

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

- and -

GOLDEN DRAGON HO 5 INC. and GOLDEN DRAGON HO 7 INC.

Respondents

**FACTUM OF THE RECEIVER
(Motion Returnable February 9, 2018)**

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FACTUM OF THE RECEIVER

PART I – OVERVIEW

1. This Factum is submitted by RSM Canada Limited, in its capacity as court-appointed receiver (in such capacity, the “**Receiver**”) of the lands and premises municipally known as (i) 39-85 Costello Avenue, Ottawa, Ontario (the “**Ottawa Property**”) and (ii) 64, 68 and 70 Reynolds Drive and 10, 14, 18 and 22 Salisbury Avenue, Brockville, Ontario (the “**Brockville Property**”, and together with the Ottawa Property, the “**Real Property**”), and of all the assets and undertakings of the Respondents acquired for or used in relation to the Real Property (collectively with the Real Property, the “**Property**”), in support of its motion for an order:

- (a) approving the sale transaction (the “**First Source Transaction**”) under the First Source APS (as defined below);

- (b) vesting the Purchased Assets in the Purchaser (as both terms are defined below) free and clear of all claims and encumbrances;
- (c) sealing the confidential appendices to the First Report of the Receiver dated January 29, 2018 (the “**First Report**”) until the filing of the Receiver’s certificate confirming completion of the First Source Transaction or further order of this Court;
- (d) authorizing and directing the Receiver to make a distribution to Bank of Montreal (“**BMO**”) as described in the First Report; and
- (e) approving the activities and fees and disbursements of the Receiver and its counsel as described in the First Report.

PART II - THE FACTS

A. BACKGROUND¹

2. Golden Dragon Ho 5 Inc. (“**GDH#5**”) is an Ontario corporation that owns the Brockville Property. Chi Van Ho is the president, treasurer, secretary and sole director of GDH#5.

3. On or about May 31, 2017, Golden Dragon Ho 7 Inc. (“**GDH#7**”) amalgamated with M.Y. Residential Inc. (corporate number 2571358) to become M.Y. Residential Inc. (corporate number 1971531) (“**MYR**”). GDH#7 is still shown as the registered owner of the Ottawa Property.

¹ All information in this section is contained in the First Report, paras. 10-19.

4. The Brockville Property and the Ottawa Property are each multi-tenant residential rental properties.
5. The Brockville Property consists of seven adjacent, 2-storey apartment buildings containing 11 units each for a total of 77 units.
6. The Ottawa Property is a 2-storey townhouse complex containing two rows of 12 units each.
7. First Source Financial Management Inc. (“**First Source**”) holds a mortgage in the principal amount of \$7,287,500 with first-ranking priority against the Ottawa Property and a mortgage with second-ranking priority against the Brockville Property. As of January 26, 2018, the aggregate amount claimed under the mortgages held by First Source was \$8,774,032.31.
8. BMO holds a first-ranking mortgage in the principal amount of \$3,863,420 registered against the Brockville Property. As of January 8, 2018, the aggregate amount claimed under the mortgage held by BMO was \$3,437,662.
9. First Source sought the appointment of the Receiver pursuant to a Notice of Application dated June 8, 2017, citing, *inter alia*, the Respondents’ default under their obligations to First Source, the Respondents’ interference with First Source’s attornment of rents, the state of disrepair of the Real Property, and the manner that the Respondents listed the Real Property for sale.
10. By Order of the Court dated June 21, 2017, entered and issued on June 23, 2017, Collins Barrow Toronto Limited was appointed as receiver over the Property (the “**Appointment Order**”).

11. Pursuant to an Order of the Court dated December 5, 2017, the name RSM Canada Limited was ordered to be substituted in place of the name Collins Barrow Toronto Limited in respect of this proceeding (and other mandates on which it is acting).

B. RECEIVER'S ACTIVITIES TO DATE²

12. The Real Property required significant attention and funds to be brought to a stabilized state of operations.

13. The activities of the Receiver to date are detailed in the First Report, and included:

- (a) hiring a property manager for both properties;
- (b) arranging for insurance for both properties;
- (c) dealing with repair and maintenance issues;
- (d) dealing with an Order to Remedy an Unsafe Building issued by the City of Ottawa with respect to the Ottawa Property;
- (e) gathering information from occupants of the Real Property as to the status of their tenancies (the rent rolls provided by the Respondents were not up to date and the leases provided were incomplete), evicting tenants who did not have leases and/or were not paying rent, and for the Brockville Property entering into new leases;
- (f) attempting to obtain the relevant books and records from the Respondents; and
- (g) marketing the Property for sale.

