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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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

APPLICATION UNDER SECTION 37 OF THE *MORTGAGE BROKERAGES, LENDERS AND ADMINISTRATORS ACT*, 2006, S.O. 2006, c. 29 and SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 c. C.43

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

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

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

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

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

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 -

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, AND GREGORY HARRIS SOLELY IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST

Defendants

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

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

BOOK OF AUTHORITIES
(Settlement Approval)

April 26, 2019

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(Updated as of April 11, 2019)

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TAB 1

2005 CarswellOnt 4267
Ontario Superior Court of Justice [Commercial List]

Ravelston Corp., Re

2005 CarswellOnt 4267, 142 A.C.W.S. (3d) 18, 14 C.B.R. (5th) 207

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Farley J.

Heard: August 25, 2005
Judgment: August 26, 2005
Docket: 05-CL-5863

Counsel: Alex MacFarlane for RSM Richter Inc. in its capacity as Receiver, Interim Receiver and Monitor of The Ravelston Corporation Limited, Ravelston Management Inc. Argus Corporation Limited, 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., 509647 Inc.
Matthew Gottlieb for Hollinger Inc.
Robert W. Staley, Derek J. Bell for Hollinger International Inc.
Lyndon Barnes, Nancy Roberts for CanWest Global Communications Corporation

Subject: Insolvency
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Management services agreement existed between R company, C Corp. and NP — R company gave C Corp. notice of termination of management services agreement on day before R company filed for protection under Companies'

Creditors Arrangement Act — Litigation ensued between receiver of R company and C Corp. regarding agreement — Receiver and C Corp. settled dispute subject to court approval for payment by C Corp. to receiver of $12.75 million, which was 50 percent of amount claimed by receiver — H International opposed settlement — Receiver brought motion for court approval of settlement — Settlement approved — If litigation had not been settled, decision would have been made on all-or-nothing basis — There was nothing approaching certainty of result — Settlement on 50-percent basis fell within general range of acceptability of fair and commercial reasonable basis.

Table of Authorities

Cases considered by *Farley J.*:

Bakemates International Inc., Re (2003), 2003 CarswellOnt 3075 (Ont. S.C.J.) — referred to

Bakemates International Inc., Re (2004), 2004 CarswellOnt 2339 (Ont. C.A.) — referred to

R. v. Mohan (1994), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), 1994 CarswellOnt 66, 1994 CarswellOnt 1155 (S.C.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION by receiver for court approval of settlement.

***Farley J.*:**

1 These are the short reasons promised yesterday where I approved the settlement between the Receiver of Ravelston and CanWest concerning the dispute between them as to the termination fee owing under the Management Services Agreement dated November 15, 2000 between Ravelston, CanWest and National Post. As I pointed out, the business efficacy of the Management Services Agreement may well be questioned; however what was to be decided by me was not that, but rather the issue of the termination arrangements.

2 The Receiver and CanWest — the day before the hearing of this dispute reached a settlement, subject to court approval, whereby the parties would exchange mutual releases and CanWest would pay the Receiver $12.75 million. This amounted to 50% of the amount the Receiver was claiming pursuant to the notice of termination which Ravelston gave CanWest the day before Ravelston filed for protection

