

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

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION and HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION

Respondents

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

IN THE MATTER OF THE RECEIVERSHIP 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.

AND IN THE MATTER OF A MOTION PURSUANT TO 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

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

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

TEXTBOOK (445 PRINCESS STREET) INC.

Respondent

**IN THE MATTER OF THE RECEIVERSHIP OF TEXTBOOK (445 PRINCESS
STREET) INC.**

**AND IN THE MATTER OF AN 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**

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

B E T W E E N:

**GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED
TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE
CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE
CORPORATION AND 7743718 CANADA INC.**

Applicant

- and -

**TEXTBOOK (774 BRONSON AVENUE) INC., TEXTBOOK ROSS PARK INC. and
MCMURRAY STREET INVESTMENTS INC.**

Respondents

**IN THE MATTER OF A MOTION PURSUANT TO 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**

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

B E T W E E N:

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION AND HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO LTD., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC., TEXTBOOK (555 PRINCESS STREET) INC., TEXTBOOK (445 PRINCESS STREET) INC., MCMURRAY STREET INVESTMENTS INC., TEXTBOOK (774 BRONSON AVENUE) INC. AND TEXTBOOK ROSS PARK INC.

Plaintiffs

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, GREGORY HARRIS IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, HARRIS + HARRIS LLP, NANCY ELLIOT, ELLIOT LAW PROFESSIONAL CORPORATION, WALTER THOMPSON, 1321805 ONTARIO INC., BRUCE STEWART, THE TRADITIONS DEVELOPMENT COMPANY LTD., DAVID ARSENAULT, JAMES GRACE, BHAKTRAJ SINGH A.K.A. RAJ SINGH, RS CONSULTING GROUP INC., TIER 1 TRANSACTION ADVISORY SERVICES INC., JUDE CASSIMY, FIRST COMMONWEALTH MORTGAGE CORPORATION, MEMORY CARE INVESTMENTS LTD., TEXTBOOK SUITES INC., TEXTBOOK STUDENT SUITES INC. AND MICHAEL CANE

Defendants

**JOINT FACTUM OF THE COURT-APPOINTED TRUSTEE AND THE
COURT-APPOINTED RECEIVER
(Returnable April 21, 2023)**

Date: April 14, 2023

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Receiver of the Receivership
Companies*

TO: THE SERVICE LISTS

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PART I - INTRODUCTION

1. This is a motion for an order (the “**Settlement Approval Order**”) approving three proposed settlements (collectively, the “**Settlements**”) with certain defendants to ongoing multi-party litigation brought jointly by two Court-appointed officers.

2. The Trustee and the Receiver (each as defined below) are of the view that the proposed Settlements are fair and commercially reasonable in the circumstances, are in the best interests of the Trustee Corporations, the Receivership Companies (each as defined and described below), and their respective stakeholders, and preserve the fairness of the ongoing litigation for the remaining parties in the action. Accordingly, the Trustee and the Receiver both recommend that the proposed Settlements be approved pursuant to the terms of the Settlement Approval Order.

PART II - SUMMARY OF FACTS

3. The facts underlying this motion are more fully set out in the Twenty-Second Report of KSV Restructuring Inc.¹ (“**KSV**”) dated April 12, 2023 (the “**Twenty-Second Report**”) and the Fifteenth Report of Grant Thornton Limited (“**GTL**”) dated April 10, 2023.² All capitalized terms used but not defined herein have the meanings ascribed to them in the Twenty-Second Report.

¹ Effective August 31, 2020, KSV Kofman Inc. changed its name to KSV Restructuring Inc.

² Twenty-Second Report of KSV Restructuring Inc. dated April 12, 2023 [Twenty-Second Report], Motion Record of the Court-appointed Receiver dated April 12, 2023 at Tab 2 [Receiver’s MR]; Fifteenth Report of Grant Thornton Limited dated April 10, 2023 [Fifteenth Report], Motion Record of the Court-appointed Trustee dated April 12, 2023 at Tab E [Trustee’s MR].

