

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

B E T W E E N:

PEOPLES TRUST COMPANY

Applicant

- and -

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY

Respondent

**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**

MOTION RECORD (Returnable November 22, 2013)

November 20, 2013

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capacity as court appointed receiver and
manager of Rose of Sharon (Ontario)
Retirement Community

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I N D E X

1. Notice of Motion returnable November 22, 2013
- A. Draft Order

TAB 1

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NOTICE OF MOTION

DELOITTE RESTRUCTURING INC. (“**Deloitte**”), in its capacity as court appointed receiver and manager (the “**Receiver**”) of Rose of Sharon (Ontario) Retirement Community (“**Rose**”), will make a motion to a judge presiding over the Commercial List at 10:00 a.m. on November 22, 2013, at 330 University Avenue, Toronto, Ontario.

THE PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR an Order substantially in the form of the draft attached as Schedule “A” hereto:

1. if necessary, abridging the time for service of the Notice of Motion and Motion Record herein, validating service of the Notice of Motion and Motion Record, and dispensing with further service thereof;
2. amending the Mandate as defined in the Representative Counsel Order of Justice Mesbur dated April 11, 2013 (the “**Representative Counsel Order**”), *nunc pro tunc*, to remove from the class of persons for which Kronis, Rotsztain, Margles, Cappel LLP (“**KRMC**”) was appointed as Representative Counsel those persons referred in the preamble to the Representative Counsel Order as “the tenants of [life-lease units other than the Arm’s Length Units] of the Rose of Sharon (Ontario) Retirement Community Life-Lease Residence”;
3. amending paragraph 8 of the Representative Counsel Order by increasing the maximum amount for legal fees to which Representative Counsel shall be allowed to \$275,000.00, plus disbursements actually incurred and applicable taxes;
4. declaring that Representative Counsel has fulfilled the Mandate, as amended;
5. discharging KRMC as Representative Counsel;
6. permitting KRMC to pass its accounts with respect to the Mandate, following its discharge as Representative Counsel;
7. appointing KRMC to provide independent legal advice in this proceeding to those individuals who are unit-holders of life-lease units in the Rose Life Lease Residence, but are not Arm’s Length Unit-holders (as defined below) and are not represented by counsel

(the “**ILA Unit-holders**”), solely with respect to the nature, meaning and effect of any documents to be executed in connection with any prospective settlements with Peoples Trust Company (“**Peoples Trust**”), and the obligations and liabilities of such ILA Unit-holders thereunder, involving their life-lease units in the Rose Life Lease Residence; and

8. such further and other relief as counsel may request and this Court may permit.

THE GROUNDS FOR THE MOTION ARE:

1. pursuant to the Order of Justice Campbell of the Ontario Superior Court of Justice (Commercial List) dated September 27, 2011, Deloitte and Touche Inc., now known as Deloitte Restructuring Inc., was appointed as Receiver of all of the current and future assets, undertakings and properties of Rose;
2. by way of the Order of Justice Mesbur made April 11, 2013 (the “**Representative Counsel Order**”), KRMC was appointed in this proceeding as Representative Counsel for the holders of the Arm’s Length Units (the “**ALUs**”), the tenants and occupants of the Arm’s Length Units (the “**ALU Tenants**”), and the tenants of the remaining units of the Rose Life-Lease Residence (the “**Remaining Unit Tenants**”) with respect to any possessory, financial, equitable and/or contingent claims and/or interests they may have in their life-lease unit(s) at the Rose Life-Lease Residence (the “**Arm’s Length Claims**”), and specifically (i) the issue of the priority between the Peoples Trust first mortgage registered against title to the real property in question (the “**Construction Mortgage**”) and the Arm’s Length Claims, and (ii) Peoples Trust’s motion seeking an Order that the 90 life-lease Units in the Rose Life-Lease Residence may be sold free and

clear of all claims and interests, including the Arm's Length Claims (collectively, the "**Mandate**");

3. the Representative Counsel Order limited the role of KRMC to the Mandate;
4. the ALUs have entered into a global settlement with Peoples Trust with respect to their units in the Rose Life-Lease Residence (the "**ALU Settlement**"), which settlement was approved by the Court on September 10, 2013;
5. the ALU Settlement deals with the interests of the ALU Tenants;
6. Peoples Trust has advised that it has offered settlements to holders of units in the Rose Life-lease Residence other than the ALUs, with respect to their units (the "**Proposed Settlements**"), on terms substantially similar to the ALU Settlement and, as a result, the interests of any tenants of these units may be dealt with in the Proposed Settlements;
7. based on the ALU Settlement and the Proposed Settlements, the number of tenants remaining in units that are not covered by either of these settlements does not require nor justify Representative Counsel;
8. Representative Counsel has fulfilled its Mandate with respect to the ALUs and the ALU Tenants;
9. the Representative Counsel Order provided a cap on the fees of Representative Counsel which needs to be increased to permit KRMC to recover the amounts still owing to it and those amounts estimated to be owing until KRMC's discharge as Representative Counsel;
10. Peoples Trust, which agreed to fund any amounts in respect of KRMC's fees and disbursements where not covered by the Receivership, does not oppose the increase in the cap of KRMC's additional fees;

