

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

THE HONOURABLE	)	WEDNESDAY, THE 30 th
	)	
JUSTICE OSBORNE	)	DAY OF NOVEMBER, 2022

B E T W E E N:

BARRETT KUDLOW CAPITAL MANAGEMENT INC.

Applicant

- and -

SMS PROPERTY TRUST INC.

Respondent

**APPLICATION UNDER SUBSECTION 47 (1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED**

**ORDER
(Appointing Monitor)**

THIS MOTION, made by Barrett Kudlow Capital Management Inc. (“**BKCM**” or the “**Applicant**”) for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing Grant Thornton Limited (“**GTL**”) as a monitor (in such capacity, the “**Monitor**”) without security, of SMS Property Trust Inc. (the “**Debtor**” or “**SMS**”), was heard this day via Zoom videoconference because of the Covid-19 pandemic.

ON READING the affidavit of Charles Barrett sworn November 24, 2022 and the exhibits thereto, and the affidavit of Charles Barrett sworn October 28, 2022 (collectively, the “**Barrett Affidavits**”) and the exhibits thereto, and on hearing the submissions of counsel for the Applicant, the Interim Receiver and such other counsel as were present, no one appearing for any

other stakeholder although duly served as appears from the affidavit of service of Ariyana Botejue sworn Nov 28, 2022, filed, and being advised of the consent of the Debtor and on reading the consent of GLT to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of this application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 101 of the CJA, GTL is hereby appointed Monitor, without security, of the Debtor with the powers, rights and duties further set out herein. This Order and the appointment of the Monitor does not constitute a finding by this Court that the Debtor is insolvent.

3. **THIS COURT ORDERS AND DECLARES** that:

- (a) Except as expressly set out herein with respect to the banking and deposited funds therein of the Debtor, the Monitor shall not take possession or control, nor shall it be deemed to have taken possession or control, of the Debtor's business or the assets, property or undertaking of the Debtor (the “**Property**”), and that the Debtor shall retain operational control of their Property, business and operations;
- (b) the Monitor shall not be and shall not be deemed to be a receiver for purposes of subsection 243(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) or under any other statute;
- (c) the Monitor shall have none of the obligations of a receiver under Part XI of the BIA, other than section 247, and for greater certainty it shall not send notice of its appointment or this order to the Superintendent in Bankruptcy or to the known creditors of the Debtor; and

- (d) the appointment of the Monitor shall not be and shall not be deemed to be a change of control of the Debtor.

MONITOR'S POWERS

4. **THIS COURT ORDERS** that the Monitor is hereby empowered and authorized, but not obligated, to act at once and, without in any way limiting the generality of the foregoing, the Monitor is hereby expressly empowered and authorized, but not obligated, to do any of the following where the Monitor considers it necessary or desirable:

- (a) to monitor the business of the Debtor;
- (b) to take possession of and exercise control over any and all proceeds, receipts and disbursements arising out of or from or in respect of the Property;
- (c) to contact any or all financial institutions holding bank accounts or assets on behalf of the Debtor and to require such financial institutions to place said accounts on deposit only and to direct such financial institutions to allow no withdrawals or payments from said accounts other than with the prior written consent of the Monitor or a further order or of this Court;
- (d) to report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property or the business of the Debtor and such other matters as may be relevant to the proceedings herein;
- (e) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel, including without limitation BKCM, and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including without limitation those conferred by this Order;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor, including without limitation rent, and to exercise all remedies of the

Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

- (g) to report to, meet with and discuss with such affected Persons (as defined below) as the Monitor deems appropriate on all matters relating to the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable;
- (h) to monitor and report on the status of negotiations between the Debtor and the Lender; and
- (i) subject to the limitations in section 3 of this Order, to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

5. **THIS COURT ORDERS** that (i) the Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Monitor.

6. **THIS COURT ORDERS** that all Persons, including but not limited to Canada Revenue Agency, shall be authorized to share information, with the Monitor, provided the Debtor shall be entitled to request and receive copies of all such information from the Monitor.

RESTRICTIONS ON OPERATING ACCOUNT OF RESPONDENT AND DISCLOSURE

7. **THIS COURT ORDERS** that any and all financial institutions, including banks, credit unions or any party holding assets of the Debtor, having received a copy of this Order from the Monitor ("**Banks**"), shall restrict any such account to be a deposit only account and to not permit the removal or transfer of monies or assets of the Debtor from said accounts or on credit on

behalf of the Debtor except with the written consent of the Monitor hereafter or upon a further Order of the Court. The Debtor may not incur any expenses outside the ordinary course of business without the prior written consent of the Monitor.

8. **THIS COURT ORDERS** that the Banks shall, upon receiving a written request from the Monitor accompanied by a copy of this Order, forthwith disclose and deliver up to the Monitor any and all records held by the Bank concerning the Debtor's assets and accounts, including the existence, nature, value and location of any monies or assets or credit, wherever situate, held on behalf of the Debtor by the Banks.

NO PROCEEDINGS AGAINST THE MONITOR

9. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

10. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Monitor or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

11. **THIS COURT ORDERS** that all rights and remedies against the Debtor, the Monitor or affecting the Property are hereby stayed and suspended except with the written consent of the Monitor or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE MONITOR

12. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Monitor or leave of this Court.

