

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

RE:

AMERICAN GENERAL LIFE INSURANCE COMPANY,
LEXINGTON INSURANCE COMPANY, AND
THE VARIABLE ANNUITY LIFE INSURANCE COMPANY

Applicants

AND

SOUTHMOUNT HEALTHCARE CENTRE INC., 180 VINE INC., 2478658
ONTARIO LTD., 2009 LONG LAKE HOLDINGS INC., 65 LARCH
HOLDINGS INC., 100 COLBORNE HOLDINGS INC., 240 OLD
PENETANGUISH HOLDINGS INC., GROSS PROPERTIES INC., 180 VINE
PURCHASER INC., AND 2413667 ONTARIO INC.

Respondents

APPLICATION UNDER section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985,
c. B-3, as amended, and under section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43

BEFORE: Koehnen J.

COUNSEL: *Ayro Shalviri, Chris Burr* for the Receiver

Evan Cobb Independent Counsel to the Receiver

Tim Duncan for Cannect International Mortgage Corporation

Brett Moldaver for Cascade TWT Inc.

Tom Masterson for ADD Capital Corp.

Various owners on their own behalf

HEARD: October 29, 2021

ENDORSEMENT

- [1] KPMG Inc. is the court-appointed receiver of Southmount Healthcare Centre Inc. and various related entities as well as for Victoria Avenue North Holdings Inc. Each entity owns a piece of real estate that is used primarily for rental to medical professionals. KPMG seeks an order approving a proposed sale process, approving settlement of a legal proceeding, and an order sealing certain confidential appendices to its First Report. For ease of reference, these reasons will deal with both the Southmount and the Victoria properties. The same set of reasons will be issued twice: once with the Southmount style of cause and a second time with the Victoria style of cause.
- [2] The relief is unopposed. At the end of the hearing on October 29 I indicated that I would grant the orders requested.
- [3] There were many individual investors present at the hearing. There are a further significant number of investors who were not at the hearing. Most investors are retail investors. Given the large number of interested parties for home this is a topic of great personal concern, I will set out an explanation and the reasons for my approval even though the matter was unopposed.
- [4] The first step in the proposed sales process is the retainer of a broker. As set out in its First Report, the Receiver sent Requests for Proposals (RFPs) to 7 listing brokers that the Receiver believed had sufficient market presence and expertise in the asset class to appropriately market the assets. Five brokers submitted RFPs. The RFPs included a description of their credentials and experience, an indication of value from the brokers, their proposed marketing strategy, proposed timelines for listing, bids and other relevant milestones, anticipated time to close and a detailed breakdown of their fee structure. After receiving this information, the Receiver had individual discussions with the proposed brokers. As a result of this process, the Receiver recommends the appointment of CBRE Limited.
- [5] I have reviewed the confidential appendices B and C to the Receiver's First Report which contain the fee structures, indicators of value and marketing proposals of all RFP participants. I am satisfied that is appropriate to appoint CBRE as a broker. As noted earlier, no one opposes the appointment. CBRE is a well-known, well-regarded broker within this asset class and has considerable experience in marketing distressed assets. Their fee structure falls within a reasonable bandwidth of compensation.
- [6] The Receiver designed the proposed sales process with the help of CBRE and the applicants. The Southmount portfolio consists of seven buildings. The Victoria portfolio consists of two buildings.

