



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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

DATE: March 6, 2025

NO. ON LIST: 4

TITLE OF PROCEEDING: TWO SHORES CAPITAL CORP. PRODUCTIVITY v MEDIA INC. et al

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
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For Defendant, Respondent, Responding Party:

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Other:

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Murtaza Tallat	Counsel for KSV Restructuring Inc., in the capacity as the Receiver	mtallat@ksvadvisory.com

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ENDORSEMENT OF JUSTICE PENNY :

Background

- [1] The Productivity Media Income funds provided short-term financing products to the film and media industry. PMI funds raised financing for this business by soliciting investment in limited partnership units in PMI funds from, among others, pension, health and other benefit plans.
- [2] One group of such investors is what is defined in the material as the “KM Represented Funds” or what I will simply call the KM Funds. These are pension, health and other benefit plans sponsored by various unions.
- [3] The CEO of PMI was William Santor. In July 2024, Mr. Santor obtained a short-term loan from Two Shores of \$2.5 million. The Two Shores loan was secured in first priority against all the assets of the PMI funds and guaranteed by certain other PMI entities.
- [4] In July 2024, PMI stopped distribution of quarterly dividend payments to unit holders. Further inquiry disclosed credible allegations that Mr. Santor had caused. PMI funds to advance fund assets to “fake” entities controlled by him. By August 2024, PMI had placed Mr. Santor on a leave of absence. Specialized legal and accounting advice was sought by PMI. All unit redemptions were suspended.
- [5] These events constituted a material change and event of default under the Two Shores loan agreement. Two Shores made demand and issued notices of intention to enforce security in October. 2024. The Two Shores debt remains unpaid.
- [6] In November 2024 Two Shores sought and obtained an order appointing KSV as Receiver of the respondent PMI entities. Following the appointment of KSV, PMI filed a lawsuit against Mr. Santor. Both a *Mareva* and a *Norwich* order were obtained against him. A further return of the *Mareva* order motion is scheduled for March 24, 2025.
- [7] Due to lack of liquidity, funding the receivership became an issue. The KM Funds made an urgently required loan of \$750,000 to fund the Receiver’s efforts to date, secured by a receiver’s certificate. Two Shores obtained an order of the court suspending the Receiver’s investigatory work, apart from realizations required to repay Two Shores’ secured loan. The Receiver has made it clear that, in the absence of an identified source of funding for the ongoing receivership before the March 24, 2025 *Mareva* order come back date, it will seek to be discharged as Receiver.

[8] Mr. Santor was found dead in his home in the Cayman Islands on December 28, 2024.

The Motion

[9] This motion is brought on behalf of the Trustees of the KM Funds for the advice and direction of the court under s. 60 of the *Trustee Act*.

[10] There are two issues for determination:

(1) as part of the advice and direction of the court sought by virtue of s. 60 of the Trustee Act, is participation in the proposed assignment transaction by each of the KM Funds Trustees consistent with their fiduciary duties in respect of the management and administration of the property of the pension, health and other benefit funds? and

(2) should the Ernst & Young Report and the proposed Funding Agreement between the unit holders (discussed below) be sealed?

Advice and Direction Under Section 60 of the *Trustee Act*

[11] The request for advice and direction arises out of the funding difficulties faced by the receivership. Two Shores, with its first in priority security and relatively modest loan, did not need, nor was it willing, to fund a complex, lengthy receivership/fraud investigation in order to recover on its loan security. It was not prepared to allow a potentially burgeoning super-priority charge in favour of the Receiver to impair its secured position. It is the investors who have the larger (unsecured) exposure and the greater need for the sophisticated expertise of the Receiver in order to investigate, recover and realize upon PMI's claims and other assets.

[12] Thus, it fell to the PMI funds' unitholders to seek an acceptable means of continuing the receivership.

[13] In these circumstances, the KM Funds and other unitholders decided that the purchase of Two Shores' security (the proposed assignment transaction) was the most practical alternative to moving forward with the Receiver's investigation. Accordingly, these unitholders entered into a Funding Agreement to pool their trust fund assets pro rata to: (i) acquire the debt and security of Two Shores; and (ii) periodically fund the Receiver's ongoing activities to further its investigation of the fraud.

[14] The Trustees of the KM Funds have obtained independent advice from Ernst & Young that there will likely be sufficient assets recovered by the Receiver to repay the cost of the proposed assignment transaction and the \$750,000 loan already advanced.

[15] The Trustees of the KM Funds have certain regulatory obligations and owe fiduciary duties to the Fund beneficiaries. The Trustees notified the relevant pension/financial regulators of their intentions. The regulators have advised that they take no position on the KM Fund's motion.

