

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

BETWEEN:

EMPIRICAL CAPITAL CORP.

Applicant

- and -

IDEAL (WC) DEVELOPMENTS INC.

Respondent

**FACTUM OF THE RECEIVER
(MOTION RETURNABLE MARCH 22, 2022)**

March 17, 2022

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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
(MOTION RETURNABLE MARCH 22, 2022)**

PART I. OVERVIEW

1. This motion for the approval of a marketing process is brought by RSM Canada Limited (“**RSM**”), 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**”).

2. In particular, the Receiver seeks an order:

(a) declaring that the Property may be sold free and clear of any claims arising

out of any agreements of purchase and sale entered into by the Debtor prior to the receivership (the “**Buyer Agreements**”);

- (b) approving the Receiver’s First Report to the Court dated March 1, 2022 (the “**First Report**”) and the Receiver’s conduct and activities set out therein;
- (c) approving the Receiver’s proposed Marketing Process (as defined below) and authorizing the Receiver to conduct the Marketing Process;
- (d) authorizing the Receiver to enter into a listing agreement with Avison Young Commercial Real Estate Services, LP (“**Avison Young**”);
- (e) sealing Confidential Appendices “1” to “4” to the First Report;
- (f) approving the Receiver’s cash receipts and disbursements for the period January 11, 2022 to February 28, 2022;
- (g) approving the fees of the Receiver for the period ending February 28, 2022; and
- (h) approving the fees of Garfinkle Biderman LLP (“**Garfinkle**”) for the period ending February 22, 2022.

3. In the Receiver’s opinion, it is desirable to carry out the Marketing Process in order to ensure that the Receiver can obtain the highest possible value for the Property for the benefit of all stakeholders.

4. In order to achieve this objective, it is also necessary to ensure that the Property can be sold free and clear of any claims or obligations arising out of the Buyer Agreements.

PART II. FACTS

A. *Background*

5. The Property consists of 1.47 acres of vacant land owned by the Debtor.¹

6. The Debtor's planned use of the Property was to build 15 residential homes on separate lots, in a development marketed as "Jewels of the Meadows." However, as detailed below, the Debtor was unable to develop the project.

7. On January 11, 2022, the Receiver was appointed over the Property pursuant to an Order of this Court (the "**Appointment Order**") under section 243(1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*.²

B. *Empirical's loan*

8. Empirical holds a first mortgage (the "**Empirical Mortgage**") in the principal amount of \$5,500,000 against the Property. As of November 15, 2021, the amount outstanding under the Empirical Mortgage was \$6,016,194.48.³

9. 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

¹ First Report of the Receiver ["First Report"], Motion Record of the Receiver ["MR"], Tab 2, p. 19, para. 10.

² Order Appointing Receiver dated January 11, 2022 ["Appointment Order"], MR, Tab 2A, pp. 32-47.

³ First Report, MR, Tab 2, p. 19, para. 11.

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.⁴

10. Two other mortgages are registered on title to the Property in the amounts of \$1,000,000 and \$2,300,000, respectively.⁵

11. The Receiver has received a legal opinion confirming that, based on the assumptions and subject to the qualifications set out therein, the Empirical Mortgage grants a valid, first-ranking charge on the Property in favour of Empirical.⁶

12. The Receiver has not yet sought an opinion as to the validity of the second and third registered mortgages.

C. *The Buyer Agreements*

13. As of the date of the Appointment Order, Ideal had entered into agreements of purchase and sale for all 15 lots at the Property (the “**Buyer Agreements**”) with various third parties (the “**Home Buyers**”).

14. On October 29, 2021, the Debtor informed the Home Buyers that it was unable to complete the Buyer Agreements.⁷

⁴ First Report, MR, Tab 2, pp. 19-20, para. 12.

⁵ First Report, MR, Tab 2, p. 29, para. 48.

⁶ First Report, MR, Tab 2, p. 29, para. 50.

⁷ First Report, MR, Tab 2, p. 21, para. 22.

