

**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
(returnable July 14, 2020)

Date: July 2, 2020

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*Lawyers for KSV Kofman Inc., in its
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JOINT FACTUM
(returnable July 14, 2020)

PART I - INTRODUCTION

1. This is a motion to approve a settlement with the defendant, James Grace ("**Mr. Grace**"), in ongoing multi-party litigation (the "**Proposed Grace Settlement**") as set out in a written settlement agreement between the Trustee and the Receiver, on the one hand, and Mr. Grace, on the other hand (the "**Grace Settlement Agreement**"). The Proposed Grace Settlement is fair and reasonable in all the circumstances, it is in the best interests of the Trustee Corporations, the Receivership Companies and their respective stakeholders (each as further defined and described herein) and it preserves the fairness of the ongoing litigation to the remaining parties in the action. Accordingly, the Trustee and the Receiver both recommend the settlement be approved pursuant to the terms of the draft Order appended to the Motion Record at Tab C.

PART II - SUMMARY OF FACTS

I. Background

A. The Appointment of GTL as Trustee

2. On October 27, 2016, Grant Thornton Limited ("**GTL**") was appointed trustee (in such capacity, the "**Trustee**") of eleven entities (collectively, the "**Trustee Corporations**") that raised monies from investors ("**Investors**") through syndicated mortgage investments ("**SMIs**"). 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 (the “**Receivership Companies**”).¹ 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.²

3. Under the Trustee’s appointment Order (the “**Trustee Appointment Order**”), the Trustee is expressly empowered and authorized 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. The Trustee Appointment Order further provides that the Trustee is at liberty and authorized and empowered to apply to any court for assistance in carrying out the terms of the Trustee Appointment Order.³

B. The Appointment of KSV as Receiver

4. On January 21, 2017, the Trustee brought a motion for an order (the “**Initial Receivership Order**”) appointing KSV Kofman Inc. (“**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, the Court granted the Initial Receivership Order.⁴

5. 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. (“**Kitchener**”), Memory

¹ Twentieth Report to Court of KSV Kofman Inc. in its capacity as Receiver and Manager of certain property Scollard Development Corporation et al. dated July 2, 2020 (the “**Receiver’s 20th Report**”), Section 1.0, para. 2.

² 13th Report to Court of Grant Thornton Limited in its capacity as Trustee of Scollard Trustee Corporation et al. dated June 25, 2020 (the “**Trustee’s 13th Report**”), para. 4, Motion Record, Tab E.

³ Trustee’s 13th Report, Appendix 1 – Appointment Order, Motion Record, Tab E 1.

Care Investments (Oakville) Ltd. (“**Oakville**”), 1703858 Ontario Inc. (“**Burlington**”), Legacy Lane Investments Ltd. (“**Legacy Lane**”), 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 “**Amended and Restated Receivership Order**”). On April 28, 2017, the Court granted the Amended and Restated Receivership Order. The Amended and Restated Receivership Order was further amended by Court order on May 2, 2017 to address certain clerical errors.⁵

6. On January 3, 2018, KingSett Mortgage Corporation, a secured creditor of Textbook (445 Princess Street) Inc. (“**445 Princess**”), brought a motion for an order (the “**445 Receivership Order**”) in a separate court proceeding appointing KSV as Receiver of the real property owned by 445 Princess and the assets, undertakings and properties of 445 Princes acquired for or used in relation to such real property. On January 9, 2018, the Court granted the 445 Receivership Order.⁶

7. 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 Amended and Restated Receivership 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.⁷

⁴ Receiver’s 20th Report, Section 1.0, para. 3.

⁵ Receiver’s 20th Report, Section 1.0, para. 4.

⁶ Receiver’s 20th Report, Section 1.0, para. 5.

⁷ Receiver’s 20th Report, Section 1.0, para. 7.