I. Background

A. The Appointment of Grant Thornton Limited as Trustee

4. On October 27, 2016, this Court granted an order (the “**Trustee Appointment Order**”) appointing GTL as trustee (in such capacity, the “**Trustee**”) of eleven entities (collectively, the “**Trustee Corporations**”) that raised monies from investors (the “**Investors**”) through syndicated mortgage investments (the “**SMIs**”). Certain of the Trustee Corporations then advanced these monies on a secured basis pursuant to loan agreements (the “**Loan Agreements**”) between the Trustee Corporations and various real estate development companies now in receivership (collectively, the “**Receivership Companies**”).³

5. The Trustee Corporations were special purpose entities required under their relevant constating agreements to hold the SMIs in trust for the Investors and to act in a fiduciary capacity to administer and enforce the SMIs.⁴

6. The Trustee Appointment Order expressly empowers and authorizes the Trustee to initiate, prosecute and continue the prosecution of any and all proceedings on behalf of the Trustee Corporations. The Trustee is also empowered and authorized to settle or compromise any such proceedings and apply to any court for assistance in carrying out the terms of the Trustee Appointment Order.⁵

³ Twenty-Second Report, *ibid* s 1 at para 2, Receiver’s MR at Tab 2; Fifteenth Report, *ibid* at paras 1-2, Trustee’s MR at Tab E. The Receivership Companies include the following: 1703858 Ontario Inc., Legacy Lane Investments Ltd., McMurray Street Investments Inc., Memory Care Investments (Kitchener) Ltd., Memory Care Investments (Oakville) Ltd., Scollard Development Corporation, Textbook (445 Princess Street) Inc., Textbook (525 Princess Street) Inc., Textbook (555 Princess Street) Inc., Textbook (774 Bronson Avenue) Inc. and Textbook Ross Park Inc.

⁴ Fifteenth Report, *ibid* at para 4, Trustee’s MR at Tab E.

⁵ Fifteenth Report, *ibid* at Appendix 1 – Appointment Order, Trustee’s MR at Tab E.

B. The Appointment of KSV Restructuring Inc. as Receiver

7. On January 21, 2017, the Trustee brought a motion for an order (the “**Initial Receivership Order**”) appointing KSV as receiver and manager (in such capacity, as amended from time to time, the “**Receiver**”) of the real property owned by Scollard Development Corporation (“**Scollard**”) and the assets, undertakings and properties of Scollard acquired for or used in relation to such real property. On February 2, 2017, this Court granted the Initial Receivership Order.⁶

8. On April 18, 2017, the Trustee brought a motion seeking, among other things, an order amending and restating the Initial Receivership Order to include the real property registered on title as being owned by Memory Care Investments (Kitchener) Ltd., Memory Care Investments (Oakville) Ltd., 1703858 Ontario Inc., Legacy Lane Investments Ltd., Textbook (525 Princess Street) Inc. (“**525 Princess**”), Textbook (555 Princess Street) Inc. (“**555 Princess**”) and the assets, undertakings and properties of these entities acquired for or used in relation to their real property (the “**A&R Order**”). The Court granted the A&R Order on April 28, 2017, and further amended the A&R Order on May 2, 2017 to address certain clerical errors.⁷

9. On January 3, 2018, KingSett Mortgage Corporation, a secured creditor of Textbook (445 Princess Street) Inc. (“**445 Princess**”), brought a motion in a separate court proceeding for an order (the “**445 Receivership Order**”) appointing KSV as Receiver of the real property owned by 445 Princess and the assets, undertakings and properties of 445 Princess acquired for or used in relation to such real property. On January 9, 2018, the Court granted the 445 Receivership Order.⁸

⁶ Twenty-Second Report, *supra* note 2 s 1 at para 3, Receiver’s MR at Tab 2.

⁷ Twenty-Second Report, *ibid* s 1 at para 4, Receiver’s MR at Tab 2.

⁸ Twenty-Second Report, *ibid* s 1 at para 5, Receiver’s MR at Tab 2.