pursuant to the CCAA (with the Receiver being the monitor under the CCAA proceedings) and for the appointment of the Receiver as the court appointed receiver of Ravelston. The two Hollinger companies, Inc. and International, were not happy with the amount of the settlement, although it appears that both were content with a settlement at a higher amount being paid the Receiver. Inc. did not support the approval of the settlement but did not oppose it. International actively opposed the settlement; its position was that the Receiver ought to have obtained a settlement in the 75% range. Both Inc. and International assert that they ought to have been more involved with the settlement process as they assert a special relationship owing to claimed security interests in the claim and its proceeds. One could well posit a situation where the process of settlement could have been improved by more involvement of Inc. and International. However, what we are concerned with is not perfection, but rather has there been material and relevant prejudice so as to taint the process to the degree that the court ought not to entertain the settlement. However, in this situation, Mr. Gottlieb for Inc. volunteered that Inc. had been alerted to the settlement prior to its being entered into, albeit just immediately prior (where in my view it would have been better to have alerted Inc. that settlement discussions were to be actively engaged in and then given progress reports at meaningful times along the way). International was kept more abreast of the situation; the Receiver and its Canadian counsel dialogued with International's counsel, Mr. Staley, including a meeting on June 7, 2005 which, *inter alia*, dealt with International's view concerning the dispute with CanWest. The Receiver of course had the benefit of the active participation of International leading up to the hearing scheduled for August 17th including a detailed factum by International opposing the CanWest position that it owed nothing. On August 15th, Mr. Staley was advised that the Receiver would be meeting with CanWest's counsel the next day to see if a settlement could be reached. While Mr. Staley was otherwise engaged on the 16th, he did indicate that a settlement would be preferable to having the matter litigated. International did not ask that another lawyer be allowed to participate in or observe the settlement discussions, nor did it indicate that a floor amount should be achieved in order that International would be supportive of a settlement.

3 The Receiver submitted that a motion to approve a settlement entered into by a court-appointed receiver is analogous to a motion to approve a sale of assets by a court-appointed receiver so that the 4 part set of principles/considerations of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16 would come into play. See *Bakemates International Inc., Re*, [2003] O.J. No. 3191 (Ont. S.C.J.), affirmed 2004 CarswellOnt 2339 (Ont. C.A.). However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a

settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property. In this regard, one may wish to consider the analogous situation of expert opinions as discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable. The case here involved an all or nothing result if the case went on to a court decision.

4 I have had the benefit of reviewing in detail the material for the August 17th hearing immediately prior to being advised that the Receiver and CanWest had reached a settlement, subject to court approval. In my view there was much to be said for the merits of each side's position. There was much to be said about the pros and cons — and it was carefully detailed in that material and so was said. I have now had as well the benefit of the material filed and argued concerning the approval of the settlement as concerns the merits of the dispute which was to have been heard on August 17th. If the case had not settled, then I would have had to make a decision, a decision on an all or nothing basis. I would have made that decision — but I cannot predict now what it would have been, nor could I predict how the Court of Appeal would have decided, given the fact that inevitably my decision would have been appealed. It would have been an interesting decision to write. There certainly was no slam-dunk either way, nor nothing approaching that certainty of result. In my view, the settlement on a 50% basis falls within the general range of acceptability on a fair and commercially reasonable basis. I therefore have approved the settlement.

5 Allow me to observe that in the fact circumstances of this case and the law as eventually argued in the respective factums, I agree that it is highly likely that attempts to negotiate a settlement before almost reaching the court house steps would have been premature. It was indeed necessary and appropriate that each side reflect on its own strengths and weaknesses once it had the benefit of refined argument on the strengths of the other side.

6 Mr. Gottlieb makes a fair request in my view where he asks on behalf of Inc. for advance notice of any intention to deal with the proceeds of this settlement. I

leave it to the Receiver in consultation with International and Inc. to deal with the issue of proceeds disposition and notice generally.

7 Order approving settlement to issue as per my fiat.

Order accordingly.

End of Document

TAB 2

2010 ONSC 6171, 2010 CarswellOnt 8436, 194 A.C.W.S. (3d) 433, 72 C.B.R. (5th) 303

2010 ONSC 6171
Ontario Superior Court of Justice [Commercial List]

Canadian Microtunneling Ltd., Re

2010 CarswellOnt 8436, 2010 ONSC 6171,
194 A.C.W.S. (3d) 433, 72 C.B.R. (5th) 303

IN THE MATTER OF the receivership of Canadian Microtunneling Ltd. of the City of Toronto in the Province of Ontario

Newbould J.