8. Under the Receivership Orders, the Receiver is expressly empowered and authorized to initiate, prosecute and continue the prosecution of any and all proceedings on behalf of the companies subject to the Receivership Orders (i.e., the Receivership Companies). The Receiver is also empowered and authorized to settle or compromise any such proceedings. The Receivership Orders further provide that the Receiver is at liberty and authorized and empowered to apply to any court for assistance in carrying out the terms of the Receivership Orders.⁸

II. The Initial Litigation commenced by the Receiver

A. The Initial Claim Against John Davies and Aeolian

9. Following the issuance of the Amended and Restated Receivership Order, the Receiver commenced a review of the receipts and disbursements of the Receivership Companies (the “**Review**”).⁹

10. In connection with the Review, the Receiver discovered extensive transfers of money to and from certain of the Receivership Companies to various related entities, including entities controlled by John Davies (“**Davies**”), who is a director and officer of each of the Receivership Companies, and others.¹⁰

⁸ Receiver’s 20th Report, Section 1.0, para. 8.

⁹ Receiver’s 20th Report, Section 1.1, para. 1.

¹⁰ Receiver’s 20th Report, Section 1.1, para. 2 and 3.

11. On June 6, 2017, the Receiver commenced litigation (the “**Initial Litigation**”) against Davies and his holding company, Aeolian Investments Ltd. (“**Aeolian**”), alleging that, among other things, they had misappropriated Investor funds in connection with the SMI scheme.¹¹

B. The Settlement with Alan Harris et al.

12. In connection with its pursuit of the Initial Litigation, the Receiver contemplated further amending its pleading in the Initial Litigation to name certain additional defendants, including, but not limited to, Dachstein Holdings Inc. (“**Dachstein**”), Alan Harris (“**A. Harris**”) and Erika Harris (“**Ms. Harris**”) (collectively, the “**Harris Settling Defendants**”).¹²

13. With the assistance of counsel, the Receiver and the Trustee engaged in extensive discussions and negotiations with A. Harris, as representative for the Harris Settling Defendants, regarding the Receivership Companies’ claims as against them, particularly regarding Dachstein’s receipt of dividends totalling \$1,000,000 from 555 Princess, 525 Princess, Bronson and Ross Park.¹³

14. Those discussions and negotiations culminated in a settlement (the “**Harris Settlement**”) between the Receiver and the Trustee, on the one hand, and the Harris Settling Defendants, on the other hand, which was formalized in a written settlement agreement (the “**Harris Settlement Agreement**”).¹⁴

15. Pursuant to the Harris Settlement Agreement, the Receiver and the Trustee agreed to resolve all known claims that they have against the Harris Settling Defendants in exchange for a

¹¹ Receiver’s 20th Report, Section 1.1, para. 3.

¹² Receiver’s 20th Report, Section 2.1.1, para. 1.

¹³ Receiver’s 20th Report, Section 2.1.1, para. 2.

¹⁴ Receiver’s 20th Report, Section 2.1.1, para. 3.

payment of \$1,000,000, representing a return of all amounts that the Harris Settling Defendants received in connection with the SMI scheme at issue in the Initial Litigation. The \$1,000,000 of dividends received and repaid by the Harris Settling Defendants was determined by an investigation conducted by the Receiver and further confirmed in a series of sworn declarations provided by the Harris Settling Defendants.¹⁵

16. On May 30, 2018, the Court approved the Harris Settlement. The Receiver and the Trustee have been paid all amounts due and owing by the Harris Settling Defendants under the Harris Settlement Agreement.¹⁶

C. The Mareva Settlement

17. On August 30, 2017, the Court issued an order (the “**Mareva Order**”) against Davies in his personal capacity and in his capacity as trustee of the Davies Family Trust (the “**Family Trust**”) and the Davies Arizona Trust (the “**Arizona Trust**”), Judith Davies in her personal capacity and in her capacity as trustee of the Family Trust, Aeolian (collectively, the “**Davies Mareva Defendants**”) and Gregory Harris, solely in his capacity as trustee of the Family Trust.¹⁷

18. The Mareva Order restricted the Davies Mareva Defendants and Mr. Harris, as trustee of the Family Trust, from selling their assets, including the real estate owned by the Arizona Trust located at 35410 North 66th Place, Carefree, Arizona, 85377 (the “**Arizona Real Property**”).¹⁸

¹⁵ Receiver’s 20th Report, Section 2.1.1, para. 4.

¹⁶ Receiver’s 20th Report, Section 2.1.1, para. 5.

¹⁷ Receiver’s 20th Report, Section 2.1.2, para. 1.