² All information in this section is contained in the First Report, paras. 20-48.

C. MARKETING OF THE PROPERTY³

14. Following its appointment, the Receiver invited six realtors to submit listing proposals for the marketing and sale of the Real Property, on the assumptions that (a) the sale process would be a request for offers by a firm bid date and (b) offers were to be unconditional with no due diligence period provided. The Receiver sought proposals on this basis since the Receiver was concerned that in view of the condition of the two properties, offerors would submit offers at an amount to “tie up” the properties, only to further negotiate with the Receiver following completion of their due diligence investigations.

15. The Receiver requested that the realtors include in their proposals: (a) what compensation the realtor would require if the successful offer (i) is submitted by a third party purchaser or (ii) is a credit bid by the secured lender, who is to be treated as an excluded party for purposes of the listing agreement; and (b) how long a marketing period was recommended from the date that marketing commenced to the deadline for bids to be submitted.

16. One of the realtors, CBRE Limited, declined the invitation to submit a proposal, and a second, Royal LePage, did not respond. Proposals were submitted by brokers from Avison Young, Century 21 Explorer Realty Inc., Colliers International, and ReMax Hallmark Realty Group. A summary of the four listing proposals, including the suggested listing prices proposed by the various realtors, has been filed with the Court as Confidential Appendix “1”.

17. The suggested combined listing prices in the listing proposals were all below the amount owing to First Source, after taking into account, among other things, (a) the commissions that

³ All information in this section is contained in the First Report, paras. 49-63.

would be payable on a sale, (b) payment of outstanding realty taxes on closing, and (c) the amount owing to BMO on account of its first charge on the Brockville Property.

18. The Receiver marketed the Property for sale as described in paragraphs 56 and 57 of the First Report. The process included:

- (a) distribution of an information letter with a description of the Real Property and general terms and conditions of sale to 213 brokers and real estate contacts;
- (b) advertisements placed in the national edition of the National Post newspaper, the Ottawa Citizen newspaper; and the Brockville Reporter newspaper;
- (c) an advertisement was placed in the Insolvency Insider, a weekly electronic newsletter on Canadian insolvency news and events including assets currently for sale that is sent to the Canadian insolvency community and other interested parties;
- (d) a posting on the Receiver's website; and
- (e) an electronic data room set up to provide access to confidential information on the Real Property to parties who signed the Receiver's confidentiality agreement.

19. Interested parties were requested to submit their offers by January 16, 2018 using a form of agreement of purchase and sale prepared by the Receiver and made available electronically to all interested parties.

20. Prior to the January 16, 2018 deadline for submission of offers:

- (a) 28 confidentiality agreements were signed by prospective purchasers or brokers, all of whom were given access to the electronic data room;
- (b) 4 tours of the Ottawa Property were conducted for 3 different parties between December 19, 2017 and January 16, 2018; and
- (c) 7 tours of the Brockville Property were conducted for 5 different parties between December 15, 2017 and January 16, 2018.

21. As of January 16, 2018, eight offers/letters of intent in connection with one or both of the Brockville Property and Ottawa Property had been submitted to the Receiver. A summary of the offers/letters of intent has been filed with the Court as Confidential Appendix "2". Also included in that appendix are descriptions of offers presented to the Receiver prior to the Receiver's sale process which were not pursued by the Receiver. The parties which submitted these offers (or their real estate brokers) were notified of the Receiver's sale process.

22. On January 23, 2018, the Receiver wrote to the parties which had submitted offers/letters of intent and provided them with the opportunity to submit a revised, improved offer prior to 4:00 pm on January 24, 2018, before a final determination was made by the Receiver as to which offer would be accepted. The Receiver further stated that if the Receiver did not receive an amended offer from a party, the Receiver would assume that that party's original offer was their best and final offer and intended by that party to be the offer to be considered by the Receiver.

23. As of January 24, 2018, three of the parties increased their offered purchase price, and one party advised the Receiver that it would not pursue the transaction and requested a return of

its deposit. A copy of the offer summary reflecting the offers received as at January 26, 2018 has been filed with the Court as Confidential Appendix “3”.

