



**SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**COUNSEL/ENDORSEMENT SLIP**

**COURT FILE NO.:** CV-24-00717051-00CL

**DATE:** November 12, 2024

**NO. ON LIST:** 6

**TITLE OF PROCEEDING:** MARSHALLZEHR GROUP INC v. 98 JAMES SOUTH (2022) INC. et al

**BEFORE:** JUSTICE OSBORNE

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**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant:**

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**For Defendant, Respondent:**

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**For Other, Self-Represented:**

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## **ENDORSEMENT OF JUSTICE OSBORNE:**

1. The Court-appointed Receiver over the property of 98 James South (2022) Inc. and 98 South Limited Partnership (collectively, the “Debtors”), including the proceeds thereof, seeks an order:
  - a. approving the marketing and sale process for the Real Property as described at Schedule “A” to the proposed Sale Process Approval Order;
  - b. authorizing and directing the Receiver, *nunc pro tunc*, to enter into the Stalking Horse APS dated November 1, 2024 with Vantage Acquisition Inc. as Purchaser solely for the purpose of acting as the stalking horse bid in the Sale Process, in the form attached as Appendix “D” to the First Report; and
  - c. approving the Receiver’s activities as described in the First Report.
2. At the conclusion of the hearing, I granted the relief sought for reasons to follow. These are those reasons.
3. The Receiver relies on the First Report dated November 4, 2024. Defined terms in this Endorsement have the meaning given to them in the First Report, and/or the motion materials, unless otherwise stated.
4. The Service List was served with the motion materials on November 4, 2024. The relief sought is not opposed by any party, although Marcus Gillam (“Gillam”) submits that the proposed Sale Process should be extended from the currently proposed 30 days to a period of 65 days. That position is supported by Hunter Milborne and Michael Budovitch.
5. The Receiver submits that the proposed Sale Process is reasonable in the circumstances for all the reasons set out in the First Report. The particulars of the Sale Process are fully set out at Appendix “F” to the First Report.
6. The Receiver submits that the timelines are reasonable and balance the urgency of this matter (including the fact that interest is continuing to accrue) against the imperative of ensuring that the assets proposed to be sold are exposed to the market for a sufficient period of time.
7. The proposed sale process includes a stalking horse bid. That in turn includes a purchase price of \$13 million and a break fee in the amount of \$260,000, representing approximately 2% of the purchase price. That purchase price and the stalking horse bid, supported by MarshallZehr, represents an amount that is less than that secured creditor is owed.
8. The Debtor submits that the proposed timelines in the sale process are not long enough to sufficiently expose the property to the market, and that the 35-day period until the Qualified Bid Deadline (including 20 days for an LOI Deadline) should be extended to 65 days, taking the process into late January, 2025.
9. I am satisfied that the sales process with its existing timelines is appropriate in the circumstances. The prejudice to MarshallZehr and the continuing interest accrual needs to be minimized. The professional opinion of the Receiver who is experienced in marketing and selling properties such as the one at issue here is that the proposed timelines are sufficient to expose the property to the market, taking into account the upcoming holiday season. The property is of sufficient value that potential bidders are anticipated to be highly sophisticated parties in any event.
10. In addition, the property is a heritage property that includes a heritage-designated structure with various heritage and conservation permits and other deadlines imposed by the municipality, such that if the benefit of the existing permits, and therefore the maximization of value in turn to the benefit of all stakeholders, is to be realized, the sales process must be commenced and completed as quickly as possible, given the

significant lead time required for design and other steps to be undertaken before the relevant heritage and other permits expire. In short, I am satisfied that there is no benefit to be achieved by extending the timelines in the sales process recommended by the Receiver.

11. In my view, and in the circumstances of this case, the appropriate, fair and transparent manner in which to test value is to conduct the sale process and see what offers the market generates. If, as was submitted, the stalking horse bid is low, the market (again, a sophisticated one here) will presumably speak in the form of superior bids.
12. As noted above, in my view the proposed sale process is appropriate and satisfies the factors set out in *Royal Bank of Canada v. Soundair Corp.* the same criteria inform the determination of whether to approve a proposed sale process by a receiver: *CCM Master Qualified Fund Ltd., v. blutip Power Technologies Ltd.*
13. Stalking horse agreements are used in insolvency proceedings to facilitate sales and establish a baseline price and transactional structure for any superior bids, all with a view to maximizing the value of an asset for the benefit of stakeholders: *Danier Leather Inc., Re.* The factors to be considered when approving a stalking horse sales process include those identified in the authorities referred to above, as well as in *Re Nortel Networks Corp., Re Brainhunter Inc. and Validus Power Corp. v. Macquarie Equipment Finance Limited*, 2023 ONSC 6367. I am satisfied that the proposed stalking horse agreement is appropriate here.
14. I am also satisfied that the break fee should be approved. Such fees represent a cost of stability in addition to disbursements and the costs of preparing a bid, and all of that may include a premium beyond out-of-pocket costs. This break fee, representing 2% of the Purchase Price, is within the range previously approved by this Court.
15. Finally, I am satisfied that the activities of the Receiver as described in the First Report were necessary, undertaken in good faith, and are consistent with the mandate of the Receiver given to it in the original Appointment Order. They are approved.
16. Order to go in the form signed by me today which is effective immediately and without issuing and entering.

Osawa, J.