¹⁸ Receiver’s 20th Report, Section 2.1.2, para. 2.

19. On January 19, 2018, the Davies Mareva Defendants obtained leave to appeal the Mareva Order (the “**Mareva Appeal**”).¹⁹

20. In early November 2018, the Arizona Trust sold the Arizona Real Property for USD\$1.65 million along with the furnishings in the Arizona Real Property for a further USD\$150,000. The net proceeds generated from the sale (after payment of transaction expenses and the liens on the property) totalled US\$862,568, which amount was then reduced by virtue of Davies accessing living expenses of \$7,500 per month, as permitted pursuant to an order issued by the Court. Net of the amounts used by Davies for his living expenses, the remaining proceeds from the sale of the Arizona Real Property was US\$828,172 (the “**Proceeds**”). The Davies Mareva Defendants provided financial disclosure to the Receiver which indicated that the Proceeds represented a significant portion of the Davies Mareva Defendants’ assets.²⁰

21. The Receiver, in consultation with the Trustee, negotiated with the Davies Mareva Defendants concerning the Mareva Order. These negotiations culminated in a settlement of the Mareva issues only (the “**Mareva Settlement**”), which was approved by the Court on May 2, 2019.²¹

22. Pursuant to the Mareva Settlement, all the Mareva-related issues were resolved in exchange for payment of 72.5% of the Proceeds to the Receiver, with the balance paid to Davies. Accordingly, the Receiver was to receive a total of US\$584,027.69 under the Mareva Settlement (the “**Mareva Settlement Proceeds**”).²²

¹⁹ Receiver’s 20th Report, Section 2.1.2, para. 3.

²⁰ Receiver’s 20th Report, Section 2.1.2, para. 4.

²¹ Receiver’s 20th Report, Section 2.1.2, para. 5.

²² Receiver’s 20th Report, Section 2.1.2, para. 6.

23. The Receiver has received all the Mareva Settlement Proceeds and allocated the proceeds equally across all of the Receivership Companies. The Receiver subsequently distributed approximately US\$425,000 of the Mareva Settlement Proceeds to the Trustee.²³

24. As required under the Mareva Settlement, the Receiver lifted the Mareva Order and the parties dismissed the Mareva Appeal on consent, subject to the condition that the Mareva Order would be immediately reinstated in the event of, among other things, any misrepresentations in the disclosure provided to the Receiver and the Trustee by the Davies Mareva Defendants in connection with the Mareva Settlement.²⁴

25. Pursuant to the Mareva Settlement, no releases were provided to any of the Davies Mareva. The Receiver and the Trustee preserved all of their rights to continue their claims and pursue recovery against the Davies Mareva Defendants for the matters in the Initial Litigation, the Litigation (as defined below) and otherwise.²⁵

III. The Expanded Litigation

26. On October 3, 2018, the Trustee and the Receiver jointly commenced new and expanded litigation (the “**Litigation**”) in respect of the SMI scheme against each of (among others):

- (a) Bahktraj Singh (“**Singh**”) and certain related corporations, including Tier 1 Transaction Advisory Services Inc. (“**Tier 1 Transaction**”) and RS Consulting Group Inc. (“**RSCG**” and, collectively with Singh and Tier 1 Transaction, the “**Singh Defendants**”);

²³ Receiver’s 20th Report, Section 2.1.2, para. 7.

²⁴ Receiver’s 20th Report, Section 2.1.2, para. 8.

²⁵ Receiver’s 20th Report, Section 2.1.2, para. 9.

- (b) certain directors and officers of the Receivership Companies, including Davies, Walter Thompson, Bruce Stewart, Jude Cassimy, David Arsenault, Mr. Grace and certain related persons and corporations (including but not limited to Ms. Davies and Aeolian);
- (c) certain lawyers and law firms that acted in connection with certain of the SMIs, the Trustee Corporations and/or the Receivership Companies, namely:
 - (A) G. Harris and Harris + Harris LLP (“**H+H**”), which are alleged in the Litigation to have acted as the solicitors for all the Trustee Corporations and certain of the Receivership Companies; and
 - (B) Nancy Elliot and Elliot Law Professional Corporation, which are alleged in the Litigation to have acted as solicitors for the Trustee Corporations in respect of their loans to certain of the Receivership Companies, but which are further alleged in the Litigation to have delegated substantially all duties to H+H, thereby creating, facilitating and/or furthering conflicts of interest in which H+H and its lawyers acted for both borrowers and lenders in respect of the applicable SMIs; and
- (d) Michael Cane, who is alleged in the Litigation to have, amongst other things, acted as the appraiser for the Receivership Companies, been aware that his

appraisals were being used and relied upon to promote and solicit the SMIs, and prepared faulty, inaccurate and/or misleading appraisals.²⁶