D. THE FIRST SOURCE TRANSACTION⁴

24. The offer received from First Source represented the highest and best realization for the Property. The Receiver has estimated the purchase price under that offer to be approximately \$11.26 million (the “**Purchase Price**”), calculated as follows:

- (a) cash payment of the “Priority Payables”. “Priority Payables” means amounts payable or accrued by the Respondents which rank or are capable of ranking prior to or *pari passu* with the mortgages held by BMO or First Source, including but not limited to outstanding realty taxes with respect to the Lands and all amounts secured by the Receiver's Charge and the Receiver's Borrowings Charge (as those terms are defined in the Appointment Order). Based on the quantum of the amounts that fall within this definition, this represents estimated consideration of \$554,067;
- (b) payment of the BMO Secured Debt. As at January 8, 2018, the amount owed to BMO was \$3,437,663; and
- (c) extinguishment of the First Source secured debt less \$1.5 million. The Receiver calculates that based on the quantum of the amounts claimed by First Source as at January 26, 2018 of \$8,774,032, this represents consideration of \$7,274,032.

⁴ All information in this section is contained in the First Report, paras. 64-69.

25. The Purchase Price exceeds the combined estimated net proceeds from the Real Property described in each of the listing proposals described in paragraph 16 above.

26. After reviewing the offer from First Source and subsequent discussions, the Receiver executed an Agreement of Purchase and Sale with First Source on January 26, 2018 (the “**First Source APS**”). First Source has designated CR Properties Management Limited Partnership as the party taking title to the Property (the “**Purchaser**”).

27. Other salient terms of the First Source APS (all defined terms are as defined in the First Source APS) include:

- (a) the “Purchased Assets” include the Ottawa Property, the Brockville Property and all of the assets and undertakings of the Respondents acquired for or used in relation to both properties;
- (b) the Purchaser is buying the Purchased Assets on an “as is, where is” basis;
- (c) no deposit is required on the execution of the agreement;
- (d) an amount sufficient to satisfy the BMO Secured Debt and the Priority Payables is payable on closing;
- (e) the agreement is conditional on court approval of the First Source APS 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 agreement. The form of order being sought follows the model form of order approved by the Commercial List Users’ Committee; and

- (f) closing of the sale is scheduled to occur on March 9, 2018 or such other date as agreed between the Purchaser and the Receiver.

28. The Receiver has received an opinion from Chaitons LLP that, subject to the standard qualifications and assumptions, *inter alia*: the mortgage in favour of BMO provides BMO with a first-in-time valid and enforceable registered charge over the Brockville Property; and the mortgages in favour of First Source provide First Source with a second-in-time valid and enforceable registered charge over the Brockville Property and a first-in-time valid and enforceable registered charge over the Ottawa Property.

E. DISTRIBUTION TO BMO

29. For the reasons explained in paragraphs 76-81 of the First Report, the Receiver is proceeding on the basis that there are no amounts outstanding for HST with respect to the Respondents or MYR and, if there are, the Receiver is not liable for any such obligations, and that any claims by Canada Revenue Agency (“CRA”) in respect of HST not paid by the Respondents or MYR do not have priority over the secured claims of First Source and BMO against the Real Property.

30. Also, as explained in paragraphs 82-85 of the First Report, there will be no funds available from the sale of the Purchased Assets to pay any corporations tax/capital gains liability or other amounts payable to CRA which may have resulted from the sale of the Real Property.

31. By virtue of BMO’s priority with respect to the proceeds of sale of the Brockville Property, the Receiver proposes to pay the claims of BMO in full on closing of the First Source Transaction.

F. SEALING ORDER

32. The First Report includes reference to three appendices filed with the Court on a confidential basis (the “**Confidential Appendices**”), being:

- (a) Summary of Listing Proposals (see paragraph 53 of the First Report);
- (b) Summary of Offers as of January 16, 2018 (see paragraph 60 of the First Report);
and
- (c) Summary of Offers as of January 26, 2018 (see paragraph 63 of the First Report).

