

CITATION: The Superintendent of Financial Services v. Textbook Student Suites (525 Princess Street) Trustee Corporation , 2017 ONSC 2694
COURT FILE NOS.: CV-16-11567-00CL and 17-11689-00CL
DATE: 20170502

**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

BEFORE: F.L. Myers J.

COUNSEL: *I. Aversa and J. Nemers* counsel for Grant Thornton Limited
G. Benchetrit, representative counsel for the Investors Committee
S. Zweig, counsel for KSV Kofman Inc.
C. Francis, counsel for 2174217 Ontario Inc.
D. Ullman, counsel for Downing Street Financial Inc.
A. Hassan, counsel for Tier 1 Advisory Services Inc. and Bhaktraj Singh
D. Jewitt in person
R. Thompson in person

HEARD: April 28, 2017

ENDORSEMENT

[1] At the conclusion of the hearing, with the exception of one paragraph discussed below, I signed the order proposed by Grant Thornton Limited in its capacity as trustee of the respondents for reasons to follow. These are the reasons.

Background

[2] On October 27, 2016, Mr. Justice Newbould of this Court appointed Grant Thornton as trustee of each of the respondents under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, SO 2006, c. 29.

[3] The respondents are trustee corporations holding syndicated mortgage investments on behalf of approximately 1,400 individual investors in the aggregate with total investments of more than \$110 million. The mortgages represent security for loans made by the investors to 16 related developers controlled or owned by or on behalf of Mr. John Davies.

[4] First Commonwealth Mortgage Corporation and Tier 1 Mortgage Corporation were among the licensed mortgage brokers that promoted and sold the mortgage investments to public investors. Tier 1 Transaction Advisory Services Inc. was also involved and had applied for a mortgage brokerage license. Bhaktraj Singh is the President and CEO of Tier 1 Transaction. He is also a mortgage agent for First Commonwealth. At the same time he is a director, officer, shareholder or profit participation interest holder in at least 11 of the developers. Mr. Singh did not properly disclose his conflicts of interest to the investors. While he was bound as a trustee to devote his selfless best interests to protecting and advancing the interests of investors, Mr. Singh held personal interests in the borrowers/developers whose interests directly oppose those of the investors.

[5] Last fall, the Superintendent discovered systematic and recurrent failures of First Commonwealth and Tier 1 Mortgage Corp. to abide by basic consumer protection measures of Ontario law. The Superintendent took regulatory steps to suspend their licenses and brought these proceedings.

[6] KSV Kofman Inc. has been engaged as receiver and manager of a project developed by a different entity that is connected to the respondents. KSV Kofman has conducted a preliminary financial review. Its initial sources and uses of funds review suggests that a substantial amount of the investors' funds may have been misdirected if not misappropriated by Mr. Davies, Mr. Singh, and/or entities related to them.

These Proceedings

[7] The trustee's role is to protect the positions of the investors. There has been much misinformation circulated as to what this involves. The trustee has been appointed as an officer of this court. Its appointment does not turn it into one of the developers or a mortgage broker. It is not a signatory to the investors' contracts. Rather, it has taken possession of the respondents' assets and business undertakings. It will provide transparent and accountable stewardship of the property under its control. Its role is to investigate the status of the projects and the investors' investments and to propose and ultimately implement strategic solutions designed to maximize the amount available to be repaid to investors.

[8] While the trustee's primary goal is to protect and enhance the positions of the investors as a whole, it is not directed by the investors, or other mortgagees of the projects, or the developers, or any one party or interest. Rather, the trustee carries out its duties in the context of public court proceedings. The trustee is required to provide transparency by way of reports to the court and information sharing. It is to consult broadly with interested parties and propose outcomes for the court's approval. The court's approval is obtained by holding hearings on notice to all interested parties so that they all have an opportunity to have input and be heard. Interested parties are entitled to participate in motion hearings by filing evidence and making submissions in court in person or by counsel.

[9] It is apparent that the projects have serious solvency issues. That means that investors are at risk of losing some portion of their funds. The amount of losses to be suffered, if any, is not yet known. No one, least of all the court, underestimates the magnitude of fear, risk, and potential long term harm that is being caused to individual investors who relied on the honesty of others to tend to their hard-earned funds.