27. A total of \$106 million in damages is sought in the Litigation (among other relief), representing the anticipated Investor losses from their aggregate investment of approximately \$131.3 million in the SMIs. The allegations in the Litigation are set out in detail in the 100-page Amended Amended statement of claim attached to the Receiver's 20th Report to Court.²⁷

IV. The Settlement with the Singh Defendants

28. Singh was the sole director, officer and shareholder of all but two of the Trustee Corporations, and he was responsible for, among other things, administering and enforcing the SMIs on behalf of the applicable Trustee Corporations. Singh is also the principal of Tier 1 Transaction and RSCG. Tier 1 Transaction promoted and sold the SMIs to Investors. RSCG held an indirect ownership interest in several of the Receivership Companies.²⁸

29. With the assistance of counsel, the Trustee and the Receiver engaged in extensive discussions and negotiations with Singh, in his personal capacity and in his capacity as representative for RSCG and Tier 1 Transaction, regarding the Trustee Companies' claims as against them in the Litigation. After lengthy investigations and due diligence, the Receiver and Trustee entered into a settlement agreement with the Singh Defendants (the "**Singh Settlement**"). Pursuant to the terms of the Singh Settlement, the Receiver and Trustee agreed to resolve all known claims that they have against the Singh Defendants in exchange for a payment of \$2.1 million. Pursuant to the terms of the Singh Settlement, the Singh Defendants also agreed

²⁶ Receiver's 20th Report, Section 1.1, paras. 7 and 8.

²⁷ Receiver's 20th Report, Appendix "B" – Amended Amended Statement of Claim.

²⁸ Receiver's 20th Report, Section 2.1.3, para 1.

to cooperate with the Trustee and the Receiver in relation to their claims and proceedings against the Non-Settling Defendants (as defined in the Singh Settlement).²⁹

30. On November 18, 2019, the Court approved the Singh Settlement. Of the Singh Settlement proceeds, the Receiver received \$525,000, which were allocated equally across the Receivership Companies, and the Trustee received the balance of the proceeds.³⁰

V. The Proposed Settlement with Mr. Grace

31. Mr. Grace is a Chartered Professional Accountant having the designations of CPA and CGA. Mr. Grace was employed as the Vice President of Finance for Textbook Suites Inc. ("TSI"). TSI is not a Receivership Company. TSI is the parent company of several of the Receivership Companies, including Textbook 445 Princess, Bronson and Textbook (256 Rideau St) Inc. ("Rideau"). Rideau is the subject of receivership proceedings commenced by Kingsett in a separate but related proceeding.³¹

32. Mr. Grace was employed as the Vice President of Finance for TSI for approximately 11.5 months, from on or about January 4, 2016 to approximately December 23, 2016. Mr. Grace was also formally listed as an officer (Vice President) on the corporate profile report for 445 Princess, which indicates he assumed such role on April 6, 2016.³²

33. Following the commencement of the Litigation, the Receiver and the Trustee engaged in negotiations with Mr. Grace. After investigations and due diligence, those negotiations culminated in the Proposed Grace Settlement between the Trustee and the Receiver, on the one

²⁹ Receiver's 20th Report, 2.1.3, paras 3 and 4.

³⁰ Receiver's 20th Report, 2.1.3, para 3.

³¹ Receiver's 20th Report, 3.0, paras 1 and 2.

