

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

BETWEEN:

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

**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:

**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

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

BETWEEN:

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

FACTUM OF THE MOVING PARTIES
(Settlement Approval)

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(Updated as of April 11, 2019)

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SERVICE LIST
(Current as of February 13, 2019)

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PART I – OVERVIEW

1. This is a motion brought by KSV Kofman Inc., solely in its capacity as Court-appointed receiver in these proceedings (the “**Receiver**”), and Grant Thornton Limited, solely in its capacity as Court-appointed trustee in these proceedings (the “**Trustee**”), to approve a settlement of, solely, the Mareva injunction granted by the Honourable Justice Myers on August 30, 2017 (the “**Mareva Order**”) and the appeal of the decision of the Honourable Justice Myers relating to the Mareva Order (the “**Appeal of the Mareva Order**” and, together with the Mareva Order, the “**Mareva Issues**”) with the defendants subject to the Mareva Order. The settlement is fair and reasonable in all the circumstances, and it is in the best interests of the receivership companies in respect of which the Receiver acts (the “**Receivership Companies**”), the trustee corporations in respect of which the Trustee acts (the “**Trustee Corporations**”) and their respective stakeholders. Accordingly, the Receiver and Trustee both recommend the settlement and request that this Honourable Court grant the sought approval Order.

PART II – FACTS

The Mareva Order and the Appeal of the Mareva Order

2. On August 30, 2017, the Receiver sought, and the Honourable Justice Myers issued, the Mareva Order against the defendants in the action bearing Court File No. CV-17-11822-00CL (the “**Action**”), John 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**”) (in all such capacities, “**Mr. Davies**”), Judith Davies in her personal capacity and in her capacity as trustee of the Family Trust (in all such capacities, “**Ms. Davies**”), and Aeolian Investments Ltd. (“**Aeolian**”,

and together with Mr. Davies and Ms. Davies, the “**Mareva Defendants**”) as well as Gregory Harris, solely in his capacity as trustee of the Family Trust (in such capacity, “**Mr. Harris**”).¹

3. The Mareva Order restricts the Mareva Defendants and Mr. Harris from selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any of their assets, wherever situate worldwide, including but not limited to the assets and accounts listed in Schedule “A” to the Mareva Order and, in particular (but not limited to) the real estate that was owned by the Arizona Trust located at 35410 North 66th Place, Carefree, Arizona, 85377 (the “**Arizona Real Property**”).²

4. On January 19, 2018, Mr. Davies and Aeolian obtained leave to appeal the Mareva Order. The Appeal of the Mareva Order has since been adjourned *sine die*, pending the outcome of this settlement approval motion.³

The Sale of the Arizona Real Property

5. On or about November 7, 2018, the Arizona Real Property was sold by the Arizona Trust 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 paying realtor commissions, a mortgage, a lien on the property and closing costs) total USD\$862,568, which amount has since been reduced by virtue of Mr. Davies accessing living expenses of CDN\$7,500 per month pursuant to an order issued by the Honourable Mr. Justice Myers granting an exemption to the Mareva Order. The total amount of proceeds currently remaining is USD\$828,171.71 (the “**Proceeds**”),

¹ Eighteenth Report to Court of KSV Kofman Inc. in its Capacity as Receiver of certain property Scollard Development Corporation et al. dated April 24, 2019 (the “**Eighteenth Report**”), Section 1.0, para. 3, Motion Record of the Moving Parties (the “**Motion Record**”), Tab 2.

² Eighteenth Report, Section 1.0, para. 4, Motion Record, Tab 2.

³ Eighteenth Report, Section 2.0, para. 6, Motion Record, Tab 2.

of which USD\$580,671.71 is currently being held in the trust account of Dentons Canada LLP (“**Dentons**”), counsel for the Mareva Defendants, with the balance, being USD\$247,500, currently being held by the United States Internal Revenue Service (the “**IRS**”) in respect of a potential withholding tax obligation.⁴

6. Dentons has provided the Receiver’s counsel with information from Mr. Davies’ agent in the United States, Mary-Heather Styles of Transatlantic Tax Inc., who has advised that the full amount of USD\$247,500 is likely to be released by the IRS to Dentons as there was a capital loss on the sale of the Arizona Real Property, which, according to Ms. Styles, would eliminate any tax liability arising from the sale of the Arizona Real Property.⁵

7. Dentons has provided an undertaking to the Receiver that none of the Proceeds will be distributed absent a court order authorizing Dentons to do so.⁶

8. The Mareva Defendants have provided financial disclosures to the Receiver during these proceedings. Based on those disclosures, the Proceeds represent most of the Mareva Defendants’ apparent assets currently known to the Receiver.⁷

The Settlement Agreement

9. The Receiver, in consultation with the Trustee and their respective counsel, engaged in discussions and negotiations with the Mareva Defendants concerning the Mareva Issues, which culminated in the settlement (the “**Settlement**”) as set out in the settlement agreement (the “**Settlement Agreement**”) as between the Receiver and the Trustee, on the one hand, and the

⁴ Eighteenth Report, Section 2.0, para. 2, Motion Record, Tab 2.

