



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

**COUNSEL/ENDORSEMENT SLIP**

COURT FILE NO.: CV-24-00730869-00CL

HEARING DATE: February 20, 2025

NO. ON LIST: 5

TITLE OF PROCEEDING: TWO SHORES CAPITAL CORP. -v- PRODUCTIVITY MEDIA INC. et al  
BEFORE: JUSTICE KIMMEL

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**PARTICIPANT INFORMATION**

**For Applicant:**

Name of Person Appearing	Name of Party	Contact Info
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**For Respondent:**

Name of Person Appearing	Name of Party	Contact Info
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Robert Drake	Counsel to the Pension Plan Trustees ( <i>Consortium of Union Sponsored Trust Unitholders</i> )	416 595 2095 rdrake@kmlaw.ca
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**Others in Attendance:**

<b>Name of Person Appearing</b>	<b>Name of Party</b>	<b>Contact Info</b>
Jordan R.M. Deering	Counsel for the Receiver, KSV Restructuring	416-365-3515 Jordan.deering@dlapiper.com
Graham Phoenix	Counsel to Westfield Capital (Trustee)	416-558-4492 gphoenix@LN.law

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**ENDORSEMENT OF JUSTICE KIMMEL:**

**This Motion**

- [1] On November 19, 2024, at the request of Two Shores Capital Corp. ("Two Shores"), KSV Restructuring Inc. ("KSV"), was appointed as the receiver and manager (in such capacity, the "Receiver") without security, of all the assets, undertakings, and properties (the "Property") of Productivity Media Inc. ("PMI"), Productivity Media Income Fund I LP (the "Limited Partnership"), and Productivity Media Lending Corp. I (collectively, the "Debtors").
- [2] Two Shores now seeks an order authorizing and directing the Receiver to: (i) until such time as the Debtors' Indebtedness to Two Shores has been repaid in full, (A) incur no further time or expense, and instruct its advisors and assistants to incur no further time or expense, in pursuing the Investigation or claims against third parties arising therefrom, and (B) devote its time, efforts, and activities toward recoveries and realizations sufficient to repay the Indebtedness in full at the earliest opportunity; and (ii) make one or more distributions to Two Shores in an aggregate amount not to exceed the amount of the Debtors' Indebtedness to Two Shores.
- [3] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the applicant's factum for this motion.

**The Background to this Application and Motion**

- [4] Two Shores Capital Corp. ("Two Shores"), is the sole secured creditor of the Debtors. In July 2024, Two Shores made a loan to the Debtors in the principal amount of US\$2.5 million which is secured by a first- ranking charge on the Property and which remains outstanding. Interest and expenses have and continue to accrue and form part of the Indebtedness owing to Two Shores.
- [5] Although Two Shores was adequately secured by the Debtors' anticipated receipts from tax credits and other sources, it commenced this application at the request and with the full

support of the Debtors so that the Receiver could commence an investigation into possible fraud that the Debtors had discovered a possible fraud, involving allegations that PMI's former CEO had invested over US\$100 million of Debtor assets in fraudulent Media Projects (the "Investigation").

- [6] This application was made in good faith because (a) Two Shores was the only secured creditor of the Debtors and appeared to be the only party with standing to seek the appointment of the Receiver, and (b) the Debtors required the appointment of the Receiver so that it could advance the Investigation and pursue recoveries for the benefit of the holders of the LP Units of the Limited Partnership, the primary other stakeholders.
- [7] All parties (Two Shores, the Receiver, the Debtors and the LP Unitholders) acknowledge that it was always understood that Two Shores would suffer no prejudice from having brought this application, that it would be repaid in full in a timely manner (with the expectation that it would be repaid no later than the end of January 2025), and that the LP Unit Holders would fund the costs of the receivership and the Investigation, both of which were initiated primarily for their benefit, not for Two Shores' benefit.
- [8] Counsel for Westfield Partners Ltd. in its capacity as the trustee of a significant cohort of the LP Unit Holders (in such capacity, the "Trustee") advised that the LP Unit Holders had, by December 8, 2024, funded into an account an amount sufficient to repay or purchase the Indebtedness to Two Shores and to begin funding the receivership. Assignment documents were negotiated and signed and the Proposed Assignment was expected to close on Monday, December 16, 2024. The Proposed Assignment did not close, and it still has not closed because of concerns raised by certain members of the funding committee (the "KM Unit Holders") represented by Koskie Minsky LLP ("KM").
- [9] To date, the Trustee has only agreed to advance \$750,000 from the funds it is holding to the Receiver, subordinated in favour of Two Shores' security, pursuant to an amended and restated Receiver's Certificate issued on December 18, 2024 ("Receiver's Certificate No. 1"). The Receiver used these funds to pay significant arrears in professional fees and other costs associated with the Investigation that existed at the time.
- [10] The assumption of responsibility for the costs of the receivership and the Investigation by the LP Unit Holders has not progressed as quickly as the parties had hoped. In the meantime, the Receiver has been forced to fund the costs of the Investigation and receivership from the Property of the estate, over which Two Shores holds a first-ranking security interest. To date, the Receiver has incurred more than \$1 million in fees and expenses which are unpaid and unfunded, and which sit in priority to Two Shores' security interest by virtue of the Receiver's Charge.
- [11] It now appears that the delay in completing the Proposed Assignment is due to the need for the KM Unit Holders to obtain regulatory approvals.

[12] Two Shores is no longer prepared to allow this priority charge to continue to erode its security and potential recoveries. The current state of affairs is commercially unreasonable and entirely inconsistent with the expectations and understandings of the parties at the time Two Shores sought the appointment of the Receiver. It seeks on an interim basis directions so that the Receiver will stop the Investigation and not take further steps or incur further fees. If the Proposed Assignment can be completed in the short term, then the receivership and the Investigation can continue after Two Shores has been repaid in full. If not, then the Receiver will be asking to be discharged.

