



SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

**COUNSEL SLIP / ENDORSEMENT**

COURT FILE NO.: CV-21-00665375-00CL

DATE: May 30, 2023,

REGISTRAR: C. Fernandez

NO. ON LIST: 4

TITLE OF PROCEEDING: American General Life Insurance Company et al. v. Victoria  
Avenue North Holdings Inc. et al.

BEFORE JUSTICE: OSBORNE

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

Name of Person Appearing	Name of Party	Contact Info
Aryo Shalviri	Counsel for Receiver	<a href="mailto:Aryo.shalviri@blakes.com">Aryo.shalviri@blakes.com</a>
Alexia Parente	Counsel for Receiver	<a href="mailto:Alexia.parente@blakes.com">Alexia.parente@blakes.com</a>
Evan Cobb	Independent counsel to the Receiver – Distribution Motion	<a href="mailto:Evan.cobb@nortonrosefulbright.com">Evan.cobb@nortonrosefulbright.com</a>

**For Defendant, Respondent, Responding Party, Defence:**

Name of Person Appearing	Name of Party	Contact Info

**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info
George Bourikas	Receiver	<a href="mailto:gbourikas@kpmg.ca">gbourikas@kpmg.ca</a>
Katherine Forbes	Receiver	<a href="mailto:katherineforbes@kpmg.ca">katherineforbes@kpmg.ca</a>
Elie Ghannoum	Counsel for Bou-Zaid General Contracting Inc	<a href="mailto:elie@glgllp.ca">elie@glgllp.ca</a>

## **ENDORSEMENT OF JUSTICE OSBORNE:**

1. KPMG Inc., in its capacity as Receiver, seeks approval of an asset purchase agreement (the Sale Agreement of April 28, 2023) and authority to complete the Proposed Transaction, approval of activities, a discharge to be effective upon the filing of a Receiver's Certificate, and ancillary relief including authorization to pay real estate commissions and make further Distributions. Finally, the Receiver seeks to seal certain confidential documents and to unseal other confidential documents previously sealed by this Court.
2. Defined terms in this Endorsement have the meaning given to them in the motion materials and in particular the Sixth Report of the Receiver, filed. The Receiver relies on all Reports, and the Sixth Report in particular.
3. None of the relief sought today is opposed by any party. It is strongly recommended by the Court-appointed Receiver, and supported by Bou-Zaid General Contracting Inc.
4. I have not set out all of the background to this matter. The Property over which the Receiver was appointed consisted primarily of interests in two medical office buildings in Hamilton, Ontario located at 304 Victoria Ave., North ("304") and 414 Victoria Avenue North ("414") respectively.
5. This Court granted a Sale Process Order on October 29, 2021. The Sale Process was carried out by the Receiver in accordance with orders of the Court and is more fully described in the Third, Fourth and Sixth Reports.
6. A May 24 Transaction previously approved by this Court failed to close when the purchaser declined to waive due diligence conditions. An October 14 Transaction was approved by the Court on October 14, 2022 in respect of 304. The order made that day sealed the 304 Confidential Appendices, and the October 14 Transaction closed on December 6, 2022.
7. On April 28, 2023, the Receiver entered into the Sale Agreement with the Purchaser in respect of 414.
8. That Sale Agreement is the subject of the approval motion today. I am satisfied that the *Soundair* Principles have been satisfied. While not determinative, the fact that there is no opposition in this matter is supportive of that conclusion.
9. The Receiver has made best efforts to get the best price. Further marketing efforts would not yield a better price or better terms. The Sale Process (previously approved) and now adhered to, protects the interests of the parties, the efficacy and integrity of the process, and there is no unfairness.
10. The draft approval and vesting order is consistent with the model of the Commercial List.
11. The sale was facilitated by the efforts of the Broker. Its Engagement Agreement, entered into by the Receiver pursuant to its authority under the Appointment Order, provides for a commission. That Engagement Agreement was previously approved by the court as part of the Sale Process Order. The sale is approved.
12. Payment of the Commission is appropriate, in accordance with the Engagement Agreement, recommended by the Receiver and is unopposed. The Receiver confirms its opinion that the Commission is consistent with the market and was earned here in accordance with the Engagement Agreement. The Commission is approved.
13. In respect of the distribution motion, the Receiver was represented by separate counsel as noted above. The particulars of the proposed distribution are set out in the Sixth Report. The Receiver seeks to distribute to the Applicants, in partial satisfaction of their secured claims, the anticipated net proceeds of the sale of

414, excluding a holdback for completion of the Receiver's mandate, ongoing operating expenses, and the anticipated bankruptcy of the Legal Owner.