Heard: November 8, 2010
Judgment: November 9, 2010
Docket: 08-CL-7454

Counsel: William J. Meyer Q.C., Douglas Christie for Edward White & Associates Inc., receiver of Canadian Microtunnelling Ltd.
Miles D. O'Reilly, Q.C. for Bruce A. Simpson and Swanick & Associates
Grant Braislsford for City of Hamilton
A. Weretelnyk for City of Toronto
Lawrence A. Pick for Gary Benner and Canadian Microtunnelling Ltd *

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Approving settlement — Bankrupt's sole asset was judgment against city with amount owing of $555,000 to $560,000 — Judgment was obtained under s. 38 of Bankruptcy and Insolvency Act due to city terminating contract with bankrupt contractor to which bankrupt was subcontracor — Damages award included amounts owed by bankrupt to its sub-trades — Act required that any amounts beyond costs and claim of bankrupt be paid to trustee of contractor — City claimed judgment could be set aside, as it was based on fraud by bankrupt that it wished to pay statute-barred claims of subcontractors — Receiver brought motion to settle outstanding issues and costs between bankrupt and city, including approval of settlement — Motion granted — Settlement was fair and reasonable and should be approved — City's position for appeal had some substance — Settlement did not represent 25 per cent discount in amount owed, as stated by bankrupt — Evidence

showed bankrupt intended to give related corporations priority over sub-trades — Bankrupt's claim that trial judge accepted that bankrupt did not intend to pay subtrades 100 per cent of amount owing was not tenable — Bankrupt may have provided misinformation regarding creditors — Claim for administration fee and amounts owing to subtrades was problematic due to operation of s. 38 — Bankrupt had improperly received amounts already paid by city and spent amount on legal fees and personal expenses while making few payments to subtrades.

Table of Authorities

Cases considered by *Newbould J.*:

Ravelston Corp., Re (2005), 2005 CarswellOnt 4267, 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

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

s. 38 — referred to

MOTION by receiver for order settling issues and approving settlement.

***Newbould J.*:**

1 The receiver moves for an order authorizing and directing the receiver to settle all outstanding issues and costs between the City of Hamilton and Canadian Microtunnelling Ltd. (CML) arising out of the judgment granted by Jennings J. in favour of CML.

2 The litigation between CML and Hamilton has some considerable history. A first trial judgment in favor CML was set aside in the Court of Appeal and a new trial directed. The new trial resulted in a judgment by Jennings J. in favor of CML dated May 17, 2005. An appeal to the Court of Appeal was unsuccessful and leave to appeal to the Supreme Court of Canada was denied on December 7, 2007. As of that date, $717,000 was owing to CML inclusive of interest and costs. On December 19, 2007 Hamilton made an interim payment of $218,507.88 to CML. The balance owing on the judgment is approximately $555,000 to $560,000.

3 On April 22, 2008 the City of Hamilton brought a motion to set aside the judgment of Jennings J. on the ground of fraud and for a new trial. Voluminous material was filed on that motion. It is alleged in that motion that Gary Benner gave false or misleading evidence before Jennings J. relating to amounts owing to subcontractors of CML.

4 CML was a subcontractor to George Robson Construction (Weston) Limited. Robson had a contract with the City of Hamilton and it was alleged that Hamilton unlawfully terminated the contract. Robson was bankrupt and CML obtained

an order under section 38 of the Bankruptcy and Insolvency Act permitting it to proceed with an action against Hamilton. As part of its proof of damages, CML gave evidence of amounts owing to its sub-trades and Jennings J. included those amounts in the damage award made in favour of CML.

5 Under the section 38 order in the bankruptcy of Robson, any amount in excess of the costs of the action against Hamilton and of the claim of CML is to be paid to the trustee of Robson. Under the order of April 11, 2008 of Campbell J. appointing the receiver, the receiver was given authority over all of CML's current and future assets, undertakings and properties of every nature and kind and authorized to take control of the property of CML and to receive and collect all money now or thereafter owing to CML. The sole asset CML is the proceeds of the judgment against Hamilton.

