

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PETER VOGELZANG

Applicant

-and-

THE ESTATE OF JAMES BARNETT, BY ITS EXECUTOR, MELISSA FISHER and 2139911
ONTARIO LIMITED

Respondents

NOTICE OF MOTION

The court appointed liquidator and receiver of 2139911 Ontario Limited, BDO Canada Limited, will make a motion to a Judge on October 4, 2018, at 10:00 AM, or as soon after that time as the motion can be heard at the court house, 5 Court Street, Kingston, Ontario, K7L 2N4.

PROPOSED METHOD OF HEARING: The motion is to be heard

in writing under subrule 37.12.1(1);

in writing as an opposed motion under subrule 37.12.1(4);

orally.

THE MOTION IS FOR

1. An order substantially in the form of the Order attached hereto as Schedule 1:

- (a) approving the activities of the Liquidator and Receiver of 2139911 Ontario Limited (the “**Liquidator/Receiver**”) as set out in the Second Report of Liquidator/Receiver dated September 12, 2018, (the “**Second Report**”);
- (b) approving the claims process, *nunc pro tunc*, conducted by the Liquidator/Receiver to solicit creditor claims against 2139911 Ontario Limited;
- (c) approving the Liquidator/Receiver’s final schedule of receipts and disbursements (actual and projected to completion);
- (d) approving the fees and disbursements (actual and projected to completion) of the Liquidator/Receiver and its legal counsel as set out in the Second Report and the affidavits of Gary Cerrato and Jonathan Wigley, and authorizing the Liquidator/Receiver to pay all approved and unpaid fees and disbursements;
- (e) providing directions with respect to responsibility for the fees and disbursements of the Liquidator/Receiver and its counsel attributable to responding to the actions and omissions of the director and shareholder of 2139911 Ontario Limited (“**213 Ontario**” or the “**Company in Liquidation**”), James Barnett (“**Barnett**”), in frustration of the Liquidator/Receiver’s statutorily and judicially mandated responsibilities – specifically, whether these costs ought to be borne by the estate of 213 Ontario or by the respondent, the Estate of James Barnett;
- (f) authorizing and approving a holdback, in the amount of \$13,506.20, to provide for the estimated future disbursements to complete the administration of these proceedings (the “**Holdback Amount**”);

- (g) authorizing and directing the Liquidator/Receiver to make a distribution to the sole creditor of the Company in Liquidation with a proven and accepted claim;
- (h) authorizing and directing the Liquidator/Receiver to distribute the funds remaining in its trust account to the applicant, Peter Vogelzang (“**Vogelzang**”), after payment of the fees and disbursements of the Liquidator/Receiver and its legal counsel and the payment of all other disbursements incidental to these proceedings and subject to the retention of the Holdback Amount, in respect of Vogelzang’s apparent 230,000 Class “A” Preference Share equity interest in the Company in Liquidation;
- (i) upon the filing by the Liquidator/Receiver of a certificate substantially in the form set out in Schedule “A” of the Distribution and Discharge Order (the “**Receiver’s Discharge Certificate**”), discharging BDO Canada Limited as Liquidator/Receiver of all of the assets, undertakings and properties of the Company and releasing BDO Canada Limited from any and all liability it now has or may have by reason of, or in any way arising out of, the acts or omissions of BDO Canada Limited while acting in its capacity as Liquidator/Receiver herein, save and except for any gross negligence or wilful misconduct on the part of the Liquidator/Receiver; and
- (j) authorizing the Liquidator/Receiver to dispose of the books and records of 213 Ontario in his possession two years following the date of filing of the certificate of completion mentioned above.

2. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE

1. The within application to liquidate 213 Ontario was commenced on or about August 21, 2015 by Vogelzang due to apparent ongoing and irreconcilable differences between himself and the only other shareholder and director of 213 Ontario: Barnett. The application was heard on March 3, 2016 and on or about June 9, 2016, the Honourable Justice Helen Macleod-Beliveau signed an order appointing BDO Canada Limited as the Liquidator/Receiver of 213 Ontario (the “**Liquidation/Receivership Order**”).