³² Receiver's 20th Report, 3.0, para 3.

hand, and Mr. Grace, on the other hand, which was formalized in the Grace Settlement Agreement. The Grace Settlement Agreement is subject only to Court approval.³³

34. The Grace Settlement Agreement is meant to be a full and final settlement of all claims that the Trustee and the Receiver have against Mr. Grace, while preserving all the Trustee's and the Receiver's claims as against the remaining parties to the Litigation and any other parties with potential liability who are not Mr. Grace (collectively, the "**Non-Settling Defendants**"), as set out in more detail below and in the Grace Settlement Agreement.³⁴ A description of the Proposed Grace Settlement is provided below; however, the below is a high-level summary only. Full particulars of the Proposed Grace Settlement are reflected in the Grace Settlement Agreement appended to both the Trustee's 13th Report to Court and the Receiver's 20th Report to Court.³⁵ All terms of the Proposed Grace Settlement have been disclosed to the Non-Settling Defendants.³⁶

35. In considering the Grace Settlement Agreement, the Receiver had previously conducted a detailed review of the Receivership Companies' records. The Receiver's review did not identify any amounts paid to Mr. Grace, nor did it identify any amounts transferred from any of the Receivership Companies to Mr. Grace. Mr. Grace has also advised that he received no compensation or consideration of any kind from any of the Receivership Companies, though he did receive normal course payroll payments from TSI, which is not a Receivership Company. The Receiver did not uncover any records that indicate that Mr. Grace intentionally or knowingly orchestrated or facilitated the SMI scheme, and Mr. Grace has also advised that he had no

³³ Receiver's 20th Report, 3.1, para 1.

³⁴ Trustee's 13th Report, paras. 41 and 43, Motion Record, Tab E.

³⁵ Trustee's 13th Report, Appendix 11 – Grace Settlement Agreement, Motion Record, Tab E 11; Receiver's 20th Report, Appendix "E" – Grace Settlement Agreement.

³⁶ All of the parties to the Litigation have been served with the Motion Record.

knowledge of any of the alleged unlawful conduct relating to the SMI scheme. Accordingly, the Grace Settlement Agreement contains no admission of liability. All liability is expressly denied by Mr. Grace.³⁷

36. The Grace Settlement Agreement contemplates a no costs dismissal of the Litigation as against Mr. Grace, as well as an exchange of full and final mutual releases between the Receiver and the Trustee, on the one hand, and Mr. Grace and his insurer, on the other hand. In exchange for the dismissal of the Litigation as against Mr. Grace, and the release from the Receiver and the Trustee, Mr. Grace has agreed to pay \$450,000 to the Trustee's counsel (the "**Settlement Funds**"), following Court approval of the Grace Settlement.³⁸

37. The payment of the Settlement Funds will reduce the Liability Coverage Limit of Liability (as defined in the responding insurance policy issued by Travelers Insurance Company of Canada bearing Policy #10383958 and effective July 28, 2016 to July 28, 2017 (the "**Policy**")) under the Policy for all purposes, regardless of any subsequent finding by any court, tribunal, administrative body or arbitrator, in any proceeding or action, that Mr. Grace engaged in conduct that triggered or may have triggered any exclusion, term or condition of the Policy, or any of them, so as to disentitle him to coverage under the Policy.³⁹

38. Under the Grace Settlement Agreement, the Receiver and the Trustee also preserve all claims, rights and remedies they have as against all the Non-Settling Defendants in the Litigation and otherwise. If the Court awards damages or any other monetary relief ("**Monetary Relief**") to the Receiver or the Trustee against the Non-Settling Defendants and finds that the Non-

³⁷ Receiver's 20th Report, 3.1, para 2.

³⁸ Receiver's 20th Report, 3.1, para 3.

³⁹ Trustee's 13th Report, Appendix 11 – Grace Settlement Agreement at para. 9, Motion Record, Tab E 11; Receiver's 20th Report, Appendix "E" – Grace Settlement Agreement at para. 9.

