

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

-and-

2507448 ONTARIO INC.

Respondent

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

FACTUM OF THE RECEIVER

(re: Approval of Sale and Sealing Order
Motion Returnable October 17, 2019)

October 16, 2019

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**FACTUM OF THE RECEIVER
(re: Approval of Sale and Sealing Order)**

PART I – INTRODUCTION

1. RSM Canada Limited, in its capacity as court appointed Receiver (in such capacity, the “**Receiver**”) of the property located at 581 Wellington Street West, Toronto, Ontario owned by 2507448 Ontario Inc. (“**250**”), brings this motion seeking, among other relief (which other relief is not addressed in this Factum), an Order:

- (a) approving the agreement of purchase and sale between the Receiver and 2562051 Ontario Inc. (the “**Purchaser**”) dated October 2, 2019 (the “**APS**”) in connection with the sale of the Real Property (as herein defined) to the Purchaser (the “**Transaction**”), authorizing the Receiver to complete the Transaction with the

Purchaser and vesting title in and to the purchased assets in the Purchaser upon closing; and

- (b) sealing Confidential Appendix J to the Receiver's Second Report to Court dated October 10, 2019 (the "**Second Report**").

PART II - FACTS

Background

2. Pursuant to an application made by First Source Financial Management Inc. ("**First Source**"), and by Order of the Ontario Superior Court of Justice ("**the Court**") dated April 8, 2019, issued and entered on April 26, 2019 (the "**Amended Appointment Order**") and effective on May 3, 2019, RSM Canada Limited was appointed as receiver over the lands and premises municipally known 581 Wellington Street West, Toronto, Ontario (the "**Real Property**") and for all of the assets, undertakings and properties of 250 acquired for, or used in relation to the Real Property, including all proceeds thereof.

Second Report, Motion Record of the Receiver, Tab 2A and para 1

3. The Real Property is a two-storey mixed use commercial building situated in downtown Toronto. 250 is an Ontario corporation and is the owner of the Real Property. According to the Corporation Profile Report for 250 dated November 21, 2018, Del Terrelonge is the president, secretary and sole director of 250.

Second Report, Motion Record of the Receiver, Tab 2 para 2

4. First Source is an Ontario corporation in the business of providing mortgage financing. First Source holds a first mortgage in the principal amount of \$3,500,000 against the Real Property. As of January 17, 2019, the aggregate amount claimed under the mortgage held by First Source was \$3,690,301.02.

Second Report, Motion Record of the Receiver, Tab 2 para 3

Marketing of the Property for Sale

5. Since its appointment the Receiver has taken steps to market and sell the Real Property. In this regard, on July 12, 2019, the Receiver executed a listing agreement with Avison Young ("Avison") to market the Real Property for sale. The Receiver's engagement of Avison for the purposes of marketing the Real Property, the development of a baseline APS to be provided to purchasers and the establishment of a September 20, 2019 date for the review of offers were all previously approved as part of the Sales Process approval granted by virtue of the September 25, 2019 Order of Justice Pattillo in this proceeding.

Second Report, Motion Record of the Receiver, Tab 2 para 14

6. Further steps taken by the Receiver/Avison in connection with marketing the Real Property include the following:

- (a) Avison officially launched its marketing campaign on August 13, 2019;
- (b) on August 13, 2019, an email communication was sent to 797 contacts on Avison's mailing list;

- (c) on September 5 and 13, 2019, an email communication was sent to over 1,320 contacts on Avison's mailing list;
- (d) a marketing brochure for the Real Property was prepared and made available to parties that received the E-mail Blast and elected to download the Brochure;
- (e) on or about August 21, 2019, the Real Property was listed on the TREB MLS;
- (f) the Real Property was listed on Avison's website;
- (g) a "For Sale" sign was put up on the building at the Real Property;
- (h) on August 27 and 29, 2019, an advertisement was placed in the Globe and Mail advertising the sale of the Real Property;
- (i) an electronic data room was set up to provide access to confidential information on the Real Property to parties who signed a confidentiality agreement;
- (j) the sales process ran from August 13 to September 20, 2019;
- (k) prospective purchasers who wished to submit an offer for the Real Property were provided with a copy of a baseline APS prepared by counsel for the Receiver; and
- (l) after consultation with Avison and having regard to activity from potential purchasers of the Real Property, September 20, 2019 (the "**Offer Review Date**") was set as the date prior to which the Receiver would not review any offers to purchase submitted.