### **Jurisdiction and Grounds Upon Which to Grant the Requested Order**

[13] This Court has the discretion to make such directions pursuant to its jurisdiction to: (a) do what "justice dictates" and "practicality demands" under section 243(1)(c) of the BIA which gives judges the "broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that arise" in the context of a Court-ordered receivership; (b) direct receivers to deal with estate property in a "commercially reasonable manner" under sections 247 and 248(1) of the BIA; and (c) give directions "on any matter relating to the duties of the receiver" or "make any order with respect to the receiver [ ... ] that it thinks fit" under section 60(2) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10.

See BIA, ss. 243(1)(c); *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, at paras. 52-53; *Re Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, at para 148, citing *DGDP-BC Holdings Ltd v. Third Eye Capital Corporation*, 2021 ABCA 226 at para 20.

[14] In circumstances where estate property is being used improvidently or contrary to the legitimate rights and expectations of the creditors, this Court has often applied sections 247 and 248(1) in concert to rectify the issue: see *Romspen v. Edgeworth*, 2014 ONSC 4340; *Clark v. Carson*, 2011 ONSC 6256, at paras 31, 38; *Sullivan v. Letnick*, 2002 CarswellOnt 3454 (ONSC), at paras 33-35.

[15] The funding of a receivership must be considered in light of the security interests of secured creditors who do not wish to be subordinated. Courts can and should limit the amount of priority funding that a receiver can obtain and often restrain the activities of the receiver so as to minimize utilization of such funding: see *Commercial Insolvency of Canada*, 4th Edition (Kevin McElcheran).

[16] Where a proposed investigation on the part of a receiver does not have the potential to benefit all creditors generally, the costs of the investigation ought to be borne by those creditors who stand to benefit and who are willing to bear the costs out of their own resources, and not from general receivership funds: see *Hickman Equipment (1985) Ltd., Re*, 2003 NLSCTD 153, at paras 18-19.

- [17] Applying the above principles cited by the applicant to the circumstances of this case, I am satisfied that it is appropriate to exercise this court's jurisdiction to provide the requested directions curtailing the activities of the Receiver to protect the Property and Two Shores' legitimate priority interests in such Property. The relief sought on this motion is necessary to prevent further erosion of Two Shores' security position and to achieve the cornerstone of its agreement to bring this application, being timely repayment in full of the Indebtedness.
- [18] Two Shores also seeks an order authorizing and approving a distribution, which will be in an aggregate amount not to exceed the amount of the Debtors' secured indebtedness to Two Shores (the "Distribution"). Orders authorizing a receiver to make a distribution to stakeholders are commonly granted in insolvency proceedings. The Court's discretion to make such orders is within its jurisdiction to do what "justice dictates" and "practicality demands" under section 243(1)(c) of the BIA. See *Third Eye*, at paras 52-53; *Re AbitibiBowater Inc.*, 2009 QCCS 6461 at para. 71.
- [19] When asked to approve a distribution, the Court must consider "the advantages, disadvantages and potential prejudice of [the] distribution to all the stakeholders of the debtor entity". The Court must also consider the validity and enforceability of the relevant security, interest savings, and liquidity of the debtor following the distribution: see *AbitibiBowater*, at paras. 63, 68, 70, 75; and *Re SemCanada Crude Company (Companies' Creditors Arrangement Act)*, 2009 ABOB 90, at para. 27.
- [20] The Distribution satisfies the criteria and it is reasonable and appropriate in the circumstances, for the reasons outlined in paragraphs 48 and 49 of the Applicant's factum.
- [21] No one opposes the relief sought on this motion. The primary concern is about the timing of the next steps and whether the Receiver can remain in place pending an assignment or repayment or refinancing of Two Shores' Indebtedness. The Receiver has not filed a report but fully supports the relief sought.
- [22] In the circumstances, the requested order is reasonable and is granted. The order may issue in the revised form dated February 20, 2025 and signed by me today.

### **Logistics**

- [23] There are Mareva orders in place in Ontario and the Cayman Islands that were obtained by the Receiver in the course of its Investigation. There is a comeback hearing scheduled in respect of the Ontario Mareva order on March 24, 2025. The Receiver advised that it intends to bring a motion for its discharge if the situation with the funding of the receivership has not been addressed to its satisfaction sufficiently in advance of the March 24, 2025 motion date.

- [24] KM advised that it has been trying to obtain the necessary regulatory approvals for the KM Unit Holders that it represents to authorize the release of the funds held by the Trustee to fund the receivership, and intends to bring a motion to secure those approvals. Time is running out. KM shall serve its clients' motion record as soon as possible during the week of February 24, 2025. The regulator respondents to that motion are urged to respond with their positions as soon as possible so that all parties can assess the feasibility of the continued Investigation into what is asserted to be a \$300 million fraud.
- [25] If the regulators are consenting to the KM Unit Holders' motion, a 9:30 appointment may be scheduled in the normal course to obtain a consent order.
- [26] A 90 minute hearing by zoom has been scheduled in this matter on March 6, 2025 commencing at 11:00 a.m. This court time should be sufficient for the hearing of the KM Unit Holders' Motion and/or the Receiver's discharge motion, as appropriate. It may also be used for any other approval motions as may be needed if the receivership is continuing, or if no further court orders are required, then counsel shall advise the Commercial List scheduling office as soon as possible so that the hearing time can be vacated.
- [27] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of a formal order being taken out.

A handwritten signature in cursive script that reads "Kimmel J." The signature is written in dark ink and is positioned above the typed name and date.

KIMMEL J.

February 21, 2025