Settling Defendants have the right to pass any liability for such relief onto Mr. Grace, the Trustee and the Receiver have agreed to waive their right to recover such Monetary Relief with respect to such portion attributable to Mr. Grace. In other words, the Trustee and the Receiver shall be entitled to recover from the Non-Settling Defendants only such claims for Monetary Relief attributable to the aggregate of the several liability of the Non-Settling Defendants. The Grace Settlement contemplates a bar order with respect to the potential exposure of the Non-Settling Defendants to claims of joint responsibility with Mr. Grace, thereby leaving the Non-Settling Defendants responsible only for the losses they are proved to have caused.⁴⁰

39. Pursuant to the terms of the Grace Settlement Agreement, Grace will also cooperate with the Trustee and the Receiver in relation to their claims and proceedings against the Non-Settling Defendants. The cooperation will include providing an account of the facts known to Mr. Grace that are relevant to such claims and proceedings and producing any relevant non-privileged documents and records and information over which Mr. Grace has possession, power and/or control. This cooperation is a material term of the Grace Settlement Agreement and an important feature of the Grace Settlement from both the Receiver's and Trustee's perspective.⁴¹

40. Subject to the approval of this Court, the purpose of the Settlement is to resolve – as against Mr. Grace only and his predecessors, successors and heirs (collectively, the “**Released Parties**”) – the Litigation and any other potential claims that the Trustee and/or the Receiver may have against the Released Parties with regard to the Litigation, the facts and issues in dispute therein and the facts and issues arising from or relating to the SMIs with the Trustee

⁴⁰ Receiver's 20th Report, 3.1, para 4.

⁴¹ Receiver's 20th Report, 3.1, para 5.

Corporations and the real estate development projects of the Receivership Companies (collectively, the “**Proposed Released Matters**”).⁴²

41. The Trustee and the Receiver are of the view that the Settlement represents the most reasonable and practical way forward because:

- (a) it generates immediate proceeds of \$450,000, which proceeds are coming from Mr. Grace's insurer under the Policy, which would otherwise be eroded by Mr. Grace's ongoing defence costs in the Litigation;
- (b) the Grace Settlement avoids protracted, complex and costly litigation with Mr. Grace in respect of the settled matters. Pursuant to the Grace Settlement Agreement, all the claims the Receiver and Trustee have as against Mr. Grace will be fully and finally resolved. The Grace Settlement therefore provides a degree of certainty regarding the costs, benefits, and timing that cannot be expeditiously achieved otherwise;
- (c) the Grace Settlement allows the Receiver 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. In that respect, Mr. Grace will also be providing the Receiver and the Trustee with cooperation in connection with the Litigation;
- (d) as the Proposed Grace Settlement requires Mr. Grace to cooperate with the Trustee and the Receiver in respect of the Litigation, it strengthens the case

⁴² Trustee's 13th Report, para. 41, Motion Record, Tab E.

against the Non-Settling Defendants, improving the chance of increased monetary recovery from those parties and streamlining and reducing the costs of the Litigation and any other related proceedings as against the Non-Settling Defendants;

- (e) it provides that the Non-Settling Defendants will only be liable for their proportionate share of the losses and it contemplates a bar order with respect to their potential exposure to claims of joint responsibility with Mr. Grace, thereby leaving the Non-Settling Defendants responsible only for the losses they can be proved to have caused;
- (f) Mr. Grace will provide the Receiver and the Trustee with a broad full and final release of all claims he 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 these parties;
- (g) the Grace Settlement Agreement is fair and reasonable, in the circumstances, as it represents a commercially reasonable compromise in respect of the claims against Mr. Grace and it is in the best interests of the Receivership Companies, the Trustee Corporations and their respective stakeholders;
- (h) it provides a degree of certainty regarding costs and benefits relating to both Mr. Grace and the Non-Settling Defendants, which cannot be expeditiously or effectively achieved otherwise; and

- (i) it reduces financial and opportunity costs related to protracted, complicated litigation, and conserves valuable court resources.⁴³

42. For these reasons, the Trustee and the Receiver both support the approval of the Grace Settlement Agreement by this Honourable Court and the granting of the related relief sought with respect to the Settlement.⁴⁴

PART III - ISSUE

43. The sole issue to be determined is whether this Court should approve the Proposed Grace Settlement as set out in the Grace Settlement Agreement and grant the related relief sought.