10. On May 17, 2018, the Trustee, as a secured creditor of Textbook (774 Bronson Avenue) Inc. (“**Bronson**”), Textbook Ross Park Inc. (“**Ross Park**”), and McMurray Street Investments Inc. (“**McMurray**”), brought a motion for an order appointing KSV as Receiver of certain property of Bronson, Ross Park and McMurray (the “**Bronson, Ross Park and McMurray Receivership Order**” and, together with the A&R Order and the 445 Princess Receivership Order, the “**Receivership Orders**”). On May 30, 2018, the Court made the Bronson, Ross Park and McMurray Receivership Order.⁹

11. The Receivership Orders expressly empower and authorize the Receiver to initiate, prosecute and continue the prosecution of any and all proceedings on behalf of the Receivership Companies. The Receiver is also empowered and authorized to settle or compromise any such proceedings and apply to any court for assistance in carrying out the terms of the Receivership Orders.¹⁰

II. The Litigation

A. The Initial and Expanded Litigation

12. Following the issuance of the A&R Order, the Receiver commenced a review of the receipts and disbursements of certain of the Receivership Companies. The Receiver’s review revealed extensive transfers of money to and from certain of the Receivership Companies to various related entities, including entities controlled by John Davies (“**Davies**”), a director and officer of each of the Receivership Companies, and others.¹¹

⁹ Twenty-Second Report, *ibid* s 1 at para 7, Receiver’s MR at Tab 2.

¹⁰ Twenty-Second Report, *ibid* s 1 at para 8, Receiver’s MR at Tab 2; Fifteenth Report, *supra* note 2 at para 22, Trustee’s MR at Tab E.

¹¹ Twenty-Second Report, *ibid* s 1.2 at paras 1-2, Receiver’s MR at Tab 2.

13. Based on the Receiver's findings, the Receiver commenced litigation (the "**Initial Litigation**") against Davies and his holding company, Aeolian Investments Ltd. ("**Aeolian**") – a direct or indirect shareholder of each of the Receivership Companies (except McMurray). The Initial Litigation alleged, among other things, fraud, breach of fiduciary duty and negligence.¹²

14. The Receiver subsequently determined that Davies and Aeolian had inappropriately transferred assets received from the Receivership Companies to Davies' wife, Judith Davies, the Davies Family Trust and the Arizona Family Trust (together, the "**Trusts**"). On August 31, 2017, this Court granted the Receiver leave to amend its Statement of Claim to add as defendants Davies in his capacity as the trustee and/or representative of the Trusts, Judith Davies, in her personal capacity and in her capacity as trustee and/or representative of the Davies Family Trust, and Gregory Harris ("**Harris**"), solely in his capacity as trustee and/or representative of the Davies Family Trust.¹³

15. After reaching two Court-approved settlements in connection with the Initial Litigation, the Trustee and the Receiver jointly commenced a new action (the "**Litigation**") on October 3, 2018 in respect of the SMI scheme against, among others:

- (a) (i) Bahktraj Singh ("**Singh**"), who was the sole director, officer and shareholder of all but two of the Trustee Corporations, and was responsible for administering and enforcing the SMIs on behalf of the applicable Trustee Corporations, and (ii) certain related corporations, including Tier 1 Transaction Advisory Services Inc. ("**Tier 1**") and RS Consulting Group Inc. (collectively with Singh and Tier 1, the "**Singh Defendants**");

¹² Twenty-Second Report, *ibid* s 1.2 at para 3, Receiver's MR at Tab 2.

¹³ Twenty-Second Report, *ibid* s 1.2 at paras 5-6, Receiver's MR at Tab 2.

- (b) Nancy Elliott (“**Elliott**”) and Elliott Law Professional Corporation (together with Elliott, the “**Elliott Defendants**”), which ostensibly acted as legal counsel for the Trustee Corporations;
- (c) Gregory Harris and his law firm, Harris + Harris LLP, which acted for the Receivership Companies and the Trustee Corporations;
- (d) certain directors and officers of the Receivership Companies, including Davies, Walter Thompson (“**Thompson**”), Bruce Stewart, James Grace (“**Grace**”), David Arsenault (“**Arsenault**”) and certain related persons and entities, including, without limitation, Judith Davies, Aeolian, the Trusts and 1321805 Ontario Inc. (“**Thompson Co.**”, and together with Thompson, the “**Thompson Defendants**”);
and
- (e) Michael Cane (“**Cane**”), who prepared appraisals of the real property on which the SMIs were raised.¹⁴

16. A total of \$106 million in damages is sought in the Litigation (among other relief), representing the anticipated amount of the principal lost by the Investors from their aggregate investment of approximately \$131.3 million in the SMIs.¹⁵

B. Court-Approved Settlements in the Expanded Litigation

17. The Receiver and the Trustee have diligently advanced the Litigation in the best interests of the Trustee Corporations, the Receivership Companies and their respective stakeholders. To

¹⁴ Twenty-Second Report, *ibid* s 1.2 at para 7, Receiver’s MR at Tab 2; Fifteenth Report, *supra* note 2 at para 11, Trustee’s MR at Tab E.