⁵ Eighteenth Report, Section 2.0, para. 3, Motion Record, Tab 2.

⁶ Eighteenth Report, Section 2.0, para. 4, Motion Record, Tab 2.

⁷ Eighteenth Report, Section 2.0, para. 5, Motion Record, Tab 2.

Mareva Defendants, on the other hand. The Settlement is subject only to the approval of this Honourable Court.⁸

10. Pursuant to the Settlement Agreement, all the Mareva Issues will be fully and finally resolved in exchange for, among other things, payment of 72.5% of the Proceeds to the Receiver, with the balance of the Proceeds, amounting to 27.5%, being paid to Mr. Davies.⁹

11. Of the USD\$580,671.71 currently in Dentons' trust account, Mr. Davies will only receive CDN\$150,000 based on the Bank of Montreal conversion rate on the date of the payment (amounting to approximately 20% of the Proceeds currently in Dentons' trust account) and the Receiver will receive the balance, amounting to approximately USD\$467,000 (approximately 80% of the Proceeds currently in Dentons' trust account). Mr. Davies will get a larger share of the Proceeds held back by the IRS. This mitigates some of the risk related to the monies currently held by the IRS.¹⁰

12. The Settlement is reasonable, particularly considering the ongoing professional costs of dealing with the Mareva Issues and the apparent limited assets of the Mareva Defendants currently known to the Receiver, which have been reviewed through the Receiver's independent investigations (including its review of the bank records of the Mareva Defendants obtained in connection with the Mareva Order) and in sworn disclosure affidavits provided by each of the Mareva Defendants to the Receiver and the Trustee in connection with the Settlement (the **"Disclosure Affidavits"**).¹¹

⁸ Eighteenth Report, Section 3.0, para. 1 and 2, Motion Record, Tab 2.

⁹ Eighteenth Report, Section 3.0, para. 3, Motion Record, Tab 2.

¹⁰ Eighteenth Report, Section 3.0, para. 4, Motion Record, Tab 2.

¹¹ Eighteenth Report, Section 3.0, para. 5, Motion Record, Tab 2.

13. The Settlement will immediately increase the value in the estates of the Receivership Companies and the Trustee Corporations, which will benefit their respective stakeholders. The Settlement also avoids the continued depletion of the Proceeds resulting from the existing exemption to the Mareva Order pursuant to which Mr. Davies has been accessing \$7,500 for living expenses. It also avoids the potential for further depletion resulting from any further exemptions to the Mareva Order, such as for the Mareva Defendants' legal fees. To date, Mr. Davies has made several requests for funding, including for legal representation.¹²

14. Pursuant to the Settlement, the Mareva Order will be lifted and the Appeal of the Mareva Injunction will be dismissed on the consent of the parties. In that regard, the Settlement avoids protracted and complex litigation with the Mareva Defendants with respect to the Mareva Issues, and will also result in legal costs savings that would have otherwise been incurred to defend the Appeal of the Mareva Injunction and otherwise address the Mareva Issues.¹³

15. To the extent it is found that there are any misrepresentations in any of the Disclosure Affidavits which serve, in part, as the basis for lifting the Mareva Order, the Mareva Order will be immediately reinstated, on the consent of the Mareva Defendants.¹⁴

16. Additionally, going forward, the Mareva Defendants will be required to report to the Receiver and the Trustee on a quarterly basis regarding all their respective direct and indirect earnings for the previous quarter. Should any of their earnings, on an individual basis, exceed CAD\$50,000 for any given quarter, the relevant party or parties will be required to provide a general accounting to the Receiver and the Trustee describing what they did with all of that

¹² Eighteenth Report, Section 3.0, para. 5, Motion Record, Tab 2.

¹³ Eighteenth Report, Section 3.0, para. 6, Motion Record, Tab 2.

¹⁴ Eighteenth Report, Section 3.0, para. 7, Motion Record, Tab 2.

quarter's earnings, including, without limitation, details of whether any earnings were sent out of the jurisdiction or used to acquire assets outside of the jurisdiction. The Receiver and/or the Trustee will be entitled to bring a new motion for a new Mareva injunction against any or all of the Mareva Defendants should the information in any of the accounting demonstrate that any of the Mareva Defendants was or is dissipating assets for the purpose of frustrating a potential judgment in the outstanding litigation.¹⁵

17. Importantly, no releases will be provided to any of the Mareva Defendants in connection with the Settlement. The Receiver and the Trustee will preserve all their rights to continue their claims and pursue recovery against the Mareva Defendants for any and all matters in the Action and in all other proceedings, subject to the terms of the Settlement Agreement. The Receiver and the Trustee will also preserve all claims, rights and remedies they have as against any and all non-Mareva Defendants in the Action and in all other proceedings.¹⁶

PART III – ISSUES

18. The sole issue to be determined on the motion is whether this Court should approve and give effect to the Settlement as set out in the Settlement Agreement and grant the sought related relief.

