

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

B E T W E E N:

**MARSHALLZEHR GROUP INC.**

Applicant

- and -

**98 JAMES SOUTH (2022) INC. and 98 JAMES SOUTH (2022) LIMITED  
PARTNERSHIP**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE APPLICANT**

(Appointment of a Receiver – Application Returnable April 15, 2024)

April 11, 2024

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TO: THE SERVICE LIST

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**FACTUM OF THE APPLICANT**

**PART I – NATURE OF THE APPLICATION**

1. This factum is filed by MarshallZehr Group Inc. (the “**Lender**”) in support of its application for an order (the “**Receivership Order**”) appointing KSV Restructuring Inc. (“**KSV**”) as receiver (in such capacity, the “**Receiver**”), without security, over the property, assets, undertakings of 98 James South (2022) Inc. (“**98 James Inc.**”) and 98 James South (2022) Limited Partnership (“**98 James LP**” and together with 98 James Inc., the “**Debtors**”) acquired for, or used in relation to a business carried on by 98 James Inc., including the real property known municipally as 98 James Street South, Hamilton, Ontario (the “**Property**”).

2. The facts underlying this application are more fully set out in the affidavit of Cecil Hayes sworn February 28, 2024 (the “**Hayes Affidavit**”).<sup>1</sup> All capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Hayes Affidavit, and all monetary amounts referred to herein are in Canadian currency unless otherwise stated.

## **PART II – FACTS**

### ***The Debtors and the Property***

3. 98 James Inc. is an Ontario corporation with its head office located in Toronto, Ontario. Michael Budovitch is the sole officer and director of 98 James Inc.<sup>2</sup>

4. 98 James LP is an Ontario limited partnership established pursuant to the Limited Partnerships Act (Ontario) and has its principal place of business in Toronto, Ontario. 98 James Inc. is the general partner to 98 James LP.<sup>3</sup>

5. 98 James Inc. is the registered owner of the Property.<sup>4</sup>

### ***Financing for the Debtor and the Lender’s Security***

6. 98 James is in the process of developing the Property into a 30-storey high density mixed-use building with 315 residential condominium units and 2,885 square feet for commercial area.<sup>5</sup>

7. 98 James Inc. purchased the Property from Hue Developments & Investments Canada Inc. (“**Hue Developments**”) in 2022. The sale transaction was funded by a vendor take-back mortgage

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<sup>1</sup> Applicant’s Application Record, Tab 2, Affidavit of Cecil Hayes sworn February 28, 2024 (the “**Hayes Affidavit**”).

<sup>2</sup> Hayes Affidavit, at para. 3; Exhibit “A” to the Hayes Affidavit.

<sup>3</sup> Hayes Affidavit, at para. 4; Exhibit “B” to the Hayes Affidavit.

<sup>4</sup> Hayes Affidavit, at para. 5; Exhibit “C” to the Hayes Affidavit.

<sup>5</sup> Hayes Affidavit, at para. 7.

from Hue Developments and a loan made by the Lender.<sup>6</sup>

8. Pursuant to a commitment letter dated August 19, 2022, as amended (the “**Commitment Letter**”), the Lender made available to 98 James Inc. a loan in the principal amount of \$12.0 million (the “**Loan**”) for the purpose of, among other things, acquiring the Property and to provide pre-construction financing. Interest was to be paid monthly, in arrears.<sup>7</sup>

### **Security**

9. As security for the Loan, the Debtor granted, among other things, the following security documents in favour of the Lender (collectively, the “**Lender’s Security**”):<sup>8</sup>

- (a) a first ranking Charge/Mortgage registered on title to the Property on September 9, 2022 in the principal amount of \$13.2 million as Instrument No. WE1632777 (the “**Lender’s Charge**”); and
- (b) a Notice of Assignment of Rents – General registered on title to the Property on September 9, 2022 as Instrument No. WE1632778; and
- (c) a General Security Agreement dated September 9, 2022 (the “**GSA**”).

10. Pursuant to the terms of the Lender’s Charge and the GSA, failure by 98 James Inc. to pay principal or interest when due is an event of default.<sup>9</sup>

11. 98 James Inc. has also agreed that, upon default, the Lender is entitled to appoint a receiver in writing and/or make an application for the court appointment of a receiver.<sup>10</sup>

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<sup>6</sup> Hayes Affidavit, at para. 8.

<sup>7</sup> Hayes Affidavit, at para. 9; Exhibit “D” to the Hayes Affidavit.

<sup>8</sup> Hayes Affidavit, at para. 10; Exhibits “E” to “F” to the Hayes Affidavit.

<sup>9</sup> Hayes Affidavit, at para. 11.