15. According to information that the Debtor provided to the Receiver, Ideal received deposits totalling \$4,580,000 from the Home Buyers (the “**Deposits**”), an average of approximately \$305,000 per lot.⁸

16. On December 1, 2021, the Debtor informed the Home Buyers that the Debtor decided to sell the project to a third-party purchaser, with the sale expected to close on December 15, 2021.⁹

17. The Debtor further informed Home Buyers that Ideal intended on returning the Deposits to the Home Buyers and that, in consideration for the return of the Deposits, the Debtor requested that the Home Buyers execute termination and mutual release agreements.¹⁰

18. While some of the Home Buyers signed the releases, it is the Receiver’s understanding that the Deposits have not been returned to the Home Buyers. Certain of the Home Buyers have commenced litigation against the Debtor.¹¹

19. On January 31, 2022, the Debtor informed the Receiver that the Debtor was not holding any of the Deposits but did not provide the Receiver with any information as to the Debtor’s disposition of the Deposits.¹²

⁸ First Report, MR, Tab 2, p. 23, para. 26.

⁹ First Report, MR, Tab 2, p. 22, para. 23.

¹⁰ First Report, MR, Tab 2, p. 23, para. 27.

¹¹ First Report, MR, Tab 2, p. 23, para. 28.

¹² First Report, MR, Tab 2, p. 23, para. 29.

20. The Receiver has made numerous requests that the Debtor provide it with a full accounting setting out the disposition of the Deposits. As of the date of the Receiver's First Report, the information requested about the Deposits had not been provided to the Receiver.¹³

21. Certain of the Home Buyers are represented by counsel. Some of those parties take no position on this motion, and others' positions are unknown at this time. Other Home Buyers who are not represented have contacted the Receiver and the Receiver suggested, among other things, that they consult with counsel.¹⁴

22. One Home Buyer, Lubna Imran, has filed an affidavit opposing this motion (the "**Imran Affidavit**"), including on the bases that (i) she would be prejudiced by the termination of her contract with Ideal, and (ii) the proceeds of any sale should be preserved pending the disposition of the Home Buyers' claims against Ideal and its principals.

23. These issues are addressed below. In short, the issues raised in the Imran Affidavit have been fully addressed by the Receiver's proposed amendments to the draft order, and/or concern matters that are not yet before the Court.

24. The Receiver notes that each of the Home Buyers expressly acknowledged their subordinated position relative to the Property's other secured creditors. Paragraph 36(a)

¹³ First Report, MR, Tab 2, p. 23, para. 29.

¹⁴ First Report, MR, Tab 2, p. 24, para. 31.

of each of the Buyer Agreements provides (the “**Subordination Clause**”):

The Purchaser hereby acknowledges the full priority of any construction financing or other mortgages arranged by the Vendor and secured by the Property over his interest as Purchaser for the full amount of the said mortgage or construction financing, notwithstanding any law or statute to the contrary and agrees to execute all acknowledgments or postponements required to give full effect thereto. Without limiting the generality of the foregoing, the Purchaser agrees that this Agreement shall be subordinated to and postponed to the mortgage(s) assumed and/or arranged by the Vendor (and presently registered or to be registered on title to the Property) and any advances made thereunder from time to time...¹⁵

D. Proposed Marketing Process

25. The Receiver invited three realtors, Avison Young, CBRE Limited and Cushman & Wakefield, to submit listing proposals for the marketing and sale of the Property.¹⁶

26. Having reviewed the proposals submitted, the Receiver, with the concurrence of Empirical, proposes to enter into a listing agreement with Avison Young to market the Property for sale.¹⁷

27. The Receiver/Avison Young’s proposed marketing process for the Property (the “**Marketing Process**”) includes that:

- (a) the Property will be marketed on an “as is, where is” basis;
- (b) the Property will be listed “unpriced”;
- (c) the Property will be listed on MLS;

¹⁵ First Report, MR, Tab 2, p. 22, para. 24.

¹⁶ First Report, MR, Tab 2, p. 25, para. 35.

¹⁷ First Report, MR, Tab 2, p. 25, para. 36.

- (d) the Receiver will have the right to reject any and all offers, including the highest offer; and
- (e) any transaction by the Receiver for the Property will be subject to Court approval.