- [7] The proposal is to sell the properties through the course of a six month process. The properties will be listed for sale without a sales price. Both CBRE and the Receiver believe that the absence of a listing price is likely to lead to higher price. Mentioning a sales price in a distressed sale tends to act as the ceiling. Both CBRE and the Receiver believe they will be able to generate a higher sales price if they allow the market to set the price.
- [8] The Receiver does not propose to commission formal valuations of the properties. Each broker that participated in the RFP process provided an indication of value, as a result of which the Receiver has at least some information about the range of potential values from a variety of market participants. The Receiver is more inclined to the view that the value of the properties is best indicated through a robust sales process rather than through appraisals. I have no basis for disagreeing with the Receiver's approach. It is often been said that the best indicator of value is what the market is willing to pay, not what an appraiser believes value to be based on a series of assumptions.
- [9] The initial marketing phase for the property will focus on marketing the properties to potential purchasers who would be interested in purchasing the entire Southmount portfolio as well as the two buildings within the Victoria portfolio for which approval is sought in a companion proceeding. Although the marketing focus within this period will be portfolio purchasers, any interested purchaser is entitled to participate in the process from day one.
- [10] Phase 2 of the marketing program will begin marketing the properties to sub portfolio purchasers, that is to say purchasers interested in purchasing one or more buildings but not the entire portfolio. That phase is expected to last 4 to 5 weeks. The reason for beginning with portfolio purchasers first is that the purchase of the entire portfolio is likely to require more due diligence than will the purchase of a sub portfolio or an individual building. Any interested party who signs a confidentiality agreement will be granted access to a confidential data room containing information about the assets.
- [11] The Receiver anticipates that sometime in December it will set an initial deadline for non-binding letters of interest sometime in mid-to-late January. The date will be set in light of the level of market activity. Once a bid deadline has been set, broad notice of it will be given at least 30 days in advance of the deadline.
- [12] After receiving the letters of interest, the Receiver can select one or more of the letters of interest and seek to negotiate binding terms with those bidders. In the alternative, the receiver may choose to invite two or more bidders to participate in a second round of binding bidding following which the receiver may negotiate further with any of the binding bidders.
- [13] Which interested parties or bidders the Receiver chooses to pursue further negotiations with will depend on a variety of factors including the Receiver's assessment of their ability to consummate the proposed transaction, financial wherewithal, availability of financing, market presence, timeline to closing, identity of sponsors, contracts to be assumed, approvals to be obtained, any remaining due diligence to be conducted etc.

- [14] The Receiver will be under no obligation to continue negotiations with any particular party, accept any bid or binding offer (including the highest or best offer) or enter into any binding agreement(s). This is designed to give the Receiver flexibility to pursue other courses of action if it determines those may lead to a better purchase price.
- [15] Any transaction the Receiver proposes to conclude will be subject to further court approval.
- [16] It strikes me that the sales process is well-thought-out, is designed to obtain the highest sales price possible and retains sufficient flexibility to pursue alternate courses of action should those appear preferable to the Receiver. I have therefore approved it.

Lease Termination

- [17] The Receiver seeks approval of a settlement of litigation relating to a lease termination with a former tenant of 2478658 Ontario LTD. The settlement would lead to a payment of \$800,000 in favour of 2478658 Ontario Ltd.
- [18] The Receiver satisfied that the settlement is reasonable in light of the amount of the claim, and the cost, risk and time involved in pursuing the litigation.
- [19] No stakeholders oppose the settlement.
- [20] In the absence of any objection and given the Receiver's legitimate reasons for recommending the settlement, I have no reason to refuse the request.

Sealing Order

- [21] The Receiver seeks an order ceiling confidential appendices A, B and C of its First Report.
- [22] In *Sherman Estate v. Donovan*, 2021 SCC 25 the Supreme Court of Canada held at para. 38 that an applicant for a sealing order must establish that:
- (i) court openness poses a serious risk to an important public interest;
 - (ii) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
 - (iii) as a matter of proportionality, the benefits of the order outweigh its negative effects.
- [23] I am satisfied that all 3 factors are satisfied here in respect of the three appendices.
- [24] Confidential appendix A contains the lease termination settlement. The settlement contains a confidentiality clause. The settlement also contains information relating to the matters in the dispute that could adversely impact the parties have disclosed.

- [25] Parties are ordinarily free to settle litigation and have the terms of the settlement remain confidential. It is only the receivership aspect here that requires the settlement to be filed with the court. In that respect, court openness poses a risk to the public interest in settling litigation: *Allianz v Canada (Attorney General)*, 2017 ONSC 4484 at para. 9. The order sought protects the right to confidentiality in the settlement. As a matter of proportionality, the effect of the sealing order is merely to maintain what would ordinarily be the case in any other form of litigation, that is to say that terms of the settlement are not disclosed. In that context I am satisfied that the limitation on the open courts principle is both minimal and proportionate to the benefit it provides.
- [26] Confidential appendix B contains information concerning the fee structures, marketing strategies and indications of value of the assets provided by the broker participants in the RFP process. Confidential appendix C contains the CBRE broker agreement with its fee structure unredacted.
- [27] Disclosing that information publicly creates a serious risk to the public interest in having court-appointed receivers be able to generate the highest price for the assets under their supervision. Publicly disclosing indications of value for the properties risks imposing a ceiling on any purchase price. Disclosing fee structures would force the disclosure of confidential information that would limit the Receiver's ability to negotiate with other brokers should it become necessary to replace CBRE. A sealing order will prevent this risk from arising. The limitation on the open courts principle in sealing this information is very limited. No reason has been advanced for anyone requiring this information. Given that releasing it could prejudice the interests of a number of retail investors, I am satisfied that the sealing order should be granted.



Koehnen J.

Date: 2021-09-01