PART IV – LAW AND ARGUMENT

19. The law is well established that the Court may approve a settlement where it concludes that the proposed settlement falls within the range of what is fair and commercially reasonable, having

¹⁵ Eighteenth Report, Section 3.0, para. 8, Motion Record, Tab 2.

¹⁶ Eighteenth Report, Section 3.0, para. 10, Motion Record, Tab 2.

regard to the strengths and weaknesses of the case, the benefits of certainty and the avoidance of delay.¹⁷

20. Here, the terms of the Settlement are fair and reasonable, and in the best interest of the Receivership Companies, the Trustee Corporations and their respective stakeholders, for the following reasons, among others:

- (a) the Mareva Defendants have limited assets currently known to the Receiver and the Trustee, which have been reviewed through the Receiver's independent investigations (including its review of the bank records of the Mareva Defendants obtained in connection with the Mareva Order) and in the Disclosure Affidavits provided to the Receiver and the Trustee in connection with the Settlement. Further, in the event it is ever found that there are any misrepresentations in the Disclosure Affidavits, which serve, in part, as the basis for the Settlement, the Mareva Order will be immediately reinstated on the consent of the Mareva Defendants;
- (b) the Settlement will result in a payment to the Receiver of approximately USD\$600,424.49, which will immediately increase the value in each of the Receivership Companies' and Trustee Corporations' estates, thereby benefitting their respective stakeholders;
- (c) the Settlement also avoids:

¹⁷ *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 at para 3 (Ont. S.C.J. [Commercial List]), Book of Authorities of the Moving Parties ("BOA"), Tab 1; *Canadian Microtunneling Ltd., Re*, 2010 ONSC 6171 at para 8 [Commercial List], BOA, Tab 2.

- (i) protracted and complex litigation with the Mareva Defendants with respect to the Mareva Issues, which will result in legal and professional costs savings that would have otherwise been incurred to defend the Appeal of the Mareva Injunction and otherwise address the Mareva Issues;
 - (ii) the risk of being unsuccessful on the Appeal of the Mareva Order and the potential adverse costs award that could be made in connection with the Appeal of the Mareva Order in the event the Receiver is unsuccessful; and
 - (iii) the continued depletion of the Proceeds resulting from the existing exemption to the Mareva Order (pursuant to which Mr. Davies has been accessing \$7,500 for living expenses) and any further exemptions to the Mareva Order;
- (d) no releases will be provided to any of the Mareva Defendants in connection with the Settlement. The Receiver and the Trustee will preserve all their rights to continue their claims and pursue recovery against the Mareva Defendants and the non-Mareva Defendants in the Action and in all other proceedings; and
- (e) the Mareva Defendants will be subject to ongoing financial reporting requirements, which will allow the Receiver and the Trustee to continue to monitor their earnings and, in particular, whether any earnings are sent out of the jurisdiction and/or used to acquire assets outside of the jurisdiction. In that regard, the Settlement specifically entitles the Receiver and the Trustee to bring a new motion for a new Mareva injunction against any or all of the Mareva Defendants should the information in any of the Mareva Defendants' financial reporting demonstrate that

any of the Mareva Defendants was or is dissipating assets for the purpose of frustrating a potential judgment in the outstanding litigation.

21. The Settlement therefore provides a degree of certainty regarding costs and benefits relating to the Mareva Issues, which cannot be expeditiously or effectively achieved otherwise.

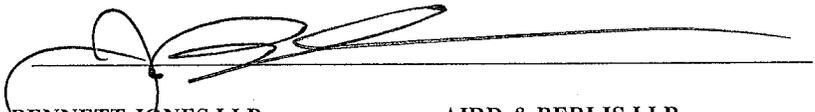
22. The Settlement Agreement represents a fair and commercially reasonable compromise in all of the circumstances and for purposes of these proceedings. It is in the best interests of the Receivership Companies, the Trustee Corporations and their respective stakeholders that the terms contemplated under the Settlement Agreement be implemented.

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

PART V - ORDER REQUESTED

24. For the foregoing reasons, the Receiver and the Trustee respectfully request that the Settlement be approved and that the Order included at Tab 3 of their Motion Record be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2019.



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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207
2. *Canadian Microtunneling Ltd., Re*, 2010 ONSC 6171

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

JOHN DAVIES et al.

Defendants

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

v.

KSV KOFMAN INC. in its capacity as Receiver and Manager of Certain Property

Plaintiff

v.

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

Plaintiffs

JOHN DAVIES et al.

Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTIES
(Settlement Approval)

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