

Court File No.: CV-21-00672628-00CL

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

BETWEEN:

**EMPIRICAL CAPITAL CORP.**

Applicant

- and -

**IDEAL (WC) DEVELOPMENTS INC.**

Respondent

APPLICATION UNDER s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c-B-3, as amended and S. 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C-43, as amended

**FACTUM OF THE RECEIVER  
(Sale Approval Motion - June 24, 2022)**

**PART I. OVERVIEW**

1. This motion is brought by RSM Canada Limited, in its capacity as the Court-appointed receiver (the “**Receiver**”), without security, of the property municipally known as 6532 & 6544 Winston Churchill Boulevard, Mississauga, Ontario (the “**Property**”)

owned by Ideal (WC) Developments Inc. (the “**Debtor**”) for, among, other things, the approval of the sale of the Property.

2. In particular, the Receiver seeks Orders:

- (i) authorizing the Receiver to enter into and carry out the terms of the transaction (the “**Transaction**”) contemplated by an agreement of purchase and sale between the Receiver and Dragon Holding Global Real Estate Funds Inc. (“**Dragon**”) dated May 26, 2022 and assigned to 1000199992 Ontario Corp. (the “**Purchaser**”) on June 20, 2022 (the “**APS**”), together with any further minor amendments thereto deemed necessary by the Receiver in its sole opinion;
- (ii) approving the sale of the Property in accordance with the terms of the APS and vesting in the Purchaser may further direct in writing, all right, title and interest of the Debtor in and to the Property, free from all Claims (as defined and described in the Order), upon closing of the Transaction and the delivery of a Receiver’s certificate to the Purchaser;
- (iii) approving the Second Report to the Court of the Receiver dated June 9, 2022 (the “**Second Report**”) and the Supplemental Report to the Second Report of the Receiver dated June 22, 2022 (the “**Supplemental Report**”), and the Receiver’s conduct and activities set out therein;

- (iv) authorizing the Receiver to make the Post-Closing Payments (as defined in the Second Report) and the Amended Empirical Distribution (as defined in the Supplemental Report);
- (v) sealing Confidential Appendix “1” to the Second Report and Tabs 1 to 4 contained therein;
- (vi) approving the Receiver’s Statement of Receipts and Disbursements contained in the Second Report;
- (vii) approving the fees of the Receiver for the period March 1, 2022 to May 31, 2022;
- (viii) approving the fees of Garfinkle Biderman LLP (“**Garfinkle**”) for the period February 7, 2022 to May 31, 2022; and
- (ix) approving the fees of Paliare Roland Rosenberg Rothstein LLP (“**Paliare**”) for the period ending May 22, 2022.

3. This factum addresses the relief sought relating to the sale of the Property and the sealing of the Confidential Appendix.

## PART II. FACTS

### **A. Background**

4. On January 11, 2022, the Receiver was appointed as receiver, without security, of the Property pursuant to an Order of this Court (the “**Appointment Order**”).<sup>1</sup>

5. The Property consists of 1.47 acres of vacant land owned by Ideal.<sup>2</sup>

6. The Receiver retained the firm of Garfinkle, Empirical’s counsel, to act as the Receiver’s legal counsel where there is no conflict of interest.<sup>3</sup>

7. The Receiver has also retained Paliare to act as the Receiver’s independent legal counsel where Garfinkle has, or may be considered to have, a conflict of interest.<sup>4</sup>

### **B. The Empirical Mortgage**

8. Empirical Capital Corp. (“**Empirical**”) holds a first mortgage (the “**Empirical Mortgage**”) in the principal amount of \$5,500,000 against the Property.<sup>5</sup>

9. As at July 11, 2022, the amount outstanding under the Empirical Mortgage is estimated to be \$6,560,254.37 as set out on the Amended Empirical Statement. This

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<sup>1</sup> Second Report to the Court of the Receiver dated June 9, 2022 at para. 1, Tab 2, Motion Record of the Receiver dated June 13, 2022

<sup>2</sup> Second Report at para. 10.

<sup>3</sup> Second Report at para. 7.

<sup>4</sup> Second Report at para. 8.