The Liquidation/Receivership

2. Pursuant to the Liquidation/Receivership Order, the Liquidator/Receiver was empowered and authorized to sell any or all of the property of the Company in Liquidation, subject to further approval of this Honourable Court. The principal asset of the Company in Liquidation was a parcel of essentially vacant real property, located on the northern side of Dixon Drive and between West Street and Sidney Street, in Trenton, Ontario (the “**Vacant Land**”). The Liquidator/Receiver took possession of the Vacant Land and entered a listing agreement with Ekort Realty Ltd. to list the Vacant Land for sale. As a result of these efforts, the Liquidator/Receiver eventually received an offer to purchase the Vacant Land that it accepted. By order of the Honourable Justice Abrams dated December 7, 2017, the sale of the Vacant Land was approved by this Honourable Court and the sale of the Vacant Land was subsequently completed.
3. In order to comply with its mandate under the Liquidation/Receivership Order, the Liquidator/Receiver required access the books and records of the Company in Liquidation to determine its assets, liabilities and any other obligations or rights of the Company in

Liquidation. Accordingly, prior to the sale of the Vacant Land in December 2017, the Liquidator/Receiver was engaged in ongoing efforts to obtain the books and records of the Company in Liquidation from Barnett, who the Liquidator/Receiver understood to be in possession of the books and records by virtue of his position as an officer and director of 213 Ontario.

4. As detailed in the Second Report, Barnett appears to have intentionally and repeatedly acted throughout late 2016 and early 2017 to obstruct and frustrate the Liquidator/Receiver's efforts to comply with its mandate. As a result of Barnett's ongoing and ultimate refusal to comply with his obligations under the Liquidation/Receivership Order, the Liquidator/Receiver was forced to prepare a motion to have Barnett found in contempt of the Liquidation/Receivership Order to gain access to the books and records of the Company.
5. The Liquidator/Receiver was in the process of attempting to serve Barnett with its motion materials for a contempt order when the Liquidator/Receiver learned that Mr. Barnett had passed away in August 2017. An order to continue this application was thereafter obtained naming the Estate of James Barnett, by its Executor, Melissa Fisher, in place of Barnett. Within several months of the Order to Continue, Ms. Fisher was apparently able take possession of the books and records of the Company in Liquidation and began providing them to the Liquidator/Receiver in accordance with the Liquidation/Receivership Order. In the process of thereafter reviewing the books and records of the Company in Liquidation, the Liquidator/Receiver also discovered evidence that Mr. Barnett had been involved in additional activities in direct contravention of the Liquidation/Receivership Order, including efforts to deal with the Vacant Land in secret and without authority.

6. Subsequent to the sale of the Vacant Land and pursuant to its mandate under the Liquidation/Receivership Order, the Liquidator/Receiver conducted a proportionate claims process to solicit creditor claims against the Company in Liquidation (the “**Claims Process**”). A claims submission deadline for the Claims Process was set for May 31, 2018. The details of the Claims Process are set out in detail in the Second Report.

7. Only two parties responded to the call for claims made in the Claims Process – the Canada Revenue Agency (the “**CRA**”) and Bond & Hughes – a law firm based in Perth, Ontario. The CRA claim pertained to unpaid HST on notionally assessed amounts due to the failure of the Company in Liquidation to file HST returns for the period October 2014 through to the date of the Liquidation/Receivership Order in June 2016. The CRA’s claim was in the amount of \$35,904.80. The Liquidator/Receiver determined, based on its review of the available books and records of the Company in Liquidation, that the Company in Liquidation had no sales during the unreported period and therefore was not in fact liable for any unpaid HST. Upon the Liquidator/Receiver filing the necessary HST returns with the CRA, the CRA formally withdrew its trust claim in the amount of \$35,904.80 on April 10, 2018.

8. The only other claimant responding to the Claims Process – Bond & Hughes – submitted an unsecured claim in the amount of \$682.53 for unpaid legal services. Based on its review of the claim, the Liquidator/Receiver determined the claim of Bond & Hughes to be a valid claim against the Company in Liquidation.