11. as a result, the Receiver is requesting that:
 - (a) KRMC be appointed to provide independent legal advice in this proceeding for the ILA Unit-holders solely with respect to the nature, meaning and effect of any documents to be executed in connection with the Proposed Settlements, and the obligations and liabilities of such ILA Unit-holders thereunder (the “**ILA Mandate**”); and,
 - (b) KRMC’s fees and costs in that role be funded from the receivership of the Rose estate;
12. Peoples Trust has advised the Receiver that should KRMC be appointed for the ILA Mandate on terms that are acceptable to it, Peoples Trust would support that appointment and KRMC’s reasonable funding from the receivership estate;
13. Rule 10.01 of the Rules of Civil Procedure; and
14. such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

1. the Third Report to the Court of the Receiver, dated February 19, 2013;
2. the Fourth Report to the Court of Receiver dated March 11, 2013;
3. the Representative Counsel Order of Justice Mesbur dated April 11, 2013;
4. the Endorsement of Justice Mesbur made September 10, 2013;
5. the Endorsement of Justice Mesbur made November 14, 2013;

6. the Amended Notice of Motion of People's Trust dated September 4, 2013, and the related affidavits of Martin Mallich sworn April 4, 2013, and Michael Lombard sworn July 9, 2013; and
7. such further and other evidence as counsel may advise and this Court permit.

November 20, 2013

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Lawyers for Deloitte Restructuring Inc., in its capacity as court appointed receiver and manager of Rose of Sharon (Ontario) Retirement Community

TO: Receivership Service List

AND TO: Tenants and Occupants of Life-Lease Units of the Rose of Sharon (Ontario) Retirement Community Life-Lease Residence Service List

AND TO: Unit-holders of the Rose of Sharon (Ontario) Retirement Community Life-Lease Residence, other than the Arm's Length Unit Holders and the holders of those Life-Lease units over which Peoples Trust has obtained priority Service List

TAB A

SCHEDULE "A"

Court File No. CV-11-9399-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]**

THE HONOURABLE)
JUSTICE MESBUR)
FRIDAY, THE 22ND DAY
OF NOVEMBER, 2013

B E T W E E N:

PEOPLES TRUST COMPANY

Applicant

- and -

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY

Respondent

**ORDER
(Discharge of Representative Counsel and ILA Appointment)**

THIS MOTION made by Deloitte Restructuring Inc. in its capacity as Receiver and Manager over all of the current and future assets, undertakings and properties of the Respondent Rose of Sharon (Ontario) Retirement Community (in that capacity, the "**Receiver**") for an Order granting the relief sought in the Notice of Motion, including (i) amending the Mandate of Representative Counsel (as defined in the Representative Counsel Order of Mesbur J. dated April 11, 2013), *nunc pro tunc*, (ii) discharging Kronis, Rotsztain, Margles, Cappel LLP ("**KRMC**") as

Representative Counsel, and (iii) appointing KRMC to provide independent legal advice in this proceeding to individuals who are unit-holders in the Rose of Sharon (Ontario) Retirement Community (“**Rose**”) life lease residence (the “**Life-Lease Residence**”), but are not Arm’s Length Unit Holders and are not represented by counsel (the “**ILA Unit-holders**”), with respect to the nature and effect of any proposed settlements (the “**Proposed Settlements**”) with Peoples Trust Company (“**Peoples Trust**”) involving their unit(s) in the Rose Life-Lease Residence, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion dated November 20, 2013, the Third Report of the Receiver dated February 19, 2013 (the “**Third Report**”), the Fourth Report of the Receiver dated March 11, 2013 (the “**Fourth Report**”), the Amended Notice of Motion of People’s Trust Company (“**Peoples Trust**”) dated September 4, 2013, and the related affidavits of Martin Mallich sworn April 4, 2013, and Michael Lombard sworn July 9, 2013, and upon hearing submissions of counsel for the Receiver, counsel for Peoples, and counsel for KRMC which also advises that it is prepared to act to provide independent legal advice, on the terms set out in the Notice of Motion, if so appointed,

1. **THIS COURT ORDERS** that the time for, and method of, service of the Receiver’s Notice of Motion returnable November 22, 2013 (the “**Notice of Motion**”), and related motion material filed in support of that Notice of Motion (the “**Motion Material**”) be and is hereby abridged, that service of the Notice of Motion and Motion Material is hereby validated such that service effected on the parties provided with the Notice of Motion and Motion Material shall be good and sufficient notice thereof, and that further service thereof is hereby dispensed with.