14. Counsel to the Receiver on that motion has opined with respect to the validity and enforceability of the security granted by the Legal Owner in favour of the Applicants that subject to customary qualifications, the charge and security interest is valid.
15. I observe that the Net Sale Proceeds are not sufficient to satisfy the secured obligations owing to the applicable Applicants.
16. It is appropriate to authorize a receiver to make distributions of sale proceeds concurrently with the approval of such sale to maximize efficiency and avoid the need for additional motions: *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173 at para. 53.
17. I observe that, as submitted, the Legal Owner appears to have outstanding HST arrears related to the period prior to the commencement of these proceedings. While, in the ordinary course outside of at bankruptcy, unremitted HST may result in a deemed trust claim by the Crown pursuant to section 222(1) of the *Excise Tax Act*, I note that such deemed trust would not survive in a bankruptcy, which is proposed and intended here in any event. The Court of Appeal for Ontario has held that a bankruptcy order may be sought with the express purpose of affecting priorities: *Grant Forest Products Inc. v. The Toronto Dominion Bank*, 2015 ONCA 570 at para. 118.
18. Moreover and in any event, even prior to the effect of the proposed bankruptcy on a deemed trust claim for HST arrears, section 222(4) of the *Excise Tax Act* provides an exception to the deemed trust provisions that the Receiver submits, and I accept, applies in this case. It provides that, for the purposes of the deemed trust provisions, a security interest does not include certain "prescribed security interests".
19. A "prescribed security interest" is defined in section 2(1) of the *Security Interest (GST/HST) Regulations* as:

For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of the mortgage or hypothec securing the performance of an obligation of the person that encumbers Land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.
20. It follows that the deemed trust pursuant to section 222(1) that could otherwise be applicable outside of a bankruptcy in this case may not apply to the proceeds of sale of the Transaction Properties to the extent that: (i) such proceeds are allocated to the lands and buildings secured by the Applicants' mortgages, which all proceeds of sale are in this case; and (ii) the Applicants' mortgages were registered prior to the non-remittance of HST (and indeed prior to the date upon which such remittance was required to be made) that would give rise to a deemed trust.
21. I also observe in this case that the federal Crown was specifically served with the motion record returnable today and has not appeared to oppose. Moreover, counsel for the Canada Revenue Agency (Attorney General) had informal discussions with counsel for the Receiver with respect to this issue, so there is no issue that the federal Crown was not aware of the relief being sought.
22. It follows that there need be no further action taken in respect of any deemed trust in respect of HST arrears.
23. The activities of the Receiver are set out in detail in its Reports. The principles set out by this Court with respect to approval of activities of a Monitor and its reports are applicable to the approval of the activities of a Receiver and its activities also: see *Target Canada* and *Laurentian University*, for example.

24. I am satisfied that the activities of the Receiver as set out in the Sixth Report were necessary, consistent with its duties and powers granted in the Appointment Order and were reasonable and for the benefit of stakeholders generally. The activities are approved.
25. Given that other than the Remaining Activities, the Receiver has completed the administration of these Proceedings, discharge is appropriate, to be effective upon the filing of a Receiver's Discharge Certificate. The Receiver is discharged upon that filing.
26. The Receiver also seeks a limited release in favour of it and its counsel. I note that such a release is contemplated by the Model Discharge Order and can be granted absent improper or negligent conduct, none of which is alleged here. See also: *Pinnacle v. Kraus*.
27. The Receiver seeks a limited release temporally circumscribed up to the date of the Discharge, Distribution and Ancillary Matters Order, and the limited subsequent release up to the date of the filing of the Discharge Certificate, provided that parties of interest are given notice of same and have an opportunity to object to such subsequent release.
28. I am satisfied that this sequential mechanism is appropriate here. It provides that the parties of interest have full and transparent disclosure of the nature and scope of the release sought, and an opportunity to challenge it or raise any issues, should they choose to do so.
29. Having reviewed all of the materials and having heard the submissions of counsel, there being no opposition, I am satisfied that the Receiver and its counsel are entitled to both releases to be effective pursuant to the mechanism described above.
30. The Receiver also seeks relief in respect of the sealing and unsealing of certain documents. In particular, it seeks to seal the 414 Confidential Appendices. They contain confidential and commercially sensitive information with respect to the key economic terms of the Proposed Transaction. Public disclosure of those terms now could negatively impact the integrity of that Proposed Transaction. The sealing order is effective only until the closing of the Proposed Transaction or upon further order of the Court. The *Sierra Club* and *Sherman Estate* test is met, and the sealing of the 414 Confidential Appendices is approved.
31. Counsel for the Receiver is to file the 414 Confidential Appendices (and, if not already done, the 304 Confidential Appendices) with the Commercial List Office in a sealed envelope marked: "Confidential and not to form part of the public record on the terms ordered by this Court and subject to further Court order".
32. The 414 Confidential Appendices and the 304 Confidential Appendices shall be unsealed upon the closing of the Proposed Transaction.
33. Orders to go in the form signed by me today which are effective immediately and without the necessity of issuing and entering.

Oliver, J.