28. Full particulars of the proposed Marketing Process for the Property are set out in the Receiver's First Report.

E. The Impact of the Buyer Agreements on the Marketing Process

29. The Receiver requested that in their listing proposals, each of the realtors consider the impact of the Buyer Agreements on the realizable value of the Property.¹⁸

30. The realtors were each of the strong view that the Property should be offered for sale free of the Buyer Agreements including that, among other things: (i) home prices and construction costs have increased significantly in recent years; (ii) it would be extremely unlikely that a prospective buyer would want to assume the Buyer Agreements given that the market value of the Property is materially higher now than when the agreements were negotiated 12-14 months ago, whereas construction costs are higher today; and (iii) requiring purchasers to honour the existing Buyer Agreements will result in a significant discount in land value, of up to 80%.¹⁹

31. The Receiver has concluded that the realizations from the Property will be

¹⁸ First Report, MR, Tab 2, p. 27, paras. 41-42.

¹⁹ First Report, MR, Tab 2, pp. 27-28, paras. 43-44.

maximized if the Property is marketed with no Buyer Agreements in place.

F. The confidential appendices

32. On this motion, the Receiver also seeks an order sealing Confidential Appendices 1 to 4 of the Receiver's First Report.

33. Confidential Appendices 1 and 2 identify certain of the Home Buyers and the financial details of their agreements with the Debtor.²⁰

34. Confidential Appendices 2, 3, and 4 contain information relating to the potential net estimated realizable value of the Property, which could potentially have an adverse influence on the Marketing Process.²¹

G. Fees of the Receiver and its counsel

35. The Receiver's accounts for the period ending February 28, 2022 total \$56,281.35 inclusive of HST. Particulars of those accounts are set out at Appendix I to the Receiver's First Report.

36. Garfinkle's accounts for the period ending February 22, 2022 total \$20,350.63, inclusive of HST. Particulars of those accounts are set out at Appendix J to the Receiver's First Report.

²⁰ First Report, MR, Tab 2, p. 28, para. 47.

²¹ First Report, MR, Tab 2, p. 28, para. 47.

PART III. ISSUES, LAW & ARGUMENT

A. *Approval of the Marketing Process*

37. The Receiver's "primary task is to ensure that the highest value is received for the assets so as to maximize the return to the creditors."²²

38. In furtherance of that mandate, the Appointment Order expressly authorizes the Receiver to market the Property and to negotiate an agreement of purchase and sale.²³ The Appointment Order also authorizes the Receiver to engage real estate brokers and other consultants.²⁴

39. The approval of the Marketing Process is justified on this basis for the Receiver to carry out its mandate.

B. *The Buyer Agreements*

40. Section 100 of the *Courts of Justice Act* provides that "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."²⁵

41. The Court of Appeal for Ontario has explained that this provision includes "a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity."²⁶

²² *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508 [at para. 73](#).

²³ Appointment Order, MR, Tab 2A, p. 35, paras. 3(i) and (j).

²⁴ Appointment Order, MR, Tab 2A, p. 34, para. 3(d).

²⁵ *Courts of Justice Act*, RSO 1990, c C43, [s. 100](#).

²⁶ *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508 [at para. 41](#).

42. The Court of Appeal has also explained in exercising the power to extinguish third-party interests, an important factor to consider is whether the third parties in question have subordinated their interests contractually.²⁷

43. The other main factor to consider is the nature of the third party interest in land: where the interest is a fixed, monetary obligation, it will be more readily extinguished than where the interest is more akin to fee simple ownership.²⁸

44. In sum, the Court has ample statutory jurisdiction to extinguish entirely the Home Buyers' rights under the Buyer Agreements.

45. However, after a request from, and consultation with, counsel to two of the Home Buyers,²⁹ the Receiver has agreed to the following clause in the draft Order on this motion (the "**Buyer Agreement Clause**"):

THIS COURT ORDERS that the Property shall 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 any agreements of purchase and sale (the "**APSs**") entered into by the Debtor including any right to compel the closing of the transactions contemplated in the APSs or any of them

46. The purpose of this provision is essentially to segregate the Receiver's efforts to sell the Property from the Home Buyers' ongoing claims (or potential claims) against the Debtor or any other party arising from the Buyer Agreements.

²⁷ *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508 [at paras. 106-108](#).

²⁸ *Third Eye Capital Corp. v. Dianor Resources Inc.*, 2019 ONCA 508 [at para. 105](#).

²⁹ Specifically, counsel representing three individuals who account for two of the fifteen Buyer Agreements.