PART IV - LAW AND ARGUMENT

44. There is an overriding public interest in favour of encouraging and supporting settlements. It is sound judicial policy which contributes to the administration of justice.⁴⁵

45. *Pierringer* agreements, such as the Grace Settlement Agreement at issue here, should be approved and supported if possible because there are not only benefits to the parties involved in the litigation but also systemic benefits to the justice system as a whole.⁴⁶

46. *Pierringer* agreements have been recognized as very helpful methods to advance settlements in complex lawsuits such as the Litigation. As described by the Supreme Court of Canada, a *Pierringer* agreement is an important tool without which it is very difficult to conclude

⁴³ Trustee's 13th Report, para. 45, Motion Record, Tab E; Receiver's 20th Report, Section 3.2, para. 1.

⁴⁴ Trustee's 13th Report, para. 47, Motion Record, Tab E; Receiver's 20th Report, Section 4.0, para. 1.

⁴⁵ *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484 ("*Allianz*"), at para 9.

⁴⁶ *Allianz*, at para. 9, citing *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 ("*Sable*"), at para 23

a settlement with only some of the defendants and with which it is possible to substantially streamline the litigation. The Supreme Court has approved the use of *Pierringer* agreements so long as the terms proposed are fair and avoid the possible prejudice associated with these types of agreements.⁴⁷

47. 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.⁴⁸

48. Here, the terms of the Proposed Grace Settlement are fair and reasonable, 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 Grace Settlement is accretive – it increases recoveries in the Trustee Corporations’ and Receivership Companies’ estates;
- (b) the Proposed Grace Settlement avoids protracted, complex and costly litigation with Mr. Grace. Subject to the terms and conditions of the Settlement Agreement, all the claims that the Trustee and the Receiver have against Mr. Grace will be fully and finally resolved. The Settlement therefore provides a degree of certainty with regard to costs, benefits and timing, which cannot be expeditiously or effectively achieved otherwise;

⁴⁷ *Sable*, at paras. 24-27; Also see *1511419 Ontario Inc. v. KPMG LLP*, 2017 ONSC 2472 (“*1511419 Ontario Inc.*”) at para. 15.

⁴⁸ *1511419 Ontario Inc.*, at para. 16.

- (c) the Proposed Grace Settlement allows the Trustee and the Receiver to focus on the other actors in the SMI scheme in the go-forward 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;
- (d) Mr. Grace will provide cooperation to the Trustee and the Receiver in connection with the Litigation and any other related actions or proceedings, thereby increasing the likelihood and extent of monetary recovery from those remaining defendants and streamlining and reducing the costs of the Litigation and any other related proceedings;
- (e) given Mr. Grace's limited involvement in the matters at issue in the Litigation, the Proposed Grace Settlement reflects an appropriate practical outcome as against him in the Litigation, while avoiding the costs of pursuing him to obtain Judgment and then seeking to enforce that Judgment;
- (f) all of the terms of the Proposed Grace Settlement, including the quantum of the Settlement Funds being paid in connection with the Proposed Grace Settlement, are being fully disclosed to the Non-Settling Defendants;
- (g) the Proposed Grace Settlement contemplates a bar order with respect to the Non-Settling Defendants' potential exposure to claims of joint responsibility with Mr. Grace, thereby leaving the Non-Settling Defendants responsible only for the losses they can be proved to have caused;
- (h) the Non-Settling Defendants will be able to fairly present their case. Among other things, all productions received from Mr. Grace will be discoverable and,

therefore, the Non-Settling Defendants will have the same access to relevant material from Mr. Grace as the Trustee and the Receiver; and

- (i) the Trustee and the Receiver both recommend the Proposed Grace Settlement and recommend the granting of the sought Order.

49. The Grace Settlement Agreement represents a fair and commercially reasonable compromise in all of the circumstances and for purposes of these proceedings. 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 terms contemplated under the Grace Settlement Agreement be approved and implemented.

50. The Trustee and the Receiver therefore respectfully request and recommend that this Honourable Court approve the Grace Settlement Agreement and grant the related relief sought.

PART V - ORDER REQUESTED

51. For the foregoing reasons, the Trustee and the Receiver respectfully request that the Proposed Grace Settlement be approved and that the Order included at Tab C of the Motion Record be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of July, 2020.



AIRD & BERLIS LLP and BENNETT JONES LLP

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Allianz v. Canada (Attorney General)*, 2017 ONSC 4484
2. *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37
3. *1511419 Ontario Inc. v. KPMG LLP*, 2017 ONSC 2472

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
(returnable July 14, 2020)

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