



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

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TITLE OF PROCEEDING: MARSHALLZEHR GROUP INC. v. LA PUE INTERNATIONAL INC.

BEFORE: JUSTICE J. DIETRICH

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE J. DIETRICH :

Overview

- [1] KSV Restructuring Inc. was appointed as receiver (the “Receiver”), of all of the assets, undertakings and properties of La Pue International Inc. (the “Company”), including the real property municipally known as 5528 Ferry Street, Niagara Falls (the “Real Property”).
- [2] The Receiver seeks, among other things, orders:
- a. Approving the asset purchase agreement dated April 4, 2024, as amended by the Reinstatement and Amending Agreement dated July 12, 2024, the Reinstatement and Amending Agreement dated October 8, 2024 and the Third Reinstatement and Amending Agreement dated November 18, 2024, between Lakeshore Luxe Design & Build Group (“Lakeshore”) and the Receiver (collectively, the “Lakeshore APS”) and vesting in 100835091 Ontario Inc. (the “Purchaser”), as assignee of Lakeshore, the Company’s right, title and interest in and to the purchased assets, including the Real Property;
 - b. Approving an interim distribution to MarshallZehr from the proceeds of the sale transaction contemplated by the Lakeshore APS (the “Transaction”);
 - c. Authorizing the Receiver to establish a Holdback Reserve in the amount of \$1.4 million;
 - d. Approving the Fourth Report of the Receiver dated December 11, 2024 (“Fourth Report”) and the conduct and activities of the Receiver as described therein; and
 - e. Sealing the Confidential Appendices to the Fourth Report.
- [3] The main opposition comes from the principal of the Company who takes the position that he was not treated fairly as a bidder during the sale process and the Transaction should not be approved – rather the Receiver should be directed to remarket the Real Property. As a second position, the Company says that it should be entitled to redeem the mortgage of MarshallZehr.

- [4] Buttcon Limited and HC Matcon Inc., who are construction lien claimants support the position of the Company – specifically the Company’s request to redeem as that would leave their claims intact.
- [5] MarshallZehr supports the relief requested by the Receiver.
- [6] The Sovereign General Insurance Company, the deposit insurer who holds a second mortgage on the property and Kada Group Inc. (another construction lien claimant) take no position on the motion.

Background

- [7] The Company is a single purpose entity that owns the Real Property. The Company intended to develop and sell three mid-rise buildings consisting of one mixed-use, one hotel and one residential building on the Real Property.
- [8] Prior to the receivership proceedings (i) the Company completed shoring and excavation work although no other phases of construction have commenced; and (ii) the Receiver understands the Company pre-sold 359 units (the “Sale Agreements”) and collected approximately \$31 million of deposits. The deposits are being held in trust with the surety.
- [9] The Receiver was appointed by Order dated October 19, 2023, on an application by MarshallZehr, the Company’s secured creditor who is owed approximately \$20.9 million, including amounts advanced prior to the Receivership Order being granted as well as amounts advanced as Receiver’s borrowings.
- [10] On December 20, 2023, the Court granted an order approving a process for marketing the Real Property. That sales process was detailed in the Receiver’s third report. On June 21, 2024, Justice Penny granted an approval and vesting order in respect of the original sale agreement dated April 4, 2024, as assigned to the Purchaser.
- [11] That transaction failed to close as neither the Second Deposit contemplated by that transaction or the remaining amount of the purchase price was paid to the Receiver. On July 4, 2024, the Receiver formally terminated the original transaction and the First Deposit was forfeited to the Receiver. However, a week later, on July 12, 2024, the Purchaser and the Receiver entered into the First Reinstatement Agreement pursuant to which the Purchaser agreed, among other things, to increase the purchase price by \$50,000 and provide two more deposits in addition to the Second Deposit. The Second Deposit was paid, but the Purchaser failed to pay the additional deposits and at the end of July of 2024, the agreement was terminated by the Receiver.
- [12] In September of 2004, the Receiver learned that the Purchaser was not registered with the Home Construction Regulatory Authority (the “HCRA”) and, accordingly, could not assume the Sale Agreements. Given that the original sales process only resulted in one other offer which was substantially inferior to the Purchaser's offer, discussions between the Purchaser, MarshallZehr and the Receiver continued.
- [13] The Second Reinstatement and Amending Agreement was entered into on October 8, 2024, which included, among other things, an additional deposit and an agreement for the Purchaser to assume the Sale Agreements conditional upon the Purchaser obtaining a vendor and builder license from the HCRA. However, the Purchaser again failed to pay the additional deposit and the Receiver again

terminated the sale agreement on October 24, 2024. At this point the Receiver re-listed the Purchased Assets for sale.

