SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: **CV-22-00689565-00CL** **DATE:** 30 November 2022

NO. ON LIST: **4**

TITLE OF PROCEEDING: **BARRETT KUDLOW CAPITAL MANAGEMENT INC V SMS PROPERTY TRUST INC**

BEFORE JUSTICE: **OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Lea Nebel	Barrett Kudlow Capital Management	inebel@blaney.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Jonathan Krieger	Receiver/Proposed Monitor	Jonathan.Krieger@ca.gt.com
Rosa Wilford	Receiver/Proposed Monitor	rosa.wilford@ca.gt.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Applicant seeks today two orders. The first would discharge Grant Thornton Limited [”GT”] in its capacity as interim receiver and approve its conduct and fees all as set out in the First Report. The second one appoint GT as monitor.
2. No one appears today for the Respondent although Applicant's Counsel confirms that the Respondent consents to the relief sought. The motion is unopposed by any party, including but not limited to the second mortgagee.
3. The Applicant has negotiated a forbearance agreement with the Respondent pursuant to which the Respondent has agreed to the appointment of GT as Monitor [and otherwise consents to the appointment of a receiver in the event of default]. The forbearance has a one year term.
4. The idea is that the Respondent will remain in control of its business but will have no ability to make material expenditures without the prior written consent of the Monitor. The Monitor, in turn, will not be a receiver but will have control over the Respondent's banking.
5. SMS owns and operates a seniors residence in Thunder Bay, Ontario, known as McKellar Place Seniors Living which provides accommodation for approximately 100 senior citizens. It is in default of its security and lending arrangements with the Applicant.
6. Justice Conway of this Court approved the appointment of an interim receiver on November 1, 2022.
7. In the circumstances, the proposed arrangement is appropriate. It provides for the oversight necessary and appropriate over the operations and activities of the Respondent to protect the position of the Applicant while minimizing the use of scarce judicial resources. It makes good sense that the same firm, GT, be appointed Monitor since it has already taken control of the banking and financing of the Respondent and has established working controls. The proposed discharge of GT as interim receiver and appointment of the same firm as Monitor, while unusual, is practical in the circumstances, and avoids a contested application at this time since the relief would be made on the consent of the parties.
8. The Applicant relies on section 101 of the *Courts of Justice Act*. That provision provides that a receiver or receiver and manager may be appointed where it appears just or convenient to do so. An order appointing a receiver may include such terms as are considered just.
9. Section 101 does not expressly refer to the appointment of a monitor, as opposed to a receiver or receiver and manager. I observe that this Court has previously appointed a monitor pursuant to section 101 in appropriate circumstances (See, for example, *Royal Bank of Canada v. Peace Bridge Duty Free Inc*., Order of Pattillo, J. dated January 17, 2022, Ct. File No. CV-21-00673084-00CL).
10. In my view, whether the term “monitor” or “receiver” is used, the provision authorizes the appointment of an officer of this Court in the nature of receiver to exercise those powers and duties of a Court officer subject to the terms of the order made. The more substantive question is whether it is just or convenient to make the appointment.
11. In making a determination about whether it is, in the circumstances of a particular case, just and convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258).
12. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 7101 at para. 27).

13. However, the presence or lack of such a contractual entitlement is not determinative of the issue. The British Columbia Supreme Court put it, I think, correctly: “these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient. (See *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).
14. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor’s attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted. [See *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 28-29].
15. In this case, having considered the factors and facts above, and particularly the consent of the Respondent to the appointment of a Monitor in the circumstances of the Respondent having defaulted on its obligations to the Applicant in the first place, and observing that the Applicant would obviously not consent to the discharge of the Interim Receiver but for the appointment of a Monitor, I am satisfied that the appointment is just and convenient.
16. Both orders to go in the form signed by me today. These two orders are effective immediately and without the necessity of issuing and entering.