33. The Receiver is of the view that that the Confidential Appendices contain financially sensitive information which should be kept confidential until completion of the First Source Transaction or further order of the Court. If these documents are not sealed, and if the First Source Transaction is not completed for any reason, the information in these documents may negatively impact realizations in the event the Receiver has to re-market the Property for sale.⁵

G. PROFESSIONAL FEES AND DISBURSEMENTS⁶

34. Pursuant to the Appointment Order, any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees and disbursements of the Receiver and of its legal counsel, incurred at their respective standard rates and charges, shall be allowed to them in passing their accounts and shall form a first charge on the Property in priority to all security interests, liens, charges, and encumbrances, statutory or otherwise, in favour of any person.

⁵ Paragraph 70 of the First Report.

⁶ All information in this section is contained in the First Report at paras. 96-98 and Appendices R and S thereto, being the Affidavit of Daniel Weisz sworn January 29, 2018 and the Affidavit of George Benchetrit sworn January 29, 2018.

35. The Receiver and its legal counsel have maintained detailed records of their professional time and costs since the date of the Appointment Order, all of which have been submitted to this Court by way of sworn affidavits from representatives of the Receiver and Chaitons LLP respectively.

PART III – LAW AND ARGUMENT

Test for Sale Approval

36. In *Royal Bank of Canada v. Soundair Corp.*⁷, the Ontario Court of Appeal held that a court must consider the following criteria on a motion by a receiver for approval of a sale of assets:

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

37. The Receiver respectfully submits that the First Source Transaction should be approved for, *inter alia*, the following reasons:

⁷ 1991 CanLII 2727 (O.C.A.), at p. 5.

- (a) the Real Property was adequately exposed to the market based on the steps taken by the Receiver, as described above;
- (b) the First Source APS represents the highest and best realization for the Real Property; and
- (c) the Purchase Price exceeds the combined estimated net proceeds from the Real Property described in each of the listing proposals described in paragraph 16 above.

Confidential Information

38. The test to be applied on a motion for a sealing order was described as follows by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*⁸:

A confidentiality order ... should only be granted when:

(a) such an order is necessary in order 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) 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 in this context includes the public interest in open and accessible court proceedings.

39. In the First Report, the Receiver explains that the Confidential Appendices contain financially sensitive information which should be kept confidential until completion of the First Source Transaction or further order of the Court.

40. If these documents are not sealed, and if the First Source Transaction is not completed for any reason, the information in these documents may negatively impact realizations in the event

⁸ 2002 SCC 41 (CanLII), at pp. 543-544.

the Receiver has to re-market the Property for sale.⁹ In such circumstance, a sealing order is appropriate.¹⁰

Fee Approval

41. In *Confectionately Yours Inc., Re*¹¹, the Court of Appeal for Ontario discussed the court's procedure and standard of review when considering the amount claimed by a court-appointed receiver and its counsel for their remuneration and disbursements. The court held, *inter alia*, that:

- (a) a receiver's accounts and a solicitor's accounts should be verified by affidavit;
- (b) the accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered;
- (c) the accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership;
- (d) the general standard of review is whether the amounts claimed are fair and reasonable; and

⁹ Paragraph 70 of the First Report.

¹⁰ *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899 (S.C.J.), at paras. 74 and 75.

¹¹ *Confectionately Yours Inc., Re*, 2001 CarswellOnt 1784 (C.A.), at paras. 37, 38, 42 and 45.

- (e) the considerations applicable in determining the reasonableness of the amounts claimed should include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

42. As explained above, the Receiver and its legal counsel have maintained detailed records of their professional time and costs since the date of the Appointment Order, all of which have been submitted to this Court by way of sworn affidavits from representatives of the Receiver and Chaitons LLP respectively.

43. It is respectfully submitted that the fees and disbursements of the Receiver and Chaitons LLP as described in the First Report and the supporting affidavits are fair and reasonable and justified in the circumstances.

PART IV – RELIEF SOUGHT

44. For the reasons set out above, the Receiver respectfully requests an order for the relief set out in its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 2nd day of February, 2018.

A handwritten signature in black ink, appearing to be 'GB', with a long horizontal line extending to the right.

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Schedule “A” – List of Authorities

1. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (O.C.A.)
2. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
3. *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 7899 (S.C.J.)
4. *Confectionately Yours Inc., Re*, 2001 CarswellOnt 1784 (C.A.)

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SUPERIOR COURT OF JUSTICE

Proceedings commenced at OTTAWA

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