- [14] However, in November of 2024, the Purchaser advised the Receiver it now had access to another additional deposit. MarshallZehr also advised the Receiver that it was prepared to finance the balance of the purchase price. Before considering a further re-instatement agreement the Receiver advised the Purchaser that it required the additional deposit to be placed in the trust account of the Purchaser's counsel. Accordingly, on November 18, 2024, the Purchaser confirmed the entirety of the additional deposit was placed in trust with their counsel and the Receiver entered to the Third Reinstatement Agreement on that day.
- [15] As a result, the Transaction for which approval is now sought is substantially similar to that approved on June 21, 2024 with the following exceptions – the purchase price has been increased by \$50,000, the deposit in the aggregate amount of 18% of the purchase price has been paid to the Receiver or the Purchaser's counsel in trust, and the Purchaser will only assume the Sale Agreements if it obtains the HRCA licenses within 90 days of closing.
- [16] As noted, MarshallZehr has agreed to finance the remaining amount of the purchase price and has advised the Receiver that other than standard financing conditions requiring court-approval of the transaction and registration of security, all other financing conditions have been waived.
- [17] As well, the Receiver advised during the hearing that communications with purchasers under the Sale Agreements have occurred via the Receiver's website – and in particular correspondence summarizing the motion was posted on the Receiver's website on December 20, 2024. Although certain purchasers under the Sale Agreements have asked questions of the Receiver, no purchaser has objected to the Transaction. As the deposits are held in trust, should those Sale Agreements not be assumed by the Purchaser, the Receiver advises the deposits will be returned to the purchasers under the Sale Agreements.
- [18] Throughout the proceedings, Mr. Fugiel, the principal of the Company, advised the Receiver that he intended to purchase the Real Property or redeem the MarshallZehr loan. This included an offer submitted by Mr. Fugiel in trust for a corporation to be incorporated, on September 20, 2024. In response, the Receiver indicated that the proof Mr. Fugiel's financial ability to close the transaction would be required for the offer to be considered. No evidence was provided at that time.
- [19] Again, on November 2, 2024, Mr. Fugiel submitted another offer in trust for a corporation to be incorporated. A conditional financing term sheet was submitted on November 3, 2024. The Receiver expressed concerns regarding the identity of the lender and the conditionality of the term sheet to Mr. Fugiel. A further financing commitment letter was provided by counsel to Mr. Fugiel on November 15, 2024, however, the financing was again conditional on, among other things, satisfactory environmental reports, budgets and an appraisal.
- [20] It appears that an updated commitment was provided to the Receiver on November 21, 2024, but by that time the Receiver had entered into the Third Reinstatement Agreement (which was dated November 18, 2024).

[21] The Company has also requested payout statements from MarshallZehr which were provided in December of 2024.

Issues

[22] The issues to be determined are:

- a. Should the Transaction be approved;
- b. Should the Company be granted a further time period to redeem the MarshallZehr mortgage loan;
- c. Should an interim distribution to MarshallZehr from the proceeds of the Transaction be approved;
- d. Should the Receiver be authorized to establish a Holdback Reserve in the amount of \$1.4 million;
- e. Should the Fourth Report and the conduct and activities of the Receiver as described therein be approved; and
- f. Should the Confidential Appendices to the Fourth Report be sealed?

Analysis

Approval of the Transaction

- [23] The parties agree that the principles governing court-approval of the Transaction are set out in *Royal Bank v Soundair Corp.* 1991 CanLII 2727 (ONCA) [*Soundair*] where the Court of Appeal stated that the following factors must be considered when considering the approval of a proposed sale: (i) whether the receiver has made sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and (iv) the interest of all parties.
- [24] The Company submits it and its principal have not been treated fairly in the sale process and was not provided a commercially reasonable opportunity to submit offers. Specifically, when offers were submitted, the Receiver requested proof of financing on what the Company says are tight and unreasonable timelines.
- [25] The Company also says that Lakeshore previously entered into a joint venture agreement with the Company, and their participation as a bidder in the sale process violates that agreement. However, the parties agree that issue is not before me today and whether Lakeshore violated any contractual agreements with the Company or Mr. Fugiel is for another day.
- [26] This receivership proceeding has been ongoing for more than fourteen months. The Company or Mr. Fugiel did not submit a bid in the original sale process approved in December of 2023. The bids that were submitted in September and November of 2024 by Mr. Fugiel were not accompanied by proof of financing and included various conditions. That a firm commitment for financing from a purchaser in

an insolvency proceeding should be expected is not a surprise. I do not see this as unfairness in the working out of the process.