7. The Receiver believes that the marketing process undertaken by the Receiver was appropriate for the type of property in question and provided sufficient market exposure to the Real Property. The Real Property was exposed to the market for a period of approximately five weeks, notice of the sale of the Real Property was sent to more than 1,300 parties, and the Real Property was listed for sale on MLS, on Avison's website and advertised in the Globe and Mail.

Second Report, Motion Record of the Receiver, Tab 2 para 27

8. As a result of the marketing efforts undertaken:

- (a) 26 parties signed back the Confidentiality Agreement; and
- (b) 21 tours for prospective purchasers were conducted at the Real Property; and

Second Report, Motion Record of the Receiver, Tab 2 para 28

Offers Received

9. As at the Offer Review Date, seven offers had been submitted to Avison for the Real Property on the Receiver's form of agreement of purchase and sale (“**First Round Offers**”).

Second Report, Motion Record of the Receiver, Tab 2 para 20

Second Report, Confidential Appendix J, Tab 2

10. Following receipt of the First Round Offers, and after review and consultation with Avison, parties representing the four offers regarded as having the most favourable terms were contacted and invited to improve or amend their offers and resubmit by noon on September 26,

2019. All four parties elected to amend their original offers to purchase (the "**Second Round Offers**").

Second Report, Motion Record of the Receiver, Tab 2 para 21

Second Report, Confidential Appendix J, Tab 3

11. Of the Second Round Offers received, only one offer, the lowest of the four, was unconditional. In consultation with Avison, it was determined that the two highest conditional Second Round Offers, as well as the low unconditional Second Round Offer, would again be approached to determine whether any were prepared to either improve their offering price or delete any conditions. While this process was ongoing, the third-highest conditional offer, as well, determined to amend its offer and resubmit.

Second Report, Motion Record of the Receiver, Tab 2 para 22

12. In the result, three of the four offers under consideration at the outset of the second round were amended once more. All resubmitted and final offers (the "**Third Round Offers**") were received by the Receiver on or before October 2, 2019.

Second Report, Motion Record of the Receiver, Tab 2 para 23

Second Report, Confidential Appendix "J", Tab 4

The APS

13. Following its review of the Third Round Offers with Avison and legal counsel, the Receiver executed the APS, dated October 2, 2019, with the Purchaser.

Second Report, Motion Record of the Receiver, Tab 2 para 24

14. The APS conforms substantially with the baseline APS approved by the Order of Justice Pattillo dated September 25, 2019. Salient terms of the APS include (all capitalized terms in this section not defined in the APS are as otherwise defined in the Second Report):

- (a) the purchased assets include the Property;
- (b) a deposit of 10% of the Purchase Price has been received from the Purchaser;
- (c) the offer is unconditional, except for the APS being conditional on court approval and the issuance of an order vesting title to the purchased assets in the Purchaser free and clear of claims and encumbrances, other than those specifically itemized in the APS;
- (d) the Purchaser is buying the Property on an "as is, where is" basis; and
- (e) closing of the sale provided for in the APS is scheduled to occur on the twentieth Business Day following the date on which the Vesting Order is granted, or such other date as agreed between the Purchaser and the Receiver.

APS, Second Report, Confidential Appendix "J" at Tab 5

15. The APS is subject to the approval of this Court. The Receiver requests that the APS be approved, that it be authorized to complete the Transaction therein contemplated and that an order vesting title in and to the purchased assets in the Purchaser upon closing be granted. The receiver furthermore requests that the Confidential Appendix, to the Second Report, including the appendices contained therein, each of which contains commercially sensitive information, be sealed until the completion of the Transaction.

PART III - ISSUES AND LAW

16. Should this Court:

- (a) approve the Transaction and the APS and grant, in favour of the purchaser, an approval and vesting order? and
- (b) seal Confidential Appendix “J” to the Receiver’s Second Report and all appendices thereto until the closing of the Transaction?

A. Approval of Sale and Vesting Order

17. The Receivership Order grants the Receiver the authority to market and sell the Real Property.

Amended Appointment Order, Receiver’s Second Report, Motion Record of the Receiver, Tab 2A

18. Under section 100 of the Courts of Justice Act, the Court has the power to vest in any person an interest in real or personal property that the Court has the power to convey.