¹⁵ Twenty-Second Report, *ibid* s 1.2 at para 8, Receiver’s MR at Tab 2; Fifteenth Report, *ibid* at para 12, Trustee’s MR at Tab E. Note that the \$106 million in damages sought in the Litigation does not take into account the recoveries obtained in the Litigation pursuant to Court-approved settlements to date.

date, the efforts of the Receiver and the Trustee in this regard have resulted in several Court-approved settlements being reached with the defendants to the Litigation, including the following:¹⁶

- (a) a settlement between the Receiver and the Trustee, on the one hand, and the Singh Defendants, on the other hand (the “**Singh Settlement**”), pursuant to which the Receiver and the Trustee resolved all known claims that they had against the Singh Defendants in exchange for, among other things, a payment of \$2.1 million and cooperation in relation to their claims and proceedings against the Non-Settling Defendants;¹⁷
- (b) a settlement between the Receiver and the Trustee, on the one hand, and Grace, on the other hand (the “**Grace Settlement**”), pursuant to which the Receiver and the Trustee resolved all known claims that they had against Grace in exchange for, among other things, a payment of \$450,000 and cooperation in relation to their claims and proceedings against the Non-Settling Defendants; and
- (c) a settlement between the Trustee and the Receiver, on the one hand, and the Elliott Defendants, on the other hand (the “**Elliott Settlement**”), pursuant to which the Receiver and the Trustee resolved all known claims that they had against the Elliott Defendants in exchange for, among other things, payment of \$680,000 and cooperation in relation to the Trustee’s and Receiver’s claims and

¹⁶ Twenty-Second Report, *ibid* s 1.2 at para 10, Receiver’s MR at Tab 2.

¹⁷ When used herein the term “Non-Settling Defendants” has the meaning ascribed to it in the corresponding settlement agreement unless the context otherwise requires.

proceedings against the Non-Settling Defendants.¹⁸

III. The Proposed Settlements for Which Court Approval is Sought

18. Since obtaining this Court's approval of the above-noted settlements, the Receiver and the Trustee have pursued their claims against each of Arsenault, Cane and the Thompson Defendants (collectively, the "**Settling Defendants**") and the other defendants to the Litigation, and have engaged in negotiations with the Settling Defendants. The negotiations with the Settling Defendants have resulted in the proposed Settlements, each of which remains subject to this Court's approval.¹⁹

19. The Settling Defendants and the proposed Settlements are discussed below.

A. The Thompson Defendants

20. Thompson was a director and officer of certain of the Receivership Companies, including 525 Princess, 555 Princess, 445 Princess, Bronson and Ross Park. He was also a director and officer of Textbook Suites Inc. ("**TSI**") and Textbook Student Suites Inc. ("**TSSI**").²⁰

21. Thompson's holding company, Thompson Co., of which Thompson is the sole officer and director, was an indirect shareholder of certain of the Receivership Companies. Namely, Thompson Co. was a shareholder of TSI and TSSI, which were shareholders of 525 Princess, 555 Princess, 445 Princess, Bronson and Ross Park.²¹

22. The claims against the Thompson Defendants are set out in the Third Amended

¹⁸ Twenty-Second Report, *supra* note 2 s 2.2.3 at paras 1-4, s 2.2.4 at paras 1-4 and s 2.2.5 at paras 1-7, Receiver's MR at Tab 2; Fifteenth Report, *supra* note 2 at paras 31-37, Trustee's MR at Tab E.

¹⁹ Twenty-Second Report, *ibid* s 3 at para 1, Receiver's MR at Tab 2.

²⁰ Twenty-Second Report, *ibid* s 3.6 at para 1, Receiver's MR at Tab 2.

²¹ Twenty-Second Report, *ibid* s 3.6 at para 2, Receiver's MR at Tab 2.