<sup>10</sup> Hayes Affidavit, at para. 11.

12. Hue Developments and the Lender are the only secured creditors of the Respondents. Hue Development's security is subordinate to the Lender.

### ***Default and Demand***

13. The Debtors defaulted under the Commitment Letter and the Lender's Security as a result of its failure, *inter alia*, to make interest payments when due.<sup>11</sup> On December 4, 2023, the Lender demanded payment of the Debtors' indebtedness to the Lender in the amount of \$12,265,947.24 and delivered notices of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA").<sup>12</sup>

14. The Lender has received no payments from the Debtors since demand was made.<sup>13</sup>

### **PART III – ISSUE**

15. The sole issue before the Court is whether it is just and convenient in the circumstances to appoint the Receiver.

### **PART IV – LAW AND ARGUMENT**

#### ***It is just and convenient to appoint the Receiver***

16. Pursuant to section 243 of the BIA, and section 101 of the *Courts of Justice Act* (Ontario) the Court may appoint a receiver where it is "just or convenient to do so."<sup>14</sup>

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<sup>11</sup> Hayes Affidavit, at para. 15.

<sup>12</sup> Hayes Affidavit, at para. 15; Exhibit "K" to the Hayes Affidavit.

<sup>13</sup> Hayes Affidavit, at para. 16.

<sup>14</sup> [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 \(the "BIA"\), section 243; Courts of Justice Act, R.S.O. 1990, c. 43, section 101.](#)

17. In making its determination if it is “just or convenient” to appoint a receiver, the Court must have regard to all of the circumstances of the case, including the nature of the property and the rights and interests of all parties in relation to the property.<sup>15</sup>

18. The burden on an applicant is lessened when the terms of the secured creditor’s security include the right to appoint a receiver. Further, the nature of appointing a receiver is not as extraordinary or equitable where the relevant security documents permit the appointment of a receiver.<sup>16</sup>

19. The appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage.<sup>17</sup>

20. A court-appointed receivership is just and convenient and appropriate in the circumstances as:

- (a) the Debtors owe in excess of \$12 million to the Lender;
- (b) the Debtors have advised the Lender that they do not currently have the means to advance construction on the Property and the Property has remained at the site plan approval stage since it was sold to the Debtors in 2022;
- (c) the Debtors agreed to the appointment of a receiver upon default pursuant to the terms of the Lender’s Charge and GSA;
- (d) the Debtors have not paid any interest on the Loan since November 1, 2023; and

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<sup>15</sup> [\*Bank of Montreal v. Carinal National Leasing Ltd.\*, 2011 ONSC 1007 \[“\*Carnival\*”\], at para. 24 citing \*Bank of Nova Scotia v. Freure Village on Clair Creek\* \(1996\) 40 C.B.R. \(3d\) 274 \(Ont. Gen. Div.\) \(“\*Freure Village\*”\), at para. 10.](#)

<sup>16</sup> [\*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.\*, 2013 ONSC 6866 at para. 27.](#)

<sup>17</sup> [\*BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.\*, 2020 ONSC 1953 at paras. 43-44.](#)

(e) there is no prospect of payment being made to the Lender absent the appointment of a Receiver.

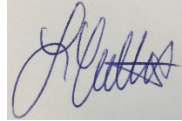
21. The Lender submits that in the circumstances, it is in the best interests of the Lender and the other mortgagee, and is just and convenient, for the Court to appoint a receiver to take control and sell the Property for the benefit of the Lender and the subsequent mortgagee.

22. KSV has consented to act as receiver.

#### **PART IV – ORDER REQUESTED**

23. The Lender seeks an Order appointing KSV as Receiver.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of April, 2024.



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**Lawyers for the Applicant**

## **SCHEDULE “A”**

### **AUTHORITIES**

1. [\*Bank of Montreal v. Carnival National Leasing Ltd.\*, 2011 ONSC 1007](#)
2. [\*Bank of Nova Scotia v. Freure Village of Clair Creek\*, \(1996\) 40 CBR \(3d\) 274 \(ON S.C.J.\)](#)
3. [\*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.\*, 2013 ONSC 6866](#)
4. [\*BCIMI Construction Fund Corporation et al v. The Clover on Yonge Inc.\*, 2020 ONSC 1953](#)



## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

#### ***Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended***

##### **Court may appoint receiver**

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

##### **Advance notice**

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

##### **Period of notice**

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

#### ***Courts of Justice Act, R.S.O. 1990, c. C.43***

##### **Injunctions and receivers**

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where

it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

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Court File No. CV-24-00717051-00CL

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PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANT**  
**(RETURNABLE APRIL 15, 2024)**

**CHAITONS LLP**

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