[10] There is a very substantial amount of work to be done by the trustee and its advisors to figure out what happened to the investors' money and to propose appropriate steps to remedy the situation as best as possible. While there is much concern about the costs of the process, there are no real alternatives. Alleged wrongdoers operating outside the law cannot be left in charge of investors' money. Neither can 1,400 individuals all determine how each project will be worked out. Moreover, there are other lenders on many of the projects – many whose mortgages rank ahead of the investors' mortgages in the legal hierarchy of repayment rights. The law provides a process for interested parties to receive information and to have a say in how the stabilization and realization efforts will proceed. But providing all of this formality and transparency takes time and costs money. Insolvency professionals are very aware of the focus on the costs of these types of proceedings. Court officers' fees and disbursements will be subject to court review and approval on notice to all interested parties. Efficiency is at a premium in insolvency cases to minimize fees. By corollary, steps which impede the trustee and its counsel and deflect them from focusing on the tasks at hand, even if well-meaning, can quickly increase costs and thereby hurt the very creditors whom all are trying to protect. There is a balancing required to ensure the necessary transparency of the public system, to ensure that the process has the confidence of interested parties, but also to protect the efficiency of the process so as to minimize disruption and unnecessary costs.

[11] It is also important to recognize that in every insolvency proceeding there are people who hold different and often competing interests. Not everyone shares the goal of enhancing investors' recovery. Some people do not want the trustee to obtain the information it needs to find out what truly happened. Some people may fear being sued. Some people invest in insolvent companies or properties to find profit possibilities in the losses of others. Some just want to earn fees for themselves. Everyone involved needs to be aware that there are any number of other possible competing interests. That does not mean that every professional is out for herself or himself and will forsake the interests they are sworn to protect. We start with a presumption that everyone acts in good faith but experience teaches that it is best to maintain a healthy skepticism and a watchful eye. This concern comes to the fore in this motion.

The Trustee's Motion

[12] On this motion the trustee seeks the following relief:

- a. An order appointing KSV Kofman Inc. as receiver and manager of six insolvent entities so as to remove Mr. Davies from management and to oversee development and implementation of a strategic process for dealing with the entities' projects;
- b. An order requiring Mr. Davies to deliver relevant documents to the trustee;
- c. An order restraining Mr. Dennis Jewitt and his company Breakwall Financial Corp. from communicating with any investors other than those in the Vaughan Crossings project;
- d. Approval of the fees and expenses of the trustee, its counsel, and a proposed allocation of those fees and expenses to the various projects; and
- e. An order requiring Mr. Jewitt and his company to reimburse the trustee for a portion of the costs it incurred in relation to this motion in the amount of \$15,000.

(a) Request for the Appointment of a Receiver

[13] No interested party in attendance at the hearing in person or by counsel opposed the appointment of KSV Kofman with the exception of Mr. Rob Thompson. Mr. Thompson was a member of the Investors' Committee but elected to opt out of that process. Of the 1,400 or so investors, only 4 have opted out to date. Mr. Thompson made submissions on his own behalf. He expressed no particular concerns about KSV Kofman itself. Rather, he was concerned with the fact that the trustee recommended KSV Kofman as receiver and manager without undertaking a competitive tender process to help ensure the receiver's independence and that its fees are competitive.

[14] Mr. Aversa, for the trustee, submitted that KSV Kofman has an advantage over other competitors in the market place because it has already been engaged as court appointed receiver in the other project referred to above. It has invested time and effort already in creating a novel process to obtain short term takeout financing. Its process protects the projects from fire sales and provides significant optionality for value-maximizing outcomes including the possibility of continued participation of investors.

[15] As mentioned above, KSV Kofman has also invested time in starting the forensic review needed to create a sources and uses of funds report for related entities. A new firm would be required to get up to speed and essentially repeat this work at investors' expense.

[16] It is the trustee's submission that RSV Kofman is an appropriate firm to function as receiver and manager and has a natural advantage that makes its appointment far more cost-effective and efficient for the projects under discussion. The court notes that no one opposed RSV Kofman otherwise. It is a highly experience insolvency firm that has the confidence of the interested parties, including representative counsel for the Investors Committee, and the court.

[17] In *Confederation Treasury Services Ltd., Re*, 1995 CanLII 7386 (ON SC), Farley J. appointed Richter & Partners Inc. as trustee in bankruptcy of a debtor despite its prior involvement as the financial advisor for one of a number of adverse creditors. At para. 28 of his endorsement, Farley J. discussed the efficiencies of appointing an officer who has already has some familiarity with the issues and the debtor:

Thus, given that Richter is the preference of the petitioning creditor (and of the ALC Committee which appears to represent apparently unchallenged major creditors); it has the advantage of being quite familiar with and knowledgeable of the situation from its prior involvement as forensic investigator; the proprietary claims have been acknowledged as complex and difficult to describe; those advancing proprietary claims have had the advantage of advice from their own forensic investigators; it does not appear on the material before me that Richter has any ongoing relationship with any creditor and particularly not with any creditor or claimant which may have an adverse position to the estate, it would not seem to me appropriate to disqualify Richter as the nominee for trustee in place of Deloitte in the petition by UBS, but rather it would seem that Richter was adequately qualified to act as trustee. This result would avoid the estate taking a significant period of time to catch up with potential slippage exposure if the litigation heats up quickly and a duplication of expense for another firm to come to the same position as Richter now is on the learning curve.