Statement of Claim. They include a claim against the Thompson Defendants for a constructive trust and/or damages in the amount of \$40 million for unjust enrichment, and against Thompson for negligence, breach of fiduciary duty, breach of contract, and knowing assistance in breach of fiduciary duty.²²

B. Cane

23. Cane is an appraiser of real property, with over forty years of experience, who focuses on the valuation of commercial real estate on behalf of developers, mortgage lenders and others. Cane is a member of the Appraisal Institute of Canada, a Professional Land Economist from the Association of Ontario Land Economists, and a retired member of the Royal Institution of Chartered Surveyors. Cane acted as the appraiser for each of the Receivership Companies in respect of their real property and Projects.²³

24. To support the amounts raised by way of the SMIs, the Receivership Companies and certain of the Development Companies (as defined in the Third Amended Statement of Claim) retained Cane as an appraiser to provide estimated hypothetical market values of the applicable real property, assuming it could be developed. The appraisals prepared by Cane were based on several assumptions, including that all necessary planning approvals would be obtained in a timely manner and that the applicable development would likewise be commenced and completed in a timely manner.²⁴

25. The claims against Cane are set out in the Third Amended Statement of Claim. They include a claim for damages in the amount of \$88 million and disgorgement of all costs and fees

²² Twenty-Second Report, *ibid* s 3.6 at para 3, Receiver's MR at Tab 2; Fifteenth Report, *supra* note 2 at para 63, Trustee's MR at Tab E.

²³ Twenty-Second Report, *ibid* s 3.4 at para 1, Receiver's MR at Tab 2.

²⁴ Twenty-Second Report, *ibid* s 3.4 at para 2, Receiver's MR at Tab 2.

paid by the Receivership Companies to Cane for professional negligence and breach of contract.²⁵

C. Arsenault

26. Arsenault carries on business as an architect through Arsenault Architect Inc. Arsenault Architect Inc. was retained by Davies to provide certain architectural services for the Project undertaken by McMurray. Arsenault was also listed as an officer of McMurray on its corporate profile report, and D. Arsenault Holdings Inc., Arsenault's holding company, was listed as a shareholder of McMurray on its corporate share register. Arsenault was named as a defendant in the Litigation on the basis of him ostensibly being an officer of McMurray.²⁶

27. The claims against Arsenault are set out in the Third Amended Statement of Claim. They include a claim for a constructive trust and/or damages in the amount of \$3.5 million (representing the expected investor losses in relation to McMurray) for negligence, breach of fiduciary duty, knowing assistance in breach of fiduciary duty and/or unjust enrichment. On discovery, Arsenault testified that he was never asked nor agreed to be an officer of McMurray despite him being listed as such on the corporate profile report for McMurray. Arsenault's position in this regard is supported by the documentary and evidentiary record that has developed during the Litigation.²⁷

A. The Settlements and the Settlement Agreements

28. The Settlements for which approval is sought on the within motion are comprised of the

²⁵ Twenty-Second Report, *ibid* s 3.4 at para 3, Receiver's MR at Tab 2; Fifteenth Report, *supra* note 2 at para 53, Trustee's MR at Tab E.

²⁶ Twenty-Second Report, *ibid* s 3.2 at para 1, Receiver's MR at Tab 2.

²⁷ Twenty-Second Report, *ibid* s 3.2 at paras 2-4, Receiver's MR at Tab 2; Fifteenth Report, *supra* note 2 at para 43, Trustee's MR at Tab E.

following:

- (a) a settlement between the Receiver and the Trustee, on the one hand, and the Thompson Defendants on the other hand (the “**Thompson Settlement**”), pursuant to the terms of a settlement agreement dated March 31, 2023 (the “**Thompson Settlement Agreement**”), under which the Thompson Defendants have (i) agreed to pay \$3.5 million and to cooperate with the Receiver and the Trustee in their claims and proceedings against the Non-Settling Defendants in exchange for the dismissal of the Litigation as against the Thompson Defendants and a release from the Receiver and the Trustee, and (ii) provided the Trustee and the Receiver with a declaration confirming that, among other things, all of the assets held by the Thompson Defendants, outside of Thompson’s personal residence, have a value of less than \$1 million (the “**Thompson Declaration**”);
- (b) a settlement between the Receiver and the Trustee, on the one hand, and Cane on the other hand (the “**Cane Settlement**”), pursuant to the terms of a settlement agreement dated January 17, 2023 (the “**Cane Settlement Agreement**”), under which Cane has (i) agreed to pay \$1.5 million and to cooperate with the Receiver and the Trustee in their claims and proceedings against the Non-Settling Defendants in exchange for the dismissal of the Litigation as against Cane and a release from the Receiver and the Trustee, and (ii) provided the Trustee and the Receiver with a declaration confirming that his personal assets, outside of his personal residence, have a value of less than \$1 million (the “**Cane Declaration**”); and
- (c) a settlement between the Receiver and the Trustee, on the one hand, and