6 Since December 2008, the receiver has participated in discussions with all interested parties with respect to settling the motion by the City of Hamilton. Hamilton has proposed terms of settlement which would provide for payment of $416,000 and for a release of its claim to be repaid the $218,507.88 previously paid to CML. All of the interested parties save for Mr. Benner, being creditors who filed claims in the receivership of CML pursuant to a claims bar order of Morawetz J. of October 27, 2009, approve of the proposed settlement. The receiver is of the opinion that the settlement is reasonable.

7 Mr. Benner opposes any settlement. His position is that there are no grounds available to the City of Hamilton to set aside the judgment of Jennings J. and that the settlement amounts to a discount of approximately 25% of the remaining unpaid portion of the judgment which he says is not warranted. I think this percentage is overstated because if one takes into account the claim by Hamilton to be reimbursed for the money previously paid to CML under the judgment, the percentage would be much less.

8 I accept the test on such a motion enunciated by Farley J in *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List]) in which he stated:

> However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the

> commercial aspects of a sale of property. ... Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable.

9 The main attack made by the City of Hamilton to set aside the judgment of Jennings J. is that Mr. Benner claim damages of amounts said by him to be owing by CML to its sub-trades. It was argued by Hamilton at the trial that claims of the sub-trades were statute barred. Jennings J. accepted evidence of Mr. Benner, however, that regardless of whether the claims were statute barred, he intended to pay them. Jennings J. stated:

> [62] The plaintiff filed at Tab 132 of Exhibit 2C a summary of and backup documents for its out of pocket costs incurred with respect to the project. No serious attack was made on those calculations. The defendant did submit however that many of the suppliers to whom the plaintiff is indebted have not yet been paid, and accordingly their claims against the plaintiff for payment might well be statute barred. I am not prepared to give effect to that argument, even if I could so find. The raising of the statute is a matter between the plaintiffs and their creditors. I accept Mr. Benner's evidence that he wishes to see the suppliers paid if only to maintain his reputation in the tunneling industry. I should add that the costs incurred by CMT were invoiced to Robson prior to its bankruptcy.
>
> [63] Accordingly, I allow these expenses as submitted at $231,893.00 (rounded).

10 The City of Hamilton relies upon evidence that within two weeks of Mr. Benner testifying that he would pay his creditors to preserve his reputation, he had completed registration of security documents under which his related corporations would be provided with priority to all judgment proceeds and that in response to a later motion by the City of Hamilton to pay a portion of the judgment to the sub-trades, Mr. Benner insisted that all money should be paid to his secured corporations. The inference the City seeks to draw is that at the time he gave his evidence before Jennings J., Mr. Benner had no intention of paying his sub-trades.

11 Mr. Benner stated in his affidavit sworn in opposition to the motion to accept the settlement that his statement to Justice Jennings that he wanted to see the sub-

trades paid did not mean that he wanted to pay 100 cents on the dollar of all these claims and that otherwise it would mean that he pursued the litigation at great expense and expenditure of time and money without hope of any net recovery. He asserted that there is no it indication that Justice Jennings took his statement otherwise. In argument Mr. Pick asserted that it should have been apparent to Justice Jennings that expenses of 17 years of litigation would be paid before the sub-trades got their money.

12 I have some difficulty with this assertion. It is clear from the reasons of Jennings J. that he accepted Mr. Benner's evidence that he wanted to see the sub-trades paid and he allowed all of the amounts said to be owing to the sub-trades as expenses of CML. In a later order he made a cost order in favour of CML against Hamilton, which is the usual way in which expenses of litigation are provided. There is no indication that he had been led to believe anything other than that the sub-trades would be paid one hundred cents on the dollar. Whether Mr. Benner had any right to negotiate with the sub-trades to reduce the amount to be paid to them is not the issue. The issue is whether Jennings J was misled. It cannot be said that there is nothing in this point that has been raised by the City of Hamilton.