CONTINUATION OF SERVICES

13. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Debtor in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Debtor, or as may be ordered by this Court.

14. **THIS COURT ORDERS** that all funds in the Post Receivership Account (as that term is defined in the Order of Justice Conway dated November 1, 2022 (the “**IR Order**”), and net of all fees of GTL in its capacity as Interim Receiver), and all funds, monies, cheques, instruments, and other forms of payments received or collected by the Monitor or SMS from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Monitor (the “**Monitor Accounts**”) and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Monitor to be paid in accordance with the terms of this Order or any further order of this Court. The Monitor shall pay the go forward ordinary operating expenses of the Debtor from the Monitor Accounts to the extent funds are

available in those accounts, including without limitation, the mortgage payment due to BCKM each month from the Debtor, from the Monitor Accounts.

EMPLOYEES

15. **THIS COURT ORDERS** that all employees of the Debtor shall remain the employees of the Debtor until such time as the Monitor, on the Debtor's behalf, may terminate the employment of such employees. The Monitor shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Monitor may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

CASL

16. **THIS COURT ORDERS** that any and all interested stakeholders in this proceeding and their counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in this proceeding, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to such other interested stakeholders in this proceeding and their counsel and advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

LIMITATION ON THE MONITOR'S LIABILITY

17. **THIS COURT ORDERS** that the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by section 14.06 of the BIA or by any other applicable legislation.

MONITOR'S ACCOUNTS

18. **THIS COURT ORDERS** that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements by the Debtor upon presentation of such accounts to the

Debtor, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Monitor and counsel to the Monitor shall also be entitled to and are hereby granted a charge (the "**Monitor's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings limited to the amount of \$250,000, and that the Monitor's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Monitor shall be at liberty to apply the monies received from the Debtor pursuant to paragraph 18 of this Order against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Monitor or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

BORROWING POWERS

21. **THIS COURT ORDERS** that the Monitor be at liberty and it is hereby empowered to borrow, on its own behalf or on the behalf of the Debtor, by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$150,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Monitor by this Order or to provide further liquidity to the Debtor to assist it in meeting its operational liabilities and expenses. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Monitor's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the

Monitor's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Monitor's Borrowings Charge nor any other security granted by the Monitor in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Monitor is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Monitor's Certificates**") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Monitor, or on the Debtor's behalf by the Monitor, pursuant to this Order or any further order of this Court and any and all Monitor's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Monitor's Certificates, but junior in priority to any outstanding receiver's certificates issued pursuant to the IR Order.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/>) shall be valid and effective service. Subject to Rule 17.05 of the *Rules of Civil Procedure* (the "**Rules**") this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules. Subject to Rule 3.01(d) of the Rules and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission.

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Monitor is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as

last shown on the records of the Debtor and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

RETENTION OF LAWYERS

27. **THIS COURT ORDERS** that the Monitor may retain solicitors to represent and advise the Monitor in connection with the exercise of the Monitor's powers and duties, including without limitation, those conferred by this Order. The Monitor is specifically authorized and permitted to use the solicitors for the Applicant herein as its own counsel in respect of any matter where there is no conflict of interest. In respect of any legal advice or issue where a conflict may exist or arise in respect of the Applicant and the Monitor or a third party, the Monitor shall utilize independent counsel.

GENERAL

28. **THIS COURT ORDERS** that the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as a trustee in bankruptcy of the Debtor.

30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and

that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of Applicant's security.

33. **THIS COURT ORDERS** that the balance of the relief sought by the Applicant in its application, in particular a further order to appoint a receiver of the Debtor, be and is adjourned until November 2, 2023 or upon a further order of the court.

34. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order or discharge the Monitor on not less than seven (7) days' notice to the Monitor, the Debtor, the Applicant and any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

SCHEDULE “A” - MONITOR’S CERTIFICATE

CERTIFICATE NO. [insert number]

AMOUNT \$[insert amount]

1. THIS IS TO CERTIFY that [insert name of monitor], the monitor (the “**Monitor**”) of the assets, undertakings and properties [insert name of debtor] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the “Property”) appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the “Court”) dated the [insert day] day of [insert month], 2022 (the “Order”) made in an action having Court file number [insert court file number]-CL, has received as such Monitor from the holder of this certificate (the “Lender”) the principal sum of \$[insert amount], being part of the total principal sum of \$[insert amount] which the Monitor is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the [insert day] day of each month] after the date hereof at a notional rate per annum equal to the rate of [insert rate] per cent above the prime commercial lending rate of Bank of [insert bank] from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Monitor pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the

Order and in the *Bankruptcy and Insolvency Act*, and the right of the Monitor to indemnify itself out of such Property in respect of its remuneration and expenses.

1. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.
2. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Monitor to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.
3. The charge securing this certificate shall operate so as to permit the Monitor to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.
4. The Monitor does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____, day of November, 2022.

[insert name of monitor], solely in its capacity as
Monitor of the Property, and not in its personal
capacity

Per:

Name: [insert name]
Title: [insert title]

BARRETT KUDLOW CAPITAL MANAGEMENT INC.

Applicant

and

SMS PROPERTY TRUST INC.

Respondent

Email address of recipients: See Service List

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Appointing Monitor)

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