Completion of the Liquidation/Receivership

9. The Liquidator/Receiver has completed the liquidation of the assets and undertaking of 213 Ontario and proposes to pay expenses and to distribute the money held to creditors and shareholders and to seek its discharge.
10. Following payment of creditors and payment of the Liquidator/Receiver and its counsel for fees and disbursements, there will be a surplus that may be distributed rateably amongst the shareholders of the corporation according to their rights and interests in the corporation.
11. Upon review of the corporate records for the Company in Liquidation as detailed in the Second Report, it appears that, while Vogelzang and Barnett are the holders of equal numbers of Common Shares in the Company in Liquidation, Vogelzang is the only holder of any Preference Shares of the Company in Liquidation, entitling him to a return of the redemption price of his 230,000 Class "A" Preference Shares, set at \$100 per share in preference to any class of Common Shares. As a result of the above and in view of the assets of the Company in Liquidation, the Liquidator/Receiver has determined that Vogelzang is entitled to any and all surplus available following payment of the sole creditor and payment of the Liquidator/Receiver and its counsel for fees and disbursements.
12. The fees and expenses of the Liquidator/Receiver and its counsel are set out in the Second Report as well as the fee affidavits filed together with the projected fees, capped, to complete this matter.
13. The fees and expenses of the Liquidator/Receiver are, in all of the circumstances, reasonable and appropriate. The Liquidator/Receiver is forced to point out, however, that a significant portion of its and its counsel's fees and expenses and are directly attributable to

the obstruction of a director, officer and shareholder of the Company in Liquidation. Especially in view of the Liquidator/Receiver's determination that Vogelzang is entitled to any and all surplus but subject to the payment of creditors and the fees and disbursements of the Liquidator/Receiver and its counsel, it is appropriate that the court provide directions with respect to the fees and expenses attributable to responding to the open obstruction and the contempt motion; in particular, whether. Barnett's estate ought to bear responsibility for those costs and be ordered to contribute such sum to the property of the Company in Liquidation or, alternatively, directly to the shareholder entitled to the Company in Liquidation's surplus: Vogelzang.

14. There are no outstanding debts to employees, as the Company in Liquidation had no employees.
15. To the best of the Liquidator/Receiver's knowledge, the Liquidator/Receiver has completed the realization of substantially all of the Company in Liquidation's assets. All of the Liquidator/Receiver's duties as set out in the Liquidation/Receivership Order will be satisfied upon the distribution of all funds as discussed above and the completion of the remaining administrative tasks as set out in detail in the Second Report. Upon completion of these tasks, the Liquidator/Receiver proposes to file the Liquidator/Receiver's Discharge Certificate with the Court certifying same to obtain a complete discharge and release from its responsibilities as Liquidator/Receiver, subject only to its duty to retain the books and records of 213 Ontario for a reasonable period of time, which the Liquidator/Receiver submits should be limited to no more than two years subsequent to its filing of the Discharge Certificate.

16. Additional time and expense will be required to complete the Liquidator/Receiver's mandate to the point of being able to file the Discharge Certificate. The Liquidator/Receiver estimates that it will incur \$6,240 in future professional fees to complete the administration of the estate consisting \$3,500 in future professional fees of the Liquidator/Receiver and its counsel plus HST of \$1,266.20, together with a contingency reserve of \$2,500, comprising the Holdback Amount.
17. It is just and convenient that an order substantially in the form attached hereto as Schedule 1 be made.
18. Rules 37, 57.01 and 60.11, of the *Rules of Civil Procedure*.
19. The provisions of Parts XVI and XVII of the *Business Corporations Act*, R.S.O. 1990, c. B.16.
20. Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43.
21. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The Second Report of the Liquidator/Receiver, dated September 12, 2018.
2. The affidavit of Jonathan Wigley, sworn September 7, 2018.
3. The affidavit of Gary Cerrato, sworn September 12, 2018.
4. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

September 14, 2018

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PETER VOGELZANG

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-and- THE ESTATE OF JAMES BARNETT, BY ITS EXECUTOR,
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Court File No. CV-15-355-00

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PROCEEDING COMMENCED AT
KINGSTON

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