[18] Unlike the *Confederation Treasury* case, here KSV Kofman's prior involvement is in the role of a neutral, court appointed officer rather than as a private advisor to one particular party. There is no basis in the evidence to question its neutrality or its independence. I agree that KSV Kofman's involvement to date makes it an ideal candidate to fulfil the proposed roles. The trustee's sixth report contains substantial evidence establishing the insolvency of the six entities under discussion and the need for independent, transparent, accountable stewardship of their assets. In the absence of any opposition from interested parties, it is just and convenient to appoint KSV Kofman as receiver and manager as proposed.

(b) Request for the Delivery of Documents to Trustee

[19] The order sought to require Mr. Davies to provide relevant documents to the trustee is a necessary incident of a court officer's appointment. The trustee is the proper party to have and to hold all documents and property of the companies under its charge.

(c) Request for an Injunction Against Dennis Jewitt

[20] The order sought by the trustee restraining Mr. Dennis Jewitt from communicating with investors is vexing. The court does not lightly restrain speech. Engaging in prior restraint can have constitutional overtones. However, Mr. Jewitt's involvement has presented a real problem for the participants in these proceedings.

[21] Mr. Jewitt is a member of management's Advisory Board for Tier 1. He denies having much involvement with Mr. Singh, yet his picture and bio are broadly displayed on Tier 1's marketing brochure. Moreover, prior to the trustee's appointment, Mr. Jewitt was retained by management to assist in working out the project known as Vaughan Crossing. He continued to be involved in the transaction to realize on that project that has now been completed.

[22] I have reviewed Mr. Jewitt's lengthy affidavit. In it, he purports to advocate on behalf of investors and seeks to involve himself in working out all of the distressed projects. He casts aspersions on the motives and integrity of the trustee and its counsel, of rep counsel for the Investors' Committee, and anyone who does not agree with his approach. However, his assertions are often either incorrect or just unhelpful. He killed several trees trying to have the trustee and the Superintendent agree that the trustee should be instructed by and bound by votes of the investors. This risks giving ousted management a back-door entrée to the projects by lobbying investors. It also ignores the roles and rights of multiple other interested parties including third party lenders who have higher priority claims than the investors in many projects. Moreover, Mr. Jewitt bristles against involvement in the process by lawyers. Whether that is born of a concern for expensive fees or a fear of oversight by experienced professionals, his communications demonstrate that Mr. Jewitt does not have a sophisticated understanding of court-based insolvency proceedings.

[23] In his submissions, Mr. Jewitt confirmed that he is not an investor in any of the projects. So he has no personal interest in the proceedings. He argues that there is opposition to the manner of proceeding proposed by the trustee by a number of investors for whom he seems to purport to speak. However, the court has already recognized a Investors' Committee and appointed counsel to represent it. Mr. Benchitrit readily concedes that among 1,400 investors, there are competing views. This is to be expected. However, the Investors' Committee is the place where investors' positions are hashed out. Rep counsel also has an independent role under its appointment order.

[24] Mr. Jewitt is not a legitimate spokesperson for a dissident group or any investors. Moreover, his connection to former management at minimum raises questions as to his motives for being involved at all. Mr. Jewitt submitted to the court that he was not seeking to make money by being involved in these proceedings. Yet his affidavit disclosed an email that he sent on February 4, 2017 to a member of the Investors' Committee in which he wrote:

I thought we had agreed that I would be retained to analyze the options and report to the Committee with respect to the status of all projects.

[25] By his own words, it is clear that Mr. Jewitt was looking to be retained on all projects – not just Vaughan Crossings in which he had been involved by former management. It is also clear that Mr. Jewitt sees his role as essentially replacing the strategic planning performed and to be performed by KSV Kofman. He is not a licensed trustee in bankruptcy. His independence is very much in issue. He lacks experience and understanding as to the roles of court officers in court proceedings such as this one. He conceded that he did not know that it is wholly contrary to the nature of these proceedings for the trustee to be bound by the votes of investors as he demanded. Yet he lashes out in a caustic manner, requiring professionals to spend precious time, and therefore investor money, defending themselves and their reputations from his freely volunteered conspiracy theories and baseless allegations of wrongdoing and bad faith.

