “excess proceeds after the [real estate development property] has been acquired”. In each instance, Davies caused the dividends to be paid immediately after 525 Princess and 555 Princess received the funds from the applicable Trust Company at a time when 525 Princess and 555 Princess had no profits. Further, as a result of the payment of dividends and the payments to related parties, 525 Princess and 555 Princess essentially had no further monies to advance their respective Projects;

Improper Payments to Davies’ Family Members

- (o) Davies also caused certain of the Receivership Companies to make further payments directly to his spouse and children for services purportedly rendered by them in connection with the Projects. However, the plaintiff is not aware of these services, if any, having been performed by these individuals;

- (p) To the extent these services were not provided, or the payments in respect of any services that were provided are unreasonable, these payments are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements;

Improper Inter-Company Transfers and Transfers to Affiliates

- (q) In further contravention of the Loan Agreements, Davies routinely caused the Receivership Companies to improperly transfer monies between entities and to affiliates, including over \$17 million to and among the Receivership Companies and certain non- Receivership Companies that Davies controls, including Textbook Ross Park Inc., Textbook (445 Princess Street) Inc., Textbook (774 Bronson Avenue) Inc. and McMurray;
- (r) Davies also caused the Receivership Companies to improperly transfer monies to Lafontaine Terrace Management Corporation (“**Lafontaine**”) and Memory Care Investments (Victoria) Ltd. (“**MC Victoria**”) – two companies in respect of which Davies is the sole director and officer. Specifically:
- (i) Scollard, Legacy Lane, Burlington and Oakville improperly transferred a total of \$324,000 to Lafontaine; and
- (ii) Legacy Lane improperly transferred \$15,000 to MC Victoria;
- (s) These transfers are prohibited under the applicable Loan Agreements and constitute a breach of the Loan Agreements;

Misappropriation of Funds to Finance the Purchase of the Ottawa Property

- (t) Davies also improperly diverted further funds from 555 Princess and Kitchener (and the respective Projects in which the funds were required to be invested) to a non-Receiver'ship Company that he controls, Textbook (256 Rideau St.) Inc. ("**Rideau**"), to finance Rideau's purchase of real property municipally described as 256 Rideau Street, Ottawa, Ontario and 211 Besserer Street, Ottawa, Ontario (collectively, the "**Ottawa Property**");
- (u) The Ottawa Property was purchased by Rideau on or around November 6, 2015 for \$11 million;
- (v) Immediately prior to Rideau's purchase of the Ottawa Property, on October 27, 2015, Davies caused 555 Princess to improperly transfer \$1.39 million to Rideau, and he caused Kitchener to improperly transfer \$111,000 to Rideau, both by way of cheque. The cheques were both signed by Davies;
- (w) The funds were transferred from 555 Princess and Kitchener to Rideau for no consideration, for an illegitimate business purpose and in contravention of the relevant Loan Agreements. Despite the fact that the funds were required to be used for specific Projects to be respectively undertaken by 555 Princess and Kitchener, Davies caused the funds to be transferred to Rideau with complete disregard for the separate corporate identities of 555 Princess, Kitchener and Rideau and the contractual and legal obligations of the parties;

- (x) Following Rideau's acquisition of the Ottawa Property, Davies caused a further \$61,200 to be improperly transferred to Rideau from 555 Princess, 525 Princess and Burlington by way of cheques, each of which was also signed by Davies. Specifically:
- (i) \$2,200 was transferred by Burlington to Rideau on November 5, 2015;
 - (ii) \$36,000 was transferred by 555 Princess to Rideau on December 17, 2015;
 - (iii) \$7,000 was transferred by 555 Princess to Rideau on May 31, 2016; and
 - (iv) \$16,000 was transferred by 525 Princess to Rideau on June 20, 2016;
- (y) Despite the fact that these funds were required to be used for the specific Projects to be respectively undertaken by 555 Princess, 525 Princess and Burlington, the \$61,200 was transferred to Rideau for no consideration, for an illegitimate business purpose and in contravention of the relevant Loan Agreements;
- (z) On May 16, 2016, KSV (in its capacity as receiver and manager of 555 Princess, 525 Princess, Kitchener and Burlington) sought an order, on an *ex parte* basis, for the issuance and registration of Certificates of Pending Litigation on title to the Ottawa Property (the "CPLs"). On May 17, 2017, the Court granted the order (the "CPL Order") and the CPLs were registered on title. Neither Davies nor Rideau, nor any other party, has since contested the CPL Order or the registration of the CPLs on title;