<sup>5</sup> Second Report at para. 13.

amount is subject to further legal fees and disbursements and other charges that are incurred up to the date of discharge.<sup>6</sup>

10. Empirical's loan was originally due on March 2, 2020, however Empirical and Ideal entered into a number of forbearance agreements, the last of which provided that the loan was to be repaid on November 15, 2021. Ideal failed to repay the amounts outstanding under the loan at the end of the forbearance term.<sup>7</sup>

11. Empirical sought the appointment of the Receiver pursuant to a Notice of Application dated November 25, 2021.<sup>8</sup>

### **C. The Receiver's Marketing Process**

12. By Order of Justice Kimmel made March 22, 2022, the Receiver obtained approval for a marketing process for the Property (the "**Marketing Process Order**").<sup>9</sup>

13. The marketing of the Property commenced on March 29, 2022 through an e-blast sent by Avison Young.<sup>10</sup>

14. Interested parties were informed that the deadline for submitting offers for the Property was 5:00 p.m. EST on May 12, 2022 (the "**Offer Deadline**").<sup>11</sup>

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<sup>6</sup> Supplemental Report to the Second Report of the Receiver dated June 22, 2022 (the "Supplemental Report") and Appendix "B" thereto.

<sup>7</sup> Second Report at para. 14.

<sup>8</sup> Second Report at para. 15.

<sup>9</sup> Second Report at para. 5 and Appendix "C".

<sup>10</sup> Second Report at para. 23.

<sup>11</sup> Second Report at para. 23.

15. The Receiver/Avison Young also carried out the following steps in connection with the marketing of the Property:<sup>12</sup>

- (a) on March 29, April 12, April 29 and May 9, 2022, Avison Yong sent emails about the opportunity to 4,064, 4,035, 4,021 and 4,043 parties, respectively;
- (b) a brochure was prepared and provided to interested parties who clicked on the link in the email;
- (c) on April 21 and 26, 2022, an advertisement of the acquisition opportunity was published in the Globe and Mail newspaper;
- (d) on April 8, 2022, a listing for the Property was posted on the MLS system (the “**MLS Listing**”);
- (e) a “For Sale” banner was installed at the Property;
- (f) a notification of the Property being offered for sale was included in the April 11, April 18, April 25, May 2 and May 9, 2022 editions of Insolvency Insider (a digital publication) and included the bid date and links to contact the listing agents;
- (g) the listing agents posted notification of the offering on their respective LinkedIn profiles;

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<sup>12</sup> Second Report at para. 25.

- (h) the Property was advertised on the Avison Young website; and
- (i) Avison set up an online data room. Parties that signed a confidentiality agreement were given access to the data room which contained additional information on the Property.

16. As a result of the marketing efforts undertaken<sup>13</sup>:

- (a) 28 potential purchasers signed Confidentiality Agreements; and
- (b) three offers to purchase the Property were received from prospective purchasers.

17. The Receiver believes that the marketing process undertaken by the Receiver was appropriate for the type of property in question and that the marketing process provided sufficient market exposure to the Property. Specifically, the Property was exposed to the market for approximately 6 weeks; notice of the sale of the Property was sent to more than 4,000 parties; and the Property was listed for sale on MLS, on Avison Young's website and advertised in the Globe and Mail newspaper.<sup>14</sup>

***D. The Home Buyers***

18. Prior to the receivership, Ideal entered into agreements of purchase and sale (the "**Buyer Agreements**") with 15 individuals (the "**Home Buyers**").

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<sup>13</sup> Second Report at para. 35.

<sup>14</sup> Second Report at para. 34.

19. Certain of the Home Buyers and/or their counsel expressed concerns regarding the form of Order sought by the Receiver in connection with the marketing process. Specifically, the Home Buyers were concerned that the termination of the Buyer Agreements would impact their ability to pursue their claims against Ideal and its principals and/or the proceeds from the sale of the Property. Accordingly, following consideration of Home Buyers' position, the Receiver agreed not to seek expressly the termination of the Buyer Agreements.<sup>15</sup>

20. Instead, the Receiver sought and obtained the Marketing Process Order which, among other things, provided that the Property be marketed and sold free from any legal, equitable or other claims that any person had, has, or may in the future have, against the Property in connection with or arising from the Buyer Agreements including any right to compel the closing of the transactions contemplated in the agreements.<sup>16</sup>

**E. The APS**

21. The Receiver has entered into the APS with the Purchaser subject to the approval of this Court.

22. The purchase price set out in the APS consists of:<sup>17</sup>

- (a) a Cash Amount which is defined in the APS to be an amount equal to the sum of:

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<sup>15</sup> Second Report at para. 4.

<sup>16</sup> Second Report at para. 5 and Appendix "C"

<sup>17</sup> Second Report at para. 31.