[16] The Trustees of the KMF Funds also seek the advice and direction of the court under s. 60 of the *Trustee Act*.

[17] Section 60 (1) and (2) of the Trustee Act entitles a trustee to seek the opinion, advice, and direction of the court with respect to the management or administration of a trust and provides certain protections:

A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

The trustee, guardian or personal representative acting upon the opinion, advice or direction given shall be deemed, so far as regards that person's responsibility, to have discharged that person's duty as such trustee, guardian or personal representative, in the subject-matter of the application, unless that person has been guilty of some fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction.

[18] When considering an application under s. 60, there are three considerations:

1. whether the trustee had the power to do what he was proposing to do;
2. whether he acted in good faith; and,
3. whether he acted fairly as among beneficiaries.

[19] Here, the Trustees have already invested trust property to fund the receivership, as evidenced by the receivership certificate covering the \$750,000 loan. The investment in Two Shore's debt is the further exercise of their power to fund the ongoing receivership.

[20] However, investing in secured debt is somewhat unusual for trustees of a pension plan. Similarly, utilizing pension funds to pursue fraud investigations is also somewhat unusual.

[21] There is no question that the Trustees have a fiduciary obligation under the common law, which includes a duty to act honestly and in good faith. Here, the Trustees: (a) obtained legal advice from counsel as to the proposed assignment transaction; (b) obtained and reviewed financial advice from an independent financial advisor (E&Y) commenting on the risks and benefits of the transaction; (c) consulted with non-trustee stakeholders who

also supported the transaction (the other syndicate investors in Two Shore's debt); and (d) considered and weighed the potential negative effects of not entering into the transaction, which would effectively terminate the receivership proceedings and likely mean a significant loss of the unitholders' initial investment in the various funds in PMI.

- [22] Finally, the steps followed and actions taken by the Trustees with respect to the proposed assignment transaction are for the benefit of all the beneficiaries of the trusts. There is no individual or group of beneficiaries who are being disadvantaged or receiving more favourable treatment. All the beneficiaries are being treated fairly.
- [23] One recognized purpose of an application under s. 60 is for legal protection of trustees against the claims of beneficiaries. As noted by the Court of Appeal for Ontario in *Bunker v. Veall*, 2023 ONCA 501, at para. 13, proceedings under s. 60 "are intended to assist, and in some cases provide legal protection to the trustee against beneficiaries for actions to be taken by the trustee in the administration of the trust or estate."
- [24] Such protection is not absolute. Subsection 60(2) makes it clear that the court's declaration that a trustee has discharged his or her duties is not applicable if the trustee is guilty of fraud, willful concealment or misrepresentation in the obtaining of the opinion, advice and direction from the court.
- [25] The remedy of advice and direction is available in circumstances where commercial investment proposals are unorthodox but deemed necessary: *McKay Estate v. Love*, [1991] O.J. No. 1972 (Ont. C.J.) and *U.S. Steel Canada Inc. (Re)* (5 June 2018), Toronto CV-14-10695-00CL (ONSC). There is often a concern about opening the door to applications by trustees for orders approving that which they arguably have the power and authority to do in any event. However, in this case, I accept that the nature of the transactions being contemplated are exceptional in nature given the overall complexity of the problem the KM Funds are faced with.
- [26] For all these reasons, I find that it is appropriate to issue the advice and directions sought by the Trustees concerning the proposed assignment transaction. That transaction is approved.

The Sealing Order

- [27] The test to determine if a sealing order should be granted was set out in *Sierra Club* and recast in *Sherman Estate*: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects. The court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as

preserving confidential information or avoiding a breach of a confidentiality agreement are an “important public interest” for purposes of this test.

[28] In the insolvency context, the goal is almost always to maximize recovery for the benefit of stakeholders in accordance with their valid priorities. Courts routinely grant sealing orders in respect of information which could affect the maximization of value in the realization process. Such concerns are present here in the form of the E&Y Report and the unitholders’ Funding Agreement.

[29] I am satisfied that the requested sealing order for the Confidential Appendices meets the test in *Sierra Club/Sherman Estates* and that disclosure of this information would pose a risk to the public interest in enabling stakeholders of a company in receivership to maximize the realization of assets. I direct counsel for the KM Funds to file a hard copy of the Confidential Appendices with the Commercial List office in a sealed envelope with a copy of the order and this Endorsement. The sealing order shall remain in place pending realization efforts to recover defrauded funds.

Conclusion

[30] For the forgoing reasons, the Trustees’ motion is granted.

[31] Order to issue in the form signed by me this day.

A handwritten signature in blue ink, appearing to read "Penny J.", followed by a period.

Penny J.