



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-21-00672880-00CL HEARING DATE: August 4, 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: CAO et al. v. YANG et al.

BEFORE JUSTICE: KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Emily Fraser	Lawyer for the Applicant, BAO YING CAO	efraser@polleyfaith.com

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Steven Rampersad	Sunrise User, Self-represented	Stevenr64@hotmail.com

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ENDORSEMENT OF JUSTICE KIMMEL:

1. Pursuant to an Interpleader Order issued by Justice Pattillo of the Ontario Superior Court of Justice (the "Court") dated December 7, 2021 (the "Appointment Order"), BDO Canada Limited was appointed receiver (the "Receiver"), without security, of the Contested Funds held by 13364097 Canada Inc. and Bao Ying Cao (collectively the "Applicants").
2. The "Contested Funds" were provided by certain users of Sunrise Technology (the "Sunrise Users") as part of a scheme (the "Sunrise Technology Scheme") operated by the respondent Xiadong Yang ("Yang"). The Applicants held the Contested Funds but made no beneficial claim to them. They were unwitting participants in the Sunrise Technology Scheme.
3. The Appointment Order gave the Receiver access, control and the authority to disburse the Contested Funds held by the Applicants. The Receiver was given a mandate to determine how to reimburse funds to Sunrise Users who advanced funds to the Applicants as a result of the Sunrise Technology Scheme operated by Yang.
4. Based on recommendations contained in the Receiver's first report dated May 19, 2022, the court made a Claims Process Order dated June 7, 2022 (the "Claims Process Order").
5. Having carried out its functions under the Claims Process Order, the Receiver now seeks various approvals from the court, including approval of its proposed distributions to Accepted Sunrise Claimants as set forth in its second report dated July 24, 2023 (the "Second Report"), and its eventual discharge. Capitalized terms in this endorsement not otherwise defined shall have the meanings ascribed to them in the Receiver's Second Report.
6. The Receiver's Second Report is detailed and its recommendations and the justifications for them are clearly set out. This was supplemented by certain specific matters addressed by counsel for the Receiver in an Aide Memoire filed with the court and oral submissions which have provided the court with the necessary support and justification for the relief that is sought by this motion and in the proposed Distribution and Discharge Order.
7. I am satisfied that, with the small changes that have been made to the proposed form of order, the relief sought by the Receiver on this motion is appropriate and justified and should be granted.
8. I will deal briefly with certain aspects of the Distribution and Discharge Order that warrant some additional explanation.

Approval of the Receiver's Determinations of Claims and Dispute Notices

9. The Claims Process Order was very detailed, including with respect to the determination of claims filed by Sunrise Users to be compensated from the Contested Funds. The process required the Receiver to first undertake significant work to identify Sunrise Users who might have claims. This involved an extensive review of many transactions involving transfers of funds into and out of the applicants' accounts in an effort to identify Sunrise Users who had advanced monies to the Applicants. Approximately 2,573 such Sunrise Users were identified.
10. The Claims Process Order required the Receiver to send out claim packages to Sunrise Users that the Receiver had identified and allowed Sunrise Users to independently come forward and make a claim. It contained claims bar date that was clearly delineated to all Sunrise Users with whom the Receiver communicated about the claims process. It included a *de minimus* net claim threshold of \$100.
11. The Receiver has provided a detailed explanation in its Second Report of efforts made to encourage all identified Sunrise Users to file claims and the reminders that were sent out as the claims bar date approached. The Receiver reports that 608 Sunrise Users who it had identified did not make a claim.
12. Only ten filed claims that were ultimately disallowed were disputed and, out of those, eight were by persons who had claimed to have advanced funds under the Sunrise Technology Scheme to persons other than the Applicants (and thus, their monies could not be considered to have been included in the

Contested Funds that the Receiver had taken control of from the Applicants' accounts). Of those eight, two were able to establish that part of their claims were in respect of funds advanced to the Applicants under different email addresses and those partial claims were later accepted by the Receiver. The Receiver seeks an order approving its Determination of Dispute Notices for those that remain unresolved.

13. The Claims Process Order contemplates that the Receiver would seek the court's approval of the procedure it followed to determine disputed claims before the final distributions are made. I consider the procedure that the Receiver followed to be justified and appropriate in the circumstances and it is approved. On this basis, there are no outstanding dispute notices as they have all been dealt with through the Receiver's process.
14. The Receiver also continues to work with Sunrise Claimants whose claims were disallowed for administrative reasons, even when they did not file a dispute notice. Those who were able to remedy the deficiencies in their claims by August 1, 2023 (for example, unsigned claims or failure to provide government identification) were able to have their claims accepted.