2. **THIS COURT ORDERS** that the Mandate is hereby amended, *nunc pro tunc*, by removing from the class of persons for which Representative Counsel was appointed those persons referenced in the preamble to the Representative Counsel Order as “the tenants of other units of the Rose of Sharon (Ontario) Retirement Community Life-Lease Residence”.

3. **THIS COURT ORDERS AND DECLARES** that Representative Counsel has fulfilled the Mandate, as amended by this Order.

4. **THIS COURT ORDERS** that paragraph 8 of the Representative Counsel Order be amended by increasing the maximum amount for legal fees to which Representative Counsel shall be allowed to \$275,000.00, plus disbursements actually incurred and applicable taxes.

5. **THIS COURT ORDERS** that KRMC is hereby discharged as Representative Counsel.

6. **THIS COURT ORDERS** that KRMC be permitted to pass at a later date its accounts with respect to the Mandate, notwithstanding its discharge as Representative Counsel.

7. **THIS COURT ORDERS** that KRMC be appointed to provide independent legal advice in this proceeding (the “**ILA Mandate**”) to the ILA Unit-holders with respect to the nature, meaning and effect of any documents to be executed in connection with the Proposed Settlements, and the obligations and liabilities of such ILA Unit-holders thereunder.

8. **THIS COURT ORDERS** that KRMC shall pass its accounts in the ILA Mandate from time to time, and for this purpose the accounts of KRMC are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice. At such passing of accounts, KRMC shall be allowed its reasonable fees and disbursements, in each case at its standard rates and

charges unless otherwise ordered by the Court, for work done as part of the ILA Mandate, up to a maximum amount of \$15,000.00 plus disbursements actually incurred and applicable taxes, subject to further Order of this Court obtained on notice to Peoples Trust and the Receiver.

9. **THIS COURT ORDERS** that subject to paragraph 8 above, after the rendering of accounts by KRMC to the Receiver in respect of the ILA Mandate, any expenditure or liability which is properly made or incurred by KRMC, including the reasonable fees and disbursements of KRMC, shall be paid by the Receiver out of the Rose estate in a timely manner and prior to the passing of accounts in respect of the ILA Mandate so as to allow KRMC to fulfill its ILA Mandate in accordance with this Order, but in the event of any disagreement regarding such fees and disbursements such matters will be dealt with on the passing of accounts in respect of the ILA Mandate and payment shall be deferred until that time.

10. **THIS COURT ORDERS** that KRMC shall have the benefit of the Receiver's Charge, established pursuant to the Amended and Restated Appointment Order of Justice Campbell dated September 27, 2011 in this proceeding, for its fees and disbursements relating to the ILA Mandate.

11. **THIS COURT ORDERS** that subject to further order of the Court, and without limitation to any other right or protection in favour of KRMC, KRMC shall not be required to take any step or action in respect of its ILA Mandate if it reasonably believes that there will not be sufficient funds available to it to complete such step or action, and KRMC may apply to this Court to be discharged from the ILA Mandate at any time in its sole discretion, including,

without limitation, on the basis that it reasonably believes that there are insufficient funds available to it to carry out the terms of this Order or otherwise fulfill the ILA Mandate.

12. **THIS COURT ORDERS** that the Receiver shall provide notice of this Order to the ILA Unit-holders by emailing, mailing or delivering a copy of this Order to them, and by posting a copy of this Order on the Receiver's website as soon as practicable after the issuance of this Order.

13. **THIS COURT ORDERS** that KRMC shall have no liability for any act or omission as a result of its appointment or the fulfillment of its duties in carrying out the provisions of this Order including but not limited to the ILA Mandate, save and except for any gross negligence or willful misconduct on its part, and that no action or other proceedings shall be commenced against KRMC relating to the ILA Mandate, except with prior leave of this Court to be obtained on at least (7) seven days' notice to KRMC, and upon further order in respect of security for costs on a substantial indemnity basis in favour of KRMC in connection with any such action or proceeding.

14. **THIS COURT ORDERS** that KRMC shall be at liberty and is authorized at any time to apply to this Court for advice and directions in the discharge and variation of its powers and duties, including but not limited to whether or not any individual should be represented by KRMC as part of the ILA Mandate, because of a potential conflict of interest or otherwise.

15. **THIS COURT ORDERS** that in the event this Order is later amended by further Order of the Court, the Receiver may post such further Order on the Receiver's website and such posting will constitute adequate notice to the ILA Unit-holders of such amended Order.

PEOPLES TRUST COMPANY

and

ROSE OF SHARON (ONTARIO) RETIREMENT COMMUNITY

Applicant

Respondent

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

Proceeding Commenced at **TORONTO**

ORDER

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceeding Commenced at **TORONTO**

**MOTION RECORD
(Returnable November 22, 2013)**

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