- [27] I am mindful that the Transaction may result in the Sale Agreements not being assumed by the Purchaser if the Purchaser cannot obtain the HCRA approvals. However, the purchasers under the Sale Agreements will have recourse to their deposits of \$31 million that are being held in trust should that occur.
- [28] As well, the purchase price under the Transaction is superior to that submitted by Mr. Fugiel in his offers. In this respect, Company's counsel indicated during the hearing that he had instructions to match the purchase price and should be given an opportunity to do so. Counsel to the Company also argued that if one accounts for the portion of the deposit that should already be forfeited to the Receiver based on the previously failed transactions, that the purchase price under the Transaction would not be superior to Mr. Fugiel's offers. Given the request for a sealing order for the redacted Transaction documents it is not clear how counsel to the Company has the required information to make those statements. It is also not appropriate for a Receiver, in this context, to be disclosing bids as suggested by the Company.
- [29] Rather what should be considered is the information available to the Receiver at the time it made a decision to proceed with the Transaction. At that time, the Transaction represented the best offer in terms of purchase price that it had received. The argument by counsel to the Company that the purchase price of Mr. Fugiel's offer is superior when one accounts for the forfeited deposits is not necessarily true. Contrary to the submissions by the Company, is not clear what portion of the deposit would be forfeited if the Transaction is not approved – counsel to the Purchaser argues that the deposit should be returned to his client based on the terms of the various reinstatement agreements.
- [30] As set out by the Ontario Court of Appeal in *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.* 2021 ONCA 375 at para 15, courts will generally defer to a court appointed receiver's business expertise in reviewing a sale and will not second guess their recommendation absent exceptional circumstances.
- [31] A similar statement was made in *Bank of Montreal v Dedicated National Pharmacies Inc. et al* 2011 ONSAC 4634 in addressing objections to a sale approval at paragraph 43: "Provided a receiver has acted reasonably, prudently and not arbitrarily, as is the case here, a court should not sit as in appeal from a receiver's decision or review in every detail every element of the procedure by which the receiver made its decision. To do so would be futile and duplicative. It would emasculate the role of the receiver.
- [32] Accordingly, I would approve the Transaction.

Redemption of the MarshallZehr mortgage loan

- [33] The Company also submits that it should be given a further time period to redeem the MarshallZehr loan. In this respect, the Company relies on the recent Court of Appeal decision in *Peakhill Capital Inc. v. 1000093910 Ontario Inc.* 2024 ONCA 584 [*Peakhill*]. The Court of Appeal in para 9 of *Peakhill* noted that the motion judge in the lower court in *Peakhill* correctly recognized that paras 9 and 10 of *Rose-*

Isli Corp. v. Smith, 2023 ONCA 548 [Rose-Isli] set out the governing principles that guided his decision. In *Rose-Isli* the Court of Appeal stated:

[9] We see no error in the motions judge applying the following principles to guide her consideration of whether, in the specific circumstances, 273 Ontario should be granted leave to redeem:

- In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 1991 CanLII 2727 (ON CA), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
- In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[10] We adopt the rationale for those guiding principles articulated in *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated, at para. 22:

A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[34] In *Peakhill*, the motions judge found that in the extraordinary circumstances of that case, including that all creditors were being paid in full and allowing the respondent to redeem would not have a significant impact on the integrity of the system in that particular case.

[35] Unlike in *Peakhill*, in the circumstances before me, providing additional time for the Company to redeem would not be appropriate. As noted, the receivership proceeding has been ongoing for over fourteen months, the Company is not coming with a cheque in hand to pay out all creditors. Rather, Mr. Fugiel has been attempting to participate as a bidder for the Real Property and is only raising the possibility of redemption (and requesting more time to put together the necessary funds) as an alternative option to delay sale approval. Unlike in *Peakhill*, there are no unusual and exceptional circumstances that exist to support granting the Company's right to redeem at this time.

Interim distribution to MarshallZehr and establishment of the Holdback Reserve

- [36] Should the Transaction close, no party objected to the Receiver's request that the Receiver be authorized to distribute the proceeds, subject to adequate reserves as determined by the Receiver to MarshallZehr.
- [37] The Receiver has obtained an opinion from its independent legal counsel that, subject to standard assumptions and qualifications, pursuant to applicable security documentation, MarshallZehr has a valid security interests or charge, as applicable, against the Real Property.
- [38] The Receiver also seeks to establish a Holdback Reserve of \$1.4 million, which exceeds 10% of the total amount of liens registered against the real property. This permits the Receiver to facilitate an interim distribution while at the same time reviewing the validity of the lien claims. Counsel for the construction lien claimants present did not object to the distribution the size of the proposed Holdback Reserve. There is separately a motion scheduled for March 7, 2025, to address MarshallZehr's position that none of the \$1.4 million has priority over its mortgage.
- [39] In the circumstances, the interim distribution to MarshallZehr and proposed Holdback Reserve, to be dealt with in accordance with the terms of the ancillary order signed by me, are approved.

Approval of Fourth Report and the Receiver's activities

- [40] The activities of the Receiver described in its fourth report were necessary and undertaken in good faith. Given my findings above, the Fourth Report and the activities of the Receiver as set out therein are approved.

Sealing of Confidential Appendices

- [41] The limited sealing order being sought is necessary to preserve the Receiver's ability to maximize the value of the Real Property in the event of the Transaction does not close. I am satisfied that the requested sealing order for the confidential appendices to the Fourth report meets the test in *Sierra Club/Sherman Estates* and that disclosure of this information would pose a risk to the public interest in enabling stakeholders of a company in receivership to maximize the realization of assets. I direct counsel for the receiver to file a hard copy of the confidential appendices with the Commercial List Office in his sealed envelope with a copy of the approval investing order in this endorsement.

Disposition

- [42] For the forgoing reasons, I grant the relief requested by the Receiver with the minor amendments to the form of draft approval and vesting order and ancillary order discussed during the hearing. Orders to issue in the forms signed by me this day.