Arsenault on the other hand (the “**Arsenault Settlement**”), pursuant to the terms of a settlement agreement dated February 7, 2022 (the “**Arsenault Settlement Agreement**”), under which Arsenault has agreed to pay \$50,000 and to cooperate with the Receiver and the Trustee in their claims and proceedings against the Non-Settling Defendants in exchange for the dismissal of the Litigation as against him, and a release from the Receiver and the Trustee.²⁸

29. Pursuant to the Thompson Settlement Agreement, the Cane Settlement Agreement and the Arsenault Settlement Agreement (collectively, the “**Settlement Agreements**”), all of the Receiver’s and the Trustee’s claims, rights and remedies as against all of the Non-Settling Defendants in the Litigation and otherwise are preserved. If the Court awards damages or any other monetary relief (the “**Monetary Relief**”) to the Receiver or the Trustee against the Non-Settling Defendants and finds that the Non-Settling Defendants have the right to pass any liability for such relief on to the Settling Defendants, the Trustee and the Receiver have agreed to waive their right to recover such Monetary Relief with respect to such portion attributable to the applicable Settling Defendants. Additionally, each of the Settlements includes a bar order with respect to the potential exposure of the Non-Settling Defendants to claims of joint responsibility with the applicable Settling Defendants, thereby leaving the Non-Settling Defendants responsible only for the losses they are proved to have caused.²⁹

30. All of the Settling Defendants have already made production in the Litigation of an

²⁸ Twenty-Second Report, *ibid* s 3.3 at paras 1-3, s 3.5 at paras 1-3 and s 3.7 at paras 1-3, Receiver’s MR at Tab 2; Fifteenth Report, *ibid* at paras 44-47, 49, 54-57, 59, 64-66, 69, Trustee’s MR at Tab E. In agreeing to resolve the Litigation pursuant to the terms of the Settlement Agreements, the Thompson Defendants, Cane and Arsenault continue to deny any liability to the Trustee and the Receiver and no findings of liability to the Trustee and the Receiver against the Thompson Defendants, Cane or Arsenault have been made by the Court. The Settlement Agreements make clear that they shall not in any way be construed as an admission of liability by any party thereto.

²⁹ Twenty-Second Report, *ibid* s 3.3 at para 2, s 3.5 at para 2 and s 3.7 at para 2, Receiver’s MR at Tab 2; Fifteenth Report, *ibid* at paras 48, 58, 68, Trustee’s MR at Tab E.

affidavit of documents and the relevant non-privileged documents and records in respect of which the Settling Defendants have possession, power and/or control, including records relating to the Settling Defendants' available insurance coverage. All of the Settling Defendants were also examined for discovery prior to the Settlements being negotiated and the Settlement Agreements being executed.³⁰

PART III - ISSUE

31. The sole issue to be determined is whether this Court should approve the proposed Settlements, as set out in the Settlement Agreements, and grant the related relief sought.

PART IV - LAW AND ARGUMENT

32. There is an overriding public interest in favour of encouraging and supporting the settlement of litigation.³¹ As the Supreme Court of Canada has recognized, promoting the settlement of litigation is sound judicial policy that contributes to the administration of justice.³²

33. The overriding public interest in favour of supporting the settlement of litigation extends to *Pierringer* agreements, such as the Settlement Agreements at issue here.³³

34. *Pierringer* agreements are important mechanisms in settling complex multi-party lawsuits such as the Litigation, without which it is very difficult to conclude a settlement with only some of the defendants and with which it is possible to substantially streamline the litigation.³⁴ For this reason, *Pierringer* agreements benefit both the parties to the litigation “by

³⁰ Twenty-Second Report, *ibid* s 3.3 at para 3, s 3.5 at para 3 and s 3.7 at para 3, Receiver's MR at Tab 2.