[26] Mr. Benchitit submitted that over 900 investors are involved in the six projects in issue. He expressed concern that individuals can be further victimized by the spread of misinformation about these proceedings. Although there is very substantial information available online, through the trustee, and from the Investors' Committee, individual investors are also vulnerable to being misled. Many investors may be continuing to take advice from management or the salespeople and brokers who sold them their investments for generous commissions who may have other agendas. Mr. Jewitt's correspondence, he argues, discloses his conflicting agendas. Mr. Jewitt has caused real costs in that people have to respond to his misinformation and mischief. Investors who read Mr. Jewitt's communications then call Investors' Committee members, or rep counsel, or the trustee, or its counsel, and deflect them from their tasks and require them to spend time undoing his misinformation. There are real cost consequences to the misinformation that he has spread and it is the investors who bear those costs. Absent evidence of wrongdoing, it is not in the investors' interests to sow discontent with those whose role it is to protect them in a transparent and accountable manner.

[27] While the court has authority to enjoin defamatory publications in appropriate cases and the court has the authority to mandate cooperation with its officers, I am not yet convinced that extraordinary injunctive relief is required. It is not clear that Mr. Jewitt has any reason to remain involved in these matters. He is not an investor and he has not been retained by any interested party. He has no role to play and he has no status to speak in court unless relief is sought against him personally. While there are costs involved, that will be dealt with below. It is not clear to me as yet that Mr. Jewitt's conduct has reached the level of concern to engage a need for extraordinary relief. If he is truly concerned for investors, Mr. Jewitt will recognize that his involvement here is concluded. If the trustee develops evidence that Mr. Jewitt is remaining involved and is causing more concrete impacts on the process, the court can be asked to revisit this issue. Accordingly, paragraph 9 of the order signed at the hearing will not come into force.

(d) Request for Indemnity for the Trustee's Costs

[28] In *Party City Ltd., Re*, 2002 CarswellOnt 116, Mr. Justice Cumming ordered costs payable by a creditor who made unsupported allegations of wrongdoing against a receiver suggesting that the receiver had acted surreptitiously to undermine the integrity of a sales process. The allegations made in that case are quite similar to those made by Mr. Jewitt against the trustee, its counsel, and the Investors' Committee's rep counsel. Mr. Jewitt has repeatedly alleged that the

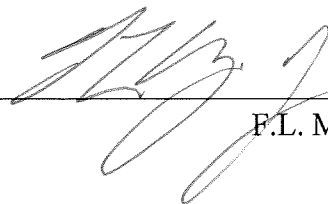
court officers lack integrity and are acting to undermine the interests of investors with no evidence at all to support such serious allegations. Justice Cumming recognized that these circumstances made that case “one of those exceptional cases where the court should exercise its discretion to hold a person who is not formally a party accountable for costs.”

[29] The court has discretion to make orders concerning costs under s. 131 of the *Courts of Justice Act*, RSO 1990, c. C.43. In *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, the Chief Justice of Ontario, writing for a panel of the Court of Appeal, confirmed that courts have authority to order costs against non-parties who conduct litigation in a manner that amounts to an abuse of the court’s process. At para. 76, the Chief Justice gave examples as follows:

Situations of gross misconduct, vexatious conduct, or conduct by a non-party that undermines the fair administration of justice other than those discussed above can be envisioned.

[30] Mr. Jewitt’s conduct is quite fairly described as conduct which “undermines the fair administration of justice.” His efforts to malign court officers tasked with protecting the interests of a large body of public investors are aimed at undermining confidence in the court’s process. Whether he is doing so for potential personal gain or due to some connection with Mr. Singh or perhaps just out of a misguided sense of propriety, his ongoing efforts to become engaged in the trustee’s process by disseminating misinformation and making unsupported allegations of misconduct against the court’s officers has increased the costs of the process and undermined the fair administration of justice by deflecting court officers from their tasks as discussed above.

[31] In my view, the investors ought to be protected from at least a portion of the costs that Mr. Jewitt needlessly and vexatiously inflicted on them. At the end of the hearing, I therefore ordered Mr. Jewitt and his corporation to be jointly and severally liable to pay the trustee costs of \$10,000 forthwith. The court will not tolerate conduct aimed at undermining the efforts of its officers to maintain an efficient process that is transparent and accountable to all interested parties in accordance with their duties.



F.L. Myers J.

Date: May 2, 2017