13 The City of Hamilton also asserts that Mr. Benner gave misleading evidence about one of the sub-trades named Anchor Shoring. At the trial Mr. Benner testified that Anchor was owed $31,756.60. However it was later revealed that Mr. Benner had not accepted the invoice/letter from Anchor for that amount and after discussing the matter with Anchor, he received a subsequent invoice/letter from Anchor reducing the amount to be paid to Anchor to $5,954.56. Mr. Benner states in his affidavit that he had misfiled the second letter and that he only found it in 2008. The City of Hamilton is skeptical of Mr. Benner's memory and points out that the inadvertent misfiling of the reduced invoice was at a time that would artificially inflate the quantum of his damages and the rediscovery of it was at a time that would serve to reduce the amount payable to his supplier.

14 The City of Hamilton also refers to the fact that at the trial, while Mr. Benner gave evidence of the amounts owing to CML by Robson, he failed to mention that there should be a set-off of amounts owing by CML to Robson and that this makes a difference of some $59,000 to date taking interest into account.

15 The City of Hamilton also relies upon an amount claimed at the trial to be owed by CML to one of its suppliers named Iseki Inc. in the amount of $156,025. Mr. Benner testified before Jennings J. that approximately $30,000 had been paid to Iseki and the balance was outstanding. The City of Hamilton has evidence that a former vice president of Iseki advised that Iseki Inc. had been incorporated in

Delaware in 1991 with a trading office in California and that in the mid-1990s Iseki had not prospered. Iseki Inc. had closed its doors around 1998, sold its equipment and ceased to trade in California with no physical presence in North America. It is asserted that Mr. Benner must have known that as he purported to be an expert in the particular market and failed to point it out to Jennings J. In his responding affidavit in the motion by the City of Hamilton to set aside the judgment, Mr. Benner stated that he did not know about the Iseki corporate group and that he was not aware that Iseki had closed its San Diego office.

16 The main issue in the action against the City of Hamilton was whether an oral representation was made by a representative of the City to Mr. Benner. Jennings J. preferred the evidence of Mr. Benner and in doing so stated that he accepted Mr. Benner as a credible witness. The City contends that as the credibility of Mr. Benner was central to the case, had the trial judge known of the true nature of the claims of the sub-trades, that is, had the trial judge been aware of Mr. Benner's perjuries, his credibility would have been undermined and it would have been unlikely that his evidence would have been preferred over the competing documentary evidence and testimony of the key municipal employee. Thus the City contends that the false evidence of Mr. Benner is important not only as to the amounts of the legitimate claims of various sub-trades that were accepted by Jennings J., but also important as to the overall credibility of Mr. Benner and the impact of his evidence on the crucial issue in the trial.

17 I of course am not in any position to determine whether the City of Hamilton or Mr. Benner is correct in their assertions made in the motion by the City to set aside the judgment Jennings J. I am, however, able to form a view as to whether, as asserted on behalf of Mr. Benner, there is nothing in the case of the City. In my view there is some substance to the position of the City. Mr. Benner appears to take whatever position he views as helpful to his case depending upon the situation at the time. The evidence relied upon by the City has sufficient strength to make a settlement desirable.

18 No litigation is a certainty. The motion by the City of Hamilton to set aside the judgment of Jennings J. falls into that category. It is not certain from either point of view. What is certain is that based on what has occurred to date, if the motion is not settled, it will take some considerable period of time before any final determination is made. It will also create further expense that will in the end have to be borne by the various participants, including those who have filed proofs of claim in the receivership of CML. In the circumstances, a final and timely settlement of the claim against the City of Hamilton is desirable.