- (i) the amount owing to Empirical secured by its mortgage against the Property;
  - (ii) priority government claims including accrued property taxes;
  - (iii) real estate commissions due on the sale of the Property;
  - (iv) amounts advanced pursuant to the Receiver's Borrowing Charge referenced in the Appointment Order; and
  - (v) the past, present and future fees and disbursements of the Receiver and its legal counsel to conduct and complete the administration of the receivership, and such other amounts as may be payable in connection with the receivership;
- (b) assumption of the debt due and owing by Ideal to the second mortgagee on the Property; and
- (c) the balance of the purchase price to be paid by way of an assumption of a portion of the debt due and owing by Ideal to Dragon secured by its mortgage against the Property.

23. Other salient terms of the APS include:<sup>18</sup>

- (a) a cash deposit of \$700,000, which has been received by the Receiver;

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<sup>18</sup> Second Report at para. 32.

- (b) the Purchaser is buying the Property on an “*as is, where is*” basis; and
- (c) closing of the sale provided for in the APS is scheduled to occur on the tenth Business Day following the date on which the Vesting Order is granted, or such other date as agreed between the Purchaser and the Receiver.

24. The APS was assigned from Dragon to the Purchaser by Assignment Agreement made June 20, 2022.<sup>19</sup>

25. The Receiver is of the view that sufficient efforts were made to obtain the best price for the Property and the marketing process was conducted fairly. The Receiver regards the APS as the most advantageous offer for the Property.<sup>20</sup>

26. The Receiver therefore recommends that this Court approve the APS and grant an Order vesting title in the purchased assets in the Purchaser or its assignee upon the closing of the Transaction.

***F. Proposed Distribution***

27. Concurrent with or following the closing of the sale of the Property, the Receiver proposes to make the following payments (the “**Post-Closing Payments**”) as described and defined in the Second Report:<sup>21</sup>

- (a) the Outstanding Property Taxes;

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<sup>19</sup> Supplemental Report at para. 6 and Appendix “A”.

<sup>20</sup> Second Report at para. 36.

<sup>21</sup> Second Report at para. 46.

- (b) the commission payable to Avison Young in respect of the sale of the Property; and
- (c) the amount of \$200,008.00, being the total of amounts owing to the Receiver, Garfinkle and Paliare on account of their respective unpaid accounts described in the First Report and the Second Report.

28. Interest continues to accrue on the outstanding balance of the Empirical Mortgage. Therefore, the Receiver is of the view that it is in the interests of all parties that the amounts owing to Empirical be paid to Empirical in order to prevent the accrual of further interest.<sup>22</sup>

29. As set out in the First Report, the Receiver received an opinion from Paliare that, based on the assumptions and subject to the qualifications set out therein, the Empirical Mortgage grants, by its terms, a valid first-ranking charge on the Property in favour of Empirical.<sup>23</sup>

30. Accordingly, following closing of the sale of the Property, the Receiver proposes to pay the amount set out on the Amended Empirical Statement (as defined in the Supplemental Report) plus such further legal fees and disbursements and other charges that are incurred up to the date of discharge (the “**Amended Empirical Distribution**”).

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<sup>22</sup> Second Report at para. 47.

<sup>23</sup> Appendix G to the Receiver’s First Report.

**G. The Confidential Appendix**

31. On this motion, the Receiver also seeks an order sealing Confidential Appendix 1 to the Receiver's Second Report and Tabs 1-4 contained therein (the "**Confidential Appendix**").

32. The Confidential Appendix contains the purchase price under the APS as well as information about the other offers submitted to the Receiver. If the Transaction does not close, the release of this information could potentially have an adverse influence on any subsequent sales process that the Receiver would carry out in connection with the Property.<sup>24</sup>

**PART III. ISSUES, LAW & ARGUMENT**

33. The Receiver's motion raises the following two legal issues:

- (a) should the Court approve the APS?
- (b) is it appropriate for the Court to seal the Confidential Appendix to the Receiver's Second Report pending the closing of the transaction contemplated by the APS?

**A. The Court Should Approve the APS**

34. The factors to be considered by this Court in its assessment of the approval of a sale by a receiver are well established. A court should consider:

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<sup>24</sup> Second Report at para. 38.

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.<sup>25</sup>

35. Having regard to the foregoing, the Receiver submits and recommends that this Court should approve the APS in order to give effect to the Transaction contemplated by the APS. In particular, the Receiver notes the following:

- (a) the Property was sufficiently exposed to the market through, among other things, email-blasts, a public MLS listing, and newspaper advertisements;
- (b) the cash component of the total consideration offered in the APS (before consideration of the credit component of the APS) is higher than the purchase price contained in each of the other offers submitted; and
- (c) the APS contains no conditions which would delay any closing.