Approval of the Receiver's Proposed Distribution to Accepted Sunrise Claimants

15. In total, there are 435 Accepted Sunrise Claimants with accepted, proven and filed claims that the Receiver has identified to be eligible to receive distributions. It proposes to make the distributions from the Contested Funds on a *pro rata* basis. According to the Receiver, this proposed distribution approach will result in Accepted Sunrise Claimants recovering in excess of 95% of their claim amounts.
16. This distribution is based on the costs of the Receiver and its counsel being paid first out of the Contested Funds. This is reflected on the Receiver's Statement of Receipts and Disbursements for which approval is also sought. This is provided for and contemplated in the Appointment Order, which authorized the payment of the Applicants' costs and the costs of the Receiver and its counsel to be paid out of the Contested Funds.
17. The law concerning how to treat claimants to co-mingled trust funds where a shortfall remains in the trust accounts was set out by the Court of Appeal in *Re Ontario Securities Commission and Greymac Corp.* (1986), 55 O.R. (2d) 673 (C.A.), affirmed (1988), [1988] 2 S.C.R. 172 and *Law Society of Upper Canada v. Toronto-Dominion Bank* (1998), 42 O.R. (3d) 257 (C.A.). The law resulting from those two cases, as summarized in *TD Bank v. 2026227 Ontario Inc.* 2012 ONSC 2992, at para. 36 was said to be: a trust account involving co-mingled funds should be distributed on a *pari passu ex post facto pro rata* basis where a shortfall exists in the account and the client deposits to the account are known.
18. The combined take-away from these three cases is a clear policy that the nature of a mixed or co-mingled trust fund is that of a whole or a blended fund. What follows from that policy is that the timing of a deposit to a mixed fund is irrelevant. Once the contribution is made and deposited, it is no longer possible to identify the claimant's funds as the claimant's funds.
19. Since the funds in this case were co-mingled, I agree with the Receiver's position that a *pro rata* distribution results in a principled, convenient, workable and proportionate treatment of the various claims against the small shortfall that exists in the pool of Contested Funds relative to the total Accepted Sunrise Claims. The Receiver's proposed distribution of Contested Funds set out in its Second Report is approved.

The Potential For Surplus Funds

20. The Sunrise Users (all of them, not just the ones with Accepted Claims) received notice of this motion. There was no opposition to this or any other aspect of the relief sought by the Receiver except one Sunrise User who had concerns about the provision of the draft order that requires the Receiver to come back for further court approval in the event there are undistributed funds either because an Accepted Sunrise Claimant does not cash the cheque they are sent or because there are excess funds in the Receiver's Completion Costs Reserve. This Sunrise User suggested that the Receiver should simply be

authorized now to distribute surplus funds on a *pro rata* basis to the Accepted Sunrise Claimants who will receive distributions in the first round.

21. While that objection raises valid points about the impracticality and expense of a further court attendance, given the potential variability in the amount of any surplus funds there is no one size fits all that is appropriate. For example, if the amount is significant and it would result in overpayments to Accepted Sunrise Claimants if the surplus funds were simply distributed *pro rata*, whether or not that could be justified could very well depend on the amount of the surplus. Likewise, if there is a *de minimus* amount of surplus funds, it could cost more to make the *pro rata* distribution than the available funds.
22. The court acknowledges and appreciates the concerns of Sunrise Users and their engagement in this process. However, in these particular circumstances, what the Receiver has proposed is the most prudent course of action and it is approved.

Approval of the Payment of the Receiver's and its Counsel's Fees and Disbursements

23. The Receiver's and its counsel's fees and disbursements are supported by fee affidavits and accounts (and the Receiver's First and Second Reports) which disclose the work done to have been within the Receiver's mandate and the hourly rates charged to be consistent with market rates. There was a lot of work involved to reach the outcome now approved, which is making the Accepted Sunrise Claimants almost whole. I consider the fees and disbursements of the Receiver and its counsel to be reasonable and appropriate in the circumstances.
24. The Receiver's Completion Costs Reserve for estimated future fees is also reasonable, if not perhaps low, for what it is expected to cover and it is also approved.

Receiver's Discharge and Release

25. The Receiver seeks to be discharged upon completing its mandate and filing a discharge certificate. It is appropriate for the Receiver to be discharged when its work is done. The proposed release language is consistent with the Commercial List practice and contains the appropriate qualifications for gross negligence and willful misconduct on the Receiver's part.

Final Disposition

26. Order dated August 4, 2023 may issue in the form signed by me.



KIMMEL J.

August 8, 2023