

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

BETWEEN:

MARSHALLZEHR GROUP INC.

Applicant

- and -

2557386 ONTARIO INC. AND 2363823 ONTARIO INC. O/A MARIMAN HOMES

Respondents

**FACTUM OF THE RECEIVER
(Motion returnable March 27, 2024)**

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capacity as Court-Appointed
Receiver**

TO: THE SERVICE LIST

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. KSV Restructuring Inc. (“**KSV**”), in its capacity as court-appointed receiver and manager (the “**Receiver**”) of all of the assets, undertakings and properties of the Respondents seeks an order, among other things:

- (a) approving the Sale Process¹; and
- (b) such further and other relief that the Receiver may request and this Honourable court may consider just.

2. In its Notice of Motion, the Receiver also indicated that it will be seeking certain relief pertaining to the property municipally known as 2051 Vickery Drive, Oakville, Ontario (the “**Vickery Property**”), including an order approving the termination of an agreement of purchase and sale between 2363823 Ontario Inc. o/a Mariman Homes (“**Mariman**”) and Arshed Omer Bhatti for the

¹ All defined terms not defined herein have the meaning ascribed to them below.

Vickery Property, a partially constructed home owned by Mariman. Following the service of the Receiver's materials, the Receiver, the first mortgagee for this property and Mr. Bhatti entered into an agreement in principal for the sale of the Vickery Property to Mr. Bhatti. The parties need time to paper the transaction and will return to Court at a later time to seek Court approval or to provide a further update to the Court.

PART II – FACTS

Background

3. 2557386 Ontario Inc. (“**255**”) is a single purpose entity that owns the real property municipally known as 30 Front Street, Haldimand, Ontario that was being developed as the Grand York Estates (the “**York Property**”).²

4. Mariman, is the registered owner of several properties, including the Vickery Property. Mariman was acting as the developer for all of these properties. All funds received by 255 in connection with the York Property development and by Mariman in connection with its other developments were comingled in Mariman's bank account. The Receiver understands that deposits received from purchasers of lots for the York Property or any of the other properties being developed by Mariman were not kept in trust and were spent by Mariman prior to the appointment of the Receiver.³

5. The Receiver was appointed on an application of MarshallZehr Group Inc. (“**MZ**”) pursuant to an order of this Court dated January 17, 2024. MZ is the first mortgagee on the York Property and had a general security interest in Mariman. At the time of the Receiver's appointment, MZ was not

² First Report of the Receiver dated March 20, 2024 (the “**First Report**”) at section 2.1.

³ First Report at section 2.1.

aware that Mariman was the registered owner of a number of other developments or property, including the Vickery Property. A summary of the properties that Mariman appears to have an ownership interest in is set out in the Receiver's First Report.

6. In addition to and following the registration of MZ's mortgage against the York Property, VanRooyen Earthmoving Ltd. registered a lien against the York Property in the amount of \$1,709,901.54.⁴

Sale Process- York Property

7. The Receiver solicited proposals from five realtors to act as listing agent to market and sell the York Property. The Receiver has previously worked with each of the prospective realtors, each of which has considerable experience selling residential development land.⁵

8. The Receiver requested that each realtor provide background information regarding each firm's experience, a marketing plan for the York Property, an estimate of value of the York Property and the realtor's proposed commission structure.⁶

9. Three realtors submitted proposals. After reviewing the proposals, the Receiver recommends and seeks approval from this Court that Colliers Macaulay Nicolls Inc. ("**Colliers**") be retained as listing agent, pursuant to the terms of a listing agreement attached as Appendix B to the First Report (the "**Listing Agreement**") for the York Property. The Receiver recommends that Colliers be retained for the following reasons:

- (a) MZ, the largest secured creditor of 255, supports the retention of Colliers;

⁴ First Report at section 2.5.1.

⁵ First Report at section 3.1.1.

⁶ First Report at section 3.1.2

- (b) The Receiver has previously retained the Colliers team that would be responsible for this mandate on similar mandates and the Colliers team has achieved strong results on similar mandates; and
- (c) Collier's proposed commission rate is reasonable based on the Receiver's experience selling real estate and the commission rate is acceptable to MZ.⁷

Sale Process

10. The recommended process pursuant to which the York Property is to be marketed for sale by the Receiver (the "**Sale Process**") is summarized in section 3.2 of the First Report. The Sale Process provides the Receiver with a period of five weeks from the date of the approval order to prepare marketing materials, identify prospects and begin mass marketing the York Property. The bid deadline under the Sale Process will be three weeks from the marketing launch, subject to market response. Upon execution of definitive transaction documents, the Receiver will seek Court approval of the successful offer(s), on not less than 7 calendar days' notice to the service list.⁸

11. The Sale Process will be subject to the following additional terms:

- (a) the York Property will be marketed on an "as is, where is" basis;
- (b) the Receiver will be entitled to extend any deadlines in the Sale Process if it considers it appropriate or necessary in the circumstances;
- (c) the Receiver will have the right to reject any and all offers, including the highest dollar value offers(s);

⁷ First Report at section 3.1.4

⁸ First Report at section 3.2.