Liquidation and Dissipation of Assets

- (aa) Following the Defendants' improper conduct as described above, and after the commencement of the receivership proceeding in January 2017, Davies embarked on a course of conduct designed to liquidate his assets and put them beyond the reach of the Receivership Companies and their creditors. Among other things:
- (i) On April 25, 2017, Davies sold his cottage located in Gravenhurst, Ontario for approximately \$3 million;
 - (ii) Davies also sold his personal residence located in King City, Ontario, which he jointly owns with his spouse (who partly owns Aeolian), though the transaction has not yet closed. The listing price for the residence was \$1.6 million;
- (bb) Davies has also engaged in other similar conduct, seemingly deliberately designed, to alienate assets and put them beyond reach of the Receivership Companies and their creditors;
- (cc) In the action, the plaintiff alleges that, by virtue of his acts and omissions, Davies, among other things: (1) committed fraud and deceit; (2) engaged in conspiracy; (3) breached his fiduciary and other legal duties owed to the Receivership Companies, (4) acted negligently, (5) converted the Receivership Companies' funds for his own personal benefit, (6) committed the unlawful means tort, and (7) has been unjustly enriched;

- (dd) In the action, the plaintiff further alleges that Aeolian, among other things: (1) committed fraud and deceit; (2) engaged in conspiracy; (3) converted the Receivership Companies' funds for its own use and benefit; (4) committed the unlawful means tort; and (5) has been unjustly enriched;
- (ee) The Defendants' conduct has exposed the Receivership Companies to significant liabilities in the form of claims for damages and losses from their creditors, including the innocent investors whose funds they misappropriated;
- (ff) In all the circumstances, it is just and equitable for a worldwide *Mareva* injunction to be issued in respect of the Defendants' assets;
- (gg) The plaintiff has a proprietary claim to these assets;
- (hh) The plaintiff has a strong *prima facie* case in fraud, amongst other causes of action, as against the Defendants;
- (ii) Given all of the Defendants' conduct to date, including Davies' alienation of his cottage and personal residence, coupled with all the other circumstances, including the duplicitous manner in which the Defendants diverted funds from the Receivership Companies through shell corporations and a network of non-arm's length parties to obtain secret profits, shelter funds, avoid detection and thwart recovery attempts, there is a real and genuine risk that the Defendants will put their assets beyond the reach of creditors for the purpose of avoiding judgment;
- (jj) The plaintiff will suffer irreparable harm, not readily compensable in damages, if the relief sought is not granted;

- (kk) The balance of convenience favours granting the relief sought by the plaintiff;
- (ll) Given the special circumstances of this case, including, among other things, the strength of the plaintiff's case and its status as the court-appointed receiver and manager of the Receivership Companies (which appointment was necessitated by the Defendants' improper conduct causing or contributing to the Receivership Companies' insolvency), the requirements of Rule 40.03 of the *Rules of Civil Procedure* ought to be dispensed with;
- (mm) Rules 37, 40, and 57.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194, as amended;
- (nn) Section 101 of the *Courts of Justice Act*, RSO 1990, c C 43, as amended;
- (oo) The inherent and equitable jurisdiction of this Honourable Court; and
- (pp) Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) KSV's Fourth Report dated June 6, 2017 with the appendices thereto; and
- (b) such further and other evidence as counsel may advise and this Honourable Court may permit.

June 6, 2017

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**KSV KOFMAN INC. in its capacity as Receiver and Manager of
Certain Property of Scollard Development Corporation, et al.**
Plaintiff

v.

JOHN DAVIES et al.

Defendants

Court File No: CV-17-11822-00CL

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PROCEEDING COMMENCED AT
TORONTO

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