36. As the Ontario Court of Appeal agreed with and adopted in *Soundair*:

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the

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<sup>25</sup> *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#) at para 16.

Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.<sup>26</sup>

37. In the present case, there are no exceptional circumstances which would warrant a rejection of the Receiver's recommendation.

38. As described in the Supplemental Report, one of the Home Buyers, Syed Muhammad Faruqi Hasan, filed an affidavit dated June 21, 2022 in opposition to the sale approval in which he raises concerns with the Receiver's sales process and states, among other things, that he wishes to make an offer for the Property in the amount of \$6,810,000.<sup>27</sup>

39. Apart from the fact that Mr. Hasan has not actually submitted an offer (and that the Offer Deadline was May 12, 2022), the proposed purchase price is less than the Cash Amount contained in the APS. As such, the stakeholders would be worse off under this potential offer.<sup>28</sup>

40. In any case, even where a belated offer is *higher* than the offer for which approval is sought, the court will not interfere with the process unless the new offer is "substantially higher" than the accepted offer; in cases where there is a substantially higher offer, the court reasons that the new offer raises doubt as to whether the receiver made sufficient

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<sup>26</sup> *Soundair* at para 21.

<sup>27</sup> Affidavit of Syed Muhammad Faruqi Hasan dated June 21, 2022 at para. 12.

<sup>28</sup> Supplemental Report at para. 15(f).

efforts to obtain the best possible price and whether the original sale was improvident.<sup>29</sup> This is far from the circumstances of the present case.

41. Moreover, Mr. Hasan had every opportunity to participate in the original sales process but, for reasons that he does not explain, never made an offer prior to the Offer Deadline. The Receiver notes that:<sup>30</sup>

- (a) Mr. Hasan was represented in court by counsel when the Marketing Process Order was made on March 22, 2022;
- (b) Mr. Hasan (like all parties on, or represented by counsel on, the service list) was contacted and given an opportunity to obtain information about the Property and the bidding process;
- (c) Avison Young sent a confidentiality Agreement and a brochure containing information about the Property and the marketing and bidding process to Loopstra Nixon, Mr. Hasan's former counsel, on April 18, 2022.

42. In all, the marketing process was fair and transparent and yielded the most advantageous offer for the Property. There is no basis to interfere with the Receiver's recommendation to approve the APS.

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<sup>29</sup> *Crown Trust Co. v. Rosenberg*, [1986 CarswellOnt 235](#) at para. 12 [*Crown Trust*];

<sup>30</sup> See the Supplemental Report at para. 15.

**B. The Court Should Seal the Confidential Appendix**

43. As noted above, the Receiver seeks an Order sealing Confidential Appendix 1 to the Receiver's Second Report pending the closing of the Transaction contemplated by the APS.

44. The limited circumstances in which this Court should seal part of a record before it were described by the Supreme Court of Canada in the case of *SierraClub of Canada v. Canada (Minister of Finance)*.<sup>31</sup>

45. In that case, that court observed that a confidentiality order should be granted in only two circumstances:

- (a) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

46. In the context of court-supervised sale proceedings, this Court has routinely applied *SierraClub* and held that it is appropriate to seal information and documentation filed in support of a motion to approve a sale where the materials "disclose the valuations

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<sup>31</sup> *SierraClub of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#) at para. 45.



of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought".<sup>32</sup>

47. Sealing these materials is necessary to ensure that the Receiver can maximize value for the Property if the contemplated Transaction does not close and the Receiver (or someone else) markets the Property for sale again.<sup>33</sup>

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of June, 2022.



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Paliare Roland Rosenberg Rothstein LLP

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<sup>32</sup> *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, [2014 ONSC 1173 \(CanLII\)](#) at para. 32 [*GE Canada*].

<sup>33</sup> [GE Canada](#) at paras. 32-34.

## SCHEDULE A – TABLE OF AUTHORITIES

### CASE LAW

1. *Royal Bank v. Soundair Corp.*, [1991 CanLII 2727 \(ONCA\)](#)
2. *Crown Trust Co. v. Rosenberg*, 1986 CarswellOnt 235
3. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)
4. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)

**EMPIRICAL CAPITAL CORP.**

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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PROCEEDING COMMENCED AT  
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**FACTUM OF THE RECEIVER  
(MOTION RETURNABLE JUNE 24, 2022)**

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