19 There is another relevant matter. CML is not entitled either under the section 38 order or the claims procedure in the receivership to obtain more than its damages. While CML has filed a claim in the bankruptcy of Robson for $273,647.51, that amount consists of $200,666.32 claimed as amounts owing to the sub-trades, a 5% administration fee of $10,033.32 and lost profits of $62,947.88. The 5% administration fee is problematic. The amounts said to be owing to sub-trades will have to be proven. On the evidence before me, that too is problematic. On his recent cross-examination, Mr. Benner was evasive in the extreme as to what he had done with his sub-trades. He asserted that except for Anchor, he had either settled with them personally or they abandoned any claim because of time, a lack of interest or it wasn't worth their time. He asserted that these sub-trades were not interested in their accounts but that the City of Hamilton and Mr. Simpson had contacted them in early 2008 and had "stirred them up" for no purpose. The tenor of his answers leads one to the conclusion that he has paid little, if anything, to his sub-trades. This is consistent with the admission that of the approximately $218,500 received by him from the payment by the City of Hamilton on the judgment, he has used it for his legal expenses and personal expenses. No mention was made of using it to pay sub-trades.

20 Mr. Benner has not produced to the receiver any information or documentation regarding any settlement with any creditors of CML. He was ordered yesterday to do so by today. He has, however, already improperly received the $218,507.88 paid by the City of Hamilton and, but for approximately $79,000, he has spent the rest for his legal fees and personal expenses. That means that he has already received and spent approximately $139,500, against a claim for lost profits of approximately $63,000 and some unknown amount, likely quite small if at all, for amounts he may have paid to sub-trades. He is also entitled under the section 38 order to be paid his costs of the litigation against the City of Hamilton, which are to be assessed, but under the proposed settlement under which a further $416,000 is to be paid, it is difficult on the evidence before me to consider that Mr. Benner will not be made whole. The other creditors who have filed claims with the receiver are the ones who will suffer from any shortfall, and with the exception of Mr. Benner and his corporations, they support the settlement.

21 In my view the proposed settlement falls within the range of what is fair and reasonable. If the City were successful in its motion, there is a risk that the entire award would be wiped out and that the amount paid by the City would be recoverable. [1] The discount on the settlement of the amount still payable on the judgment is in round terms $125,000. The amount owed by CML to Robson that should have been deducted from the payable said by Mr. Benner at the

trial to be owing by Robson to CML amounts with interest to approximately $59,000. The difference between the two invoices of Anchor with interest amounts to approximately $45,500. The amount said by Mr. Benner to be owing to Iseki is U.S. $120,000. While the issues regarding these matters are to some extent disputed by Mr. Benner, the discount in the settlement does not appear unreasonable.

22 In all the circumstances, in my view, the settlement proposed by the receiver should be accepted, and I order that the settlement be approved in the terms contained in paragraphs 2 to 6 of the draft order which is schedule A to the notice of motion by the receiver dated January 8, 2010.

23 Mr. Simpson/Swanick has brought a motion for a charging order on the proceeds of the judgment to be paid by the City of Hamilton. Mr. O'Reilly acknowledged that so long as the proceeds are paid to the receiver, a charging order is not necessary as the fees and disbursements of Simpson/Swanick, which are to be assessed, are protected by the section 38 order. I order that payment of the judgment against the City of Hamilton is to be paid by the City of Hamilton to the receiver. Thus there is no need to proceed with the motion for a charging order.

Motion granted.

Footnotes

* Although CML is in receivership, no one took objection to Mr. Pick purporting on this motion to represent CML.

1 Of the $218507.88 paid by the City to CML, none of which until now was paid to the receiver in spite of the terms of the order of Campbell J, it was stated in court by Mr. Pick that only approximately $79,000 was available as the remainder had been spent by Mr. Benner either for legal fees or personal expenses. I ordered that the remaining amount be paid forthwith to the receiver.

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, 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

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

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

AND IN THE MATTER OF AN APPLICATION 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

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

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

GRANT THORNTON LIMITED, in its capacity as Trustee of Textbook Student Suites (525 Princess Street) Trustee Corporation et al.
Plaintiffs

v.

JOHN DAVIES et al.
Defendants
Court File No: CV-18-606314-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTIES
(Settlement Approval)

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