³¹ [Allianz v Canada \(Attorney General\), 2017 ONSC 4484](#) at para 9 [*Allianz*]; [Physicians' Dialysis Center Inc. v The Credit Valley Hospital, 2022 ONSC 2283](#) at para 14 [*Credit Valley*].

³² [Sable Offshore Energy Inc. v Ameron International Corp., 2013 SCC 37](#) at para 11 [*Sable*]; [Allianz, ibid](#) at para 9 [*Allianz*]; [Credit Valley, ibid](#) at para 14.

³³ [Credit Valley, ibid](#) at paras 14-15; [Sable, ibid](#) at paras 6, 11; [Allianz, ibid](#) at paras 9, 11; [1511419 Ontario Inc. v KPMG LLP, 2017 ONSC 2472](#) at para 15 [*1511419 Ontario Inc.*].

³⁴ [Sable, ibid](#) at paras 21, 23; [Allianz, ibid](#) at para 9; [Credit Valley, ibid](#) at para 15.

saving them the expense of trial of disputed issues”, and the justice system as a whole by reducing the “strain upon an already overburdened provincial Court system”.³⁵

35. Given their benefits, *Pierringer* agreements are “approved and supported by the court whenever possible”, provided the terms proposed are fair and avoid the possible prejudice to the remaining defendants associated with partial settlement agreements.³⁶ Promoting settlement while preserving the fairness of the ongoing litigation process to the remaining parties (i.e., the Non-Settling Defendants) is at the heart of *Pierringer* agreement approval.³⁷

36. Where, as in the instant case, approval of a settlement entered into by a Court-appointed officer is sought, the Court must also be satisfied that the proposed settlement “[falls] within the range of what [is] fair and commercially reasonable”.³⁸

37. Here, the terms of the proposed Settlements are fair and commercially reasonable, are in the best interest of the Trustee Corporations, the Receivership Companies and their respective stakeholders, and avoid possible prejudice to the Non-Settling Defendants, for the following reasons, among others:

- (a) the proposed Settlements are accretive – they generate immediate proceeds of \$5.05 million in the aggregate, all of which proceeds are coming from Arsenault’s, Cane’s and Thompson’s respective policies of insurance that would otherwise be eroded by Arsenault’s, Cane’s and Thompson’s ongoing defence costs in the Litigation;

³⁵ *Sable*, *ibid* at para 11. See also, *Credit Valley*, *ibid* at para 15; *Allianz*, *ibid* at paras 9, 11.

³⁶ *Sable*, *ibid* at paras 24-27; *1511419 Ontario Inc.*, *supra* note 33 at para 15; *Allianz*, *ibid* at para 11; *Credit Valley*, *ibid* at paras 15-16.

³⁷ *1511419 Ontario Inc.*, *ibid* at para 16.

³⁸ *Re Ravelston Corp.*, (2005) 14 CBR (5th) 207 at para 3; *Re IWHL Inc.*, 2011 ONSC 5672 at para 7.

- (b) the proposed Settlements avoid protracted, complex and costly litigation with the Settling Defendants in respect of the settled matters. Pursuant to the Settlement Agreements, all of the claims the Receiver and the Trustee have as against the Settling Defendants will be fully and finally resolved. The proposed Settlements therefore provide a degree of certainty regarding the costs, benefits, and timing that cannot be expeditiously achieved otherwise;
- (c) with respect to Cane and Thompson, (i) the payments to be made pursuant to the Cane Settlement and the Thompson Settlement, represent significant recoveries under their respective policies of insurance having regard to available limits, and all of the other circumstances, and (ii) based on the Cane Declaration and the Thompson Declaration (the contents of which are confidential), the Receiver and the Trustee are satisfied that Cane's and Thompson's respective policies of insurance represent the only material source of recovery against such Settling Defendants;
- (d) the proposed Settlements allow the Receiver and the Trustee to focus on other actors in the SMI scheme in the Litigation, which will increase the efficiency and efficacy with which the Litigation can be advanced, thereby resulting in further costs savings, timing efficiencies and benefits. Moreover, pursuant to the Settlement Agreements, the Settling Defendants have agreed to provide the Receiver and the Trustee with cooperation in connection with the Litigation;
- (e) the proposed Settlements make clear that the Non-Settling Defendants will only be liable for their proportionate share of the losses and contemplate a bar order with respect to their potential exposure to claims of joint responsibility with the