- (d) any transaction will be subject to court approval;
- (e) MZ will have the right to credit bid the debt owing to it in respect of the York Property at the conclusion of the Sale Process if the offers are not sufficient to repay its mortgage on the York Property in full;
- (f) the Receiver and MZ have been discussing the sale of the York Property with several interested parties. Accordingly, the Receiver has negotiated a carveout from the Listing Agreement for these parties (the “**Prior Interested Parties**”). If a transaction is closed with any of the Prior Interested Parties or if MZ makes a credit bid, Colliers will receive a work fee of \$200,000. The work fee is significantly less than the commission to which Colliers would otherwise be entitled.⁹

PART III – ISSUE

12. The issues to be determined on this motion are:

- (a) Should the Sale Process be approved? and
- (b) Should the ReMax Listing Agreement for the Vickery Property be sealed pending the completion of the sale of this property?

PART IV – LAW AND ARGUMENT

The Sale Process Should be Approved by the Court

13. This Court has jurisdiction to approve the Sale Process pursuant to section 243(1)(c) of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3.

⁹ First Report at section 3.2.2 and 3.1.4(c).

14. In the case of *Royal Bank of Canada v. Soundair Corp.*, the Ontario Court of Appeal held that a court was to consider the following factors when deciding whether to approve the sale of property subject to a receivership:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the efficacy and integrity of the process by which offers are obtained;
- (c) whether there has been unfairness in the working out of the process; and
- (d) the interests of all parties.¹⁰

15. In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*¹¹, the Court held that the criteria identified in *Soundair* also informs the determination of whether to approve a court-appointed receiver's proposed sale process. Specifically, the court is to assess:

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

¹⁰ [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) at para. 16.

¹¹ [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para. 6.](#)

16. The Receiver recommends that the Court approve the Sale Process and the listing agreement between the Receiver and Colliers for the following reasons:

- (a) Collier's team has extensive experience selling undeveloped residential properties in the Niagara area and its commission structure is consistent with market rates;
- (b) MZ supports the engagement of Colliers and the Sale Process;
- (c) the Sale Process is designed to be a fair, open and transparent process intended to canvass the market broadly on an orderly basis in order to obtain the highest and best price;
- (d) the duration of the Sale Process is sufficient to allow interested parties to perform diligence and submit offers. The Receiver will also have the ability to extend or amend timelines as it considers necessary, to maximize value. Colliers believes that the duration of the Sale Process is sufficient to fully canvass the market; and
- (e) the Sale Process includes procedures commonly used to sell real estate development projects, including by KSV in other court-supervised real property sale processes.

The Listing Agreement Should be Sealed

17. In its First Report, the Receiver reported that it proposed to engage ReMax Escarpment as listing broker for the Vickery Property. In connection with this proposed retainer, ReMax Escarpment provided the Receiver with an analysis supporting the recommended listing price which was attached to the First Report as a Confidential Appendix. The Receiver seeks an order sealing this appendix.

18. The Supreme Court of Canada has held that a sealing order may be granted:

- (a) where it is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) where the salutary effects of the confidentiality outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.¹²

19. This Court has applied the *Sierra* test in court-supervised sale proceedings to ensure that competitors or potential bidders do not gain an advantage if the sale transaction does not close. In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, this Court held that the “integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.”¹³

20. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that:¹⁴

- (a) court openness poses a serious risk to public interest;
- (b) the order sought is necessary to prevent the risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

21. The Receiver believes that the proposed sealing of the Confidential Appendix is appropriate in the circumstances. The Confidential Appendix contain confidential and commercially sensitive

¹² [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41](#) at para. 45 [“*Sierra*”].

¹³ [GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.](#), 2014 ONSC 1173 at para. 34.

¹⁴ [Sherman Estate v. Donovan, 2021 SCC 25](#) at para. 38.

information regarding the value of the Vickery Property, which if disclosed, would be harmful and materially prejudicial to the receivership estate and stakeholders in the event that the sale transaction with the existing purchaser is not completed and the Receiver will need to market this property for sale.

PART V – RELIEF SOUGHT

22. The Receiver respectfully recommends and requests that the Court grant the orders sought on this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of March, 2024.



CHAITONS LLP

Lawyers for the Receiver, KSV Restructuring Inc.

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Royal Bank of Canada v. Soundair Corp.* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
2. [*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750](#)
3. [*CannTrust Holdings Inc. v. Ernst & Young Inc.*, 2022 ONSC 6720](#)
4. [*Sierra Club of Canada v. Canada \(Minister of Finance\)*, 2002 SCC 41](#)
5. [*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173](#)
6. [*Sherman Estate v. Donovan*, 2021 SCC 25](#)

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Court File No. CV-23-00699432-00CL

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