S.100, *Courts of Justice Act*, RSO 1990 c. C. 43 (“CJA”)

19. The following principles (the “*Soundair Principles*”) are to be considered where a court is asked to approve the sale of property under receivership:

- (a) whether the party made sufficient effort to obtain the best price and to not act improvidently;

- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the party obtained offers;
- (d) whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp., (1991), 4 OR (3d) 1 (C.A.)

20. Absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a Court is to grant deference to the recommendations of a receiver to sell a debtor's assets. Only in exceptional circumstances will a court intervene and proceed contrary to the recommendation of its officer, the receiver.

Royal Bank of Canada v. Soundair Corp., (1991), 4 OR (3d) 1 (C.A.)

21. It is of the very essence of a receiver's function to make business judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them. If the court was 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 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.

Royal Bank of Canada v. Soundair Corp., (1991), 4 OR (3d) 1 (C.A.) at para 21

Battery Plus Inc. (Re), [2002] O.J. No. 731 at para 23

22. The primary interests of the Receiver may be the creditors, but a secondary and important interest is the integrity of the process by which a sale may be affected. Moreover, the interest of a purchaser who has negotiated a sale agreement with a Court-appointed receiver is also to be considered.

Business Development Bank of Canada v Marlwood Golf & Country Club Inc., [2015] OJ No 3283 at paras 25-27

B&M Handelman Investments Ltd v Mass Properties Inc., [2009] OJ No 3044 at paras 27-29

23. Once a process has been put in place by court order for the sale of assets, that process should be honored, except in extraordinary circumstances.

Re Grant Forest Products Inc., [2010] O.J. No. 1684 at para 29

24. With reference to the marketing efforts previously approved by the September 25, 2019 Order of Justice Pattillo and as additionally detailed in the Receiver's Second Report and above, the Receiver submits that the marketing process for the Real Property was reasonable and appropriate, that sufficient efforts were made to obtain the best price for the Real Property and that the process was conducted fairly and in a manner consistent with the *Soundair* Principles.

25. The Receiver regards the APS as the offer received for the Real Property which is the most advantageous to the creditors of 250. The Receiver therefore recommends that this Court approve the APS and grant an Order vesting title in the purchased assets in the Purchaser upon the closing of the Transaction.

B. Sealing Order

26. The Court has authority to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

S.137(2), CJA

27. As per the Supreme Court's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, a sealing order may be granted when:

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

***Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522 at para 53**

28. The sealing of Confidential Appendix J to the Second Report and its appendices is necessary to preserve the integrity of any subsequent attempts to sell the Real Property, should such become necessary. There is no other reasonable alternative measure which will prevent this commercially sensitive information from becoming public.

29. The Receiver requests that Confidential Appendix J to the Second Report and all appendices thereto be sealed until the completion of the Transaction and filing of the Receiver's Certificate respecting same.

PART IV – RELIEF SOUGHT

30. The Receiver therefore requests that an Order be granted:

- (a) approving the APS;
- (b) authorizing and directing the Receiver to carry out the terms of the APS and complete the Transaction with the Purchaser;
- (c) vesting title in and to the purchased assets in the Purchaser upon the closing of the Transaction; and
- (d) sealing Confidential Appendix J to the Second Report and the appendices thereto until the completion of the Transaction and the filing of the Receiver's Certificate respecting same with the Court.

ALL OF WHICH IS SUBMITTED THIS 16th DAY OF OCTOBER 2019.



Stewart Thom

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 OR (3d) 1 (C.A.)
2. *Battery Plus Inc. (Re)*, [2002] O.J. No. 731
3. *Business Development Bank of Canada v Marlwood Golf & Country Club Inc.*, [2015] OJ No 3283
4. *B&M Handelman Investments Ltd v Mass Properties Inc.*, [2009] OJ No 3044
5. *Re Grant Forest Products Inc.*, [2010] O.J. No. 1684
6. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. S.100, *Courts of Justice Act*, RSO 1990 c. C. 43 ("CJA")

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. .

2. S.137(2), *CJA*

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

FIRST SOURCE FINANCIAL MANAGEMENT INC.
Applicant

-and- 2507448 ONTARIO INC.
Respondent

Court File No. CV-19-00613044-00CL

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PROCEEDING COMMENCED AT
TORONTO

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