47. This provision will enable prospective purchasers of the Property to bid with the certainty that they will not be faced with claims from any Home Buyers, either (i) for the specific performance of the Buyer Agreements at prices which, in light of subsequent market developments, are no longer competitive; or (ii) to honour the deposits paid by the Home Buyers in respect of the Buyer Agreements.

48. At the same time, this provision will not affect the Home Buyers' ongoing or potential claims against the Debtor and/or its principals or any other party arising from the Buyer Agreements – it is not a full extinguishment of the Home Buyers' contractual rights (just the Home Buyers' rights against the Property), even though the Court has the power to make such an order.

49. In the Receiver's view, the Buyer Agreement Clause is in the best interests of stakeholders generally because:

- (a) it will allow the Property to be sold free from any claims that Home Buyers may have against the Property;
- (b) it will ensure that the Buyer Agreements do not impair the price that the Receiver can hope to obtain from the sale of the Property;
- (c) it appropriately balances the Home Buyers' rights with the rights of the other stakeholders; and
- (d) the Buyer Agreement Clause is within the reasonable expectations of the Home Buyers, who have all already voluntarily subordinated themselves to

the Property's secured creditors by way of the Subordination Clause in the respective Buyer Agreements, as reviewed above.

C. *Issues raised by Lubna Imran*

50. The Imran Affidavit raises two primary issues in connection with the proposed sale of the Property by the Receiver:

- (a) that the termination of her Buyer Agreement is inappropriate because "the agreement sought to be terminated by the receiver is the sole document creating a legal & contractual relationship between the home buyers and Ideal," in other words that her "root cause of action would be eliminated," and
- (b) the Property should not be sold free and clear of any Home Buyers' claims because the Property "would not be preserved for enforcement of any orders by the [Home Buyers]."

51. These are reasonable concerns, but neither justifies declining the narrow relief sought on this motion:

- (a) as set out above, the Receiver has already agreed, in consultation with counsel for other Home Buyers, to tailor the draft order such that it will not terminate any Buyer Agreements and is expressly without prejudice to any claims the Home Buyers may have against Ideal or any other party;

- (b) issues respecting the distribution of proceeds of the eventual sale of the Property are premature. Nothing on this motion affects the Home Buyers' – or any parties' – rights to seek an interest in such proceeds, once the sale occurs. This motion is only about the approval of the Marketing Process. The Receiver will have to come back to Court to seek an approval of any eventual sale, and any proposed distribution of the sale proceeds, at which time all stakeholders will have a right to be heard regarding distribution issues. In the meantime, it is in the interests of all stakeholders – including the Home Buyers – to maximize the realizable proceeds for the Property. That is what this motion is designed to accomplish.

D. The confidential appendices

52. As noted above, the Receiver seeks an order sealing Confidential Appendices 1-4 to the Receiver's First Report pending the completion of the Marketing Process and an eventual sale.

53. The circumstances in which this Court should seal part of a record were described by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*.³⁰

54. In that case, that court observed that a confidentiality order should be granted in

³⁰ *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII) [at para. 45](#) [*"Sierra Club"*].

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.

55. In the context of court-supervised sale proceedings, this Court has routinely applied *Sierra Club* 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 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”.³¹

56. Clearly, the same rationale applies in respect of this Marketing Process.

57. Sealing these materials is necessary to protect the integrity and fairness of the sales process, preventing potential bidders from gaining an unfair advantage by obtaining commercially sensitive information, and ensuring the Receiver can maximize value for the Property as the Marketing Process unfolds.³²

³¹ *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173 [at para. 32](#).

³² *GE Canada* [at paras. 32-34](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March, 2022.



Jeff Larry

SCHEDULE A – TABLE OF AUTHORITIES

CASE LAW

1. *Third Eye Capital Corp. v. Dianor Resources Inc.*, [2019 ONCA 508](#)
2. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)
3. *GE Canada Real Estate Financing Business Property Company v. 1262354 Ontario Inc.*, [2014 ONSC 1173](#)

SCHEDULE B – TABLE OF STATUTORY AUTHORITIES

[Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3](#)

PART XI Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

[Courts of Justice Act, R.S.O. 1990, c. C.43](#)

Vesting orders

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.

Interlocutory Orders

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

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