Settling Defendants, thereby leaving the Non-Settling Defendants responsible only for the losses they can be proved to have caused;

- (f) the Settling Defendants will each provide the Receiver and the Trustee with a broad full and final release of all claims they may have against the Receivership Companies and the Trustee Corporations, providing a further degree of certainty and closure with respect to any disputes as between such parties;
- (g) the Settlement Agreements are fair and reasonable in the circumstances as the Trustee and the Receiver believe they represent a commercially reasonable compromise in respect of the claims against the Settling Defendants, which are in the best interests of the Receivership Companies, the Trustee Corporations and their respective stakeholders;
- (h) the terms of the Settlement Agreements, including their respective financial terms, have been disclosed to the Non-Settling Defendants;
- (i) the non-financial terms of the Settlement Agreements are materially similar to those previously approved by this Court in these proceedings, including the Singh Settlement, the Grace Settlement and the Elliott Settlement;
- (j) the Settling Defendants have already made production in the Litigation of affidavits of documents and the relevant non-privileged documents and records in respect of which such Settling Defendants have possession, power and/or control, and they have all been examined for discovery;
- (k) the Settlement Agreements were entered into after extensive investigation, due

diligence and negotiation by the Trustee and the Receiver; and

- (1) the Trustee and the Receiver both recommend that the proposed Settlements be approved and that the proposed Settlement Approval Order be granted.³⁹

38. In light of the foregoing, each of the proposed Settlements, as set out in the Settlement Agreements, represents a fair and commercially reasonable compromise in all of the circumstances and for purposes of these proceedings. The Trustee and the Receiver believe that it is in the best interests of the Trustee Corporations, the Receivership Companies, their respective stakeholders, the Court and the administration of justice that the proposed Settlements and the Settlement Agreements be approved and implemented.

PART V - ORDER REQUESTED

39. For the foregoing reasons, the Trustee and the Receiver respectfully request that the proposed Settlements, as set out in the Settlement Agreements, be approved pursuant to the Settlement Approval Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF APRIL, 2023.

Bennett Jones LLP
AIRD & BERLIS LLP / BENNETT JONES LLP

³⁹ Twenty-Second Report, *supra* note 2 s 3.8 at para 1, Receiver's MR at Tab 2; Fifteenth Report, *supra* note 2 at paras 50-52, 60-62, 70-72, Trustee's MR at Tab E.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*1511419 Ontario Inc. v KPMG LLP*, 2017 ONSC 2472](#)
2. [*Allianz v Canada \(Attorney General\)*, 2017 ONSC 4484](#)
3. [*Physicians’ Dialysis Center Inc. v The Credit Valley Hospital*, 2022 ONSC 2283](#)
4. [*Re IWHL Inc.*, 2011 ONSC 5672](#)
5. [*Re Ravelston Corp.*, \(2005\) 14 CBR \(5th\) 207](#)
6. [*Sable Offshore Energy Inc. v Ameron International Corp.*, 2013 SCC 37](#)

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and - **TEXTBOOK STUDENTS SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION ET AL.**

Respondents

Court File No: CV-16-11567-00CL

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, ET AL.

Court File No: CV-17-11689-00CL

KINGSETT MORTGAGE CORPORATION

Applicant

- and - **TEXTBOOK (445 PRINCESS STREET) INC.**

Respondent

Court File No. CV-17-589078-00CL

GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, ET AL.

Applicant

- and - **TEXTBOOK (774 BRONSON AVENUE) INC., ET AL.**

Respondents

Court File No. CV-18-598788-00CL

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, ET AL, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, ET AL.

Plaintiffs

- and - **AEOLIAN INVESTMENTS LTD., ET AL.**

Defendants

Court File No. CV-18-606314-00CL

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

**PROCEEDING COMMENCED AT
TORONTO**

**JOINT FACTUM OF THE COURT-APPOINTED TRUSTEE AND THE COURT-
APPOINTED RECEIVER**

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