



ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-24-00716277-00CL

DATE: 17-OCT-2024

NO. ON LIST: 5

TITLE OF PROCEEDING: MARSHALLZEHR GROUP INC. v. 2174542 ONTARIO INC.
et al.

BEFORE: JUSTICE KIMMEL

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

Name of Person Appearing	Name of Party	Contact Info
Laura Culleton	Counsel for TDB Restructuring Limited, in its capacity as Court-Appointed Receiver	laurac@chaitons.com

For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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ENDORSEMENT OF JUSTICE KIMMEL:

[1] TDB Restructuring Limited ("TDB"), in its capacity as court-appointed receiver (the "Receiver") without security, of the assets, undertakings, and properties of 2174542 Ontario Inc. ("217"), Safe Harbour Homes Inc. ("Homes") and Safe Harbour Developments Inc. (collectively the "Debtors"), seeks an order:

- a. approving the marketing and sale process (the "Sale Process") for the real property consisting of approximately 60 parcels of land located at Television Road and Old Norwood Road in the Township of Otonabee-South Monaghan (the "Real Property"), including the engagement of CBRE Limited ("CBRE") as the listing broker, as described in the First Report of the Receiver dated October 10, 2024 (the "First Report");
- b. authorizing and directing the Receiver to enter into the listing agreement with CBRE;
- c. approving the Receiver's activities as described in the First Report;
- d. sealing Confidential Appendix "I" to the First Report; and
- e. approving the fees and disbursements of the Receiver and its counsel, Chaitons LLP ("Chaitons").

[2] The relief requested on this motion is supported by the first secured creditor of the Debtors (the Applicant). No party on the service list has indicated any opposition.

[3] Through an oversight, one creditor with security over two leased vehicles of the Debtors was not on the e-service list. That creditor (Ford Credit Canada Company) has no security interest in the Real Property that is the focus of this motion. Its interest in the vehicles over which it holds security is not affected by this motion. That creditor will be served at the indicated PO Box for service with a copy of the motion record and this endorsement and today's court order following the motion.

[4] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the Receiver's factum filed for this motion.

Approval of the CBRE Listing Agreement and the Sale Process

[5] To assist in assembling the information required to develop a process to market and sell the Real Property, the Receiver requested and received listing proposals from three leading real estate brokerages, including CBRE Limited, Colliers Inc. and Cushman & Wakefield ULC. All three real estate brokers submitted proposals. The Receiver has selected CBRE to act as listing agent for the Real Property, and recommends that the court approve the proposed CBRE listing agreement.

[6] CBRE is a leading commercial real estate brokerage firm, with recent relevant sales experience of development sites, including in the Peterborough area. CBRE's team managing the mandate has extensive experience buying, selling, underwriting and managing projects involving undeveloped land, both within and outside of formal restructuring proceedings.

[7] The Receiver's further reasons for selecting CBRE are set out in the First Report and the Receiver's factum. It is noted that CBRE has experience with the subject Real Property and its commission structure is comparable to fee arrangements in formal restructuring proceedings of a similar scale and the Receiver is of view that the commission rate is reasonable as it is in line with market standards for engagements of a similar nature. Other terms of this proposed engagement (detailed in Confidential Appendix 1 that is subject to a sealing order, discussed later in this endorsement) are also within the range of the other listing agreement proposals received and considered by the Receiver.

[8] The Sale Process is set out in detail in the Receiver's First Report and summarized in its factum. The court has jurisdiction to approve the Sale Process pursuant to section 243(1)(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

[9] The reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), at para 16, adopted in *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII), at para.6. 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] The proposed Sales Process accords with the *Soundair* principles. It is fair, open, and transparent and is intended to canvass the market broadly in an orderly basis in order to obtain the highest and best price in a reasonable time period with an experienced listing agent, and will encourage a competitive and fair environment for the solicitation of offers for the sale of the Real Property. Its duration designed to be sufficient to allow interested parties to perform due diligence and to submit offers, but at the same time, efficient. The Sale Process is designed to be flexible in that the lots can be sold either *en bloc* or by lot individually.

[11] Further, the Sale Process is recommended by the Receiver, to whom the court grants considerable deference, and there is no opposition. See *Regal Constellation Hotel Ltd., Re*, 2004 CanLII 206 (ON CA), at para 23; see also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857, at paras. 43-45 citing *Marchant Realty Partners Inc. v. 2407533 Ontario Inc.*, 2021 ONCA 375 at para 15.

[12] The CBRE listing agreement and the Sale Process are approved.

Sealing of Confidential Appendix 1

[13] The Receiver seeks a sealing order over Confidential Appendix "1" to its First Report until the completion of the sale transaction following the Sale Process or further order of the Court.

[14] This Confidential Appendix contains a summary of listing proposals includes valuations from each real estate brokerage listed above which, if disclosed, the Receiver believes could negatively impact the value of a transaction for the sale of the Real Property. The Receiver is not aware of any party that will be prejudiced if the information contained in the Receiver's Confidential Appendix "1" is sealed.

[15] It is just, appropriate and necessary to the integrity of this receivership proceeding that the Confidential Appendix be sealed:

- a. It contains sensitive information about the value of the Real Property, the disclosure of which prior to the identification of a sale transaction and completion of the sale transaction in respect of the Real Property could be prejudicial to the stakeholders of the Debtors could as it could lead to a reduction in any future sale of the Real Property.
- b. Sealing this Confidential Appendix is necessary and appropriate to ensure that the Receiver can maximize value for the Real Property, in the interests of all stakeholders.
- c. Protecting the information contained within the Confidential Appendix is an important commercial interest that should be protected.

- d. There is no other reasonable alternative to sealing that will prevent Confidential Appendix from becoming public.

[16] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC requirements, as modified by the reformulation of the test in *Sherman Estate v. Donovan*, 2021 SCC 25, at para 38. Preservation of the confidentiality of information inherent in a sale process is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 85 when limited to only that material that contains the confidential and sensitive information and only for as long as may be necessary, as has been proposed in this case since it will terminate upon the completion of a sale transaction (or further order of the court). This Court has a long history of applying 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 (see, for example, *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 ONSC 1173 at para. 34).

[17] Counsel is directed to ensure that the sealed Confidential Appendix is provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the Confidential Appendix can physically sealed. Counsel is further directed to apply, at the appropriate time, for an unsealing order.

Approval of the Receiver's Activities and the Fees and Disbursements of the Receiver and its Counsel

[18] The activities of the Receiver since the issuance of the Appointment Order are described in the First Report at paragraphs 13-28. The Receiver considers all of these activities to have been necessary and states that they were undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order.

[19] The proposed form of order contains the appropriate qualification regarding the approval of the Receiver's activities, in accordance with the court's practice.

[20] It is common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter. See 21 *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 2 and 23; *Triple-I Capital Partners Limited v. 1241 1300 Canada Inc.*, 2023 ONSC 3400, at paras. 65-66. The Receiver's activities as described in the First Report are approved.

[21] The Receiver has provided services and incurred disbursements during the period of May 29, 2024, to September 30, 2024 as set out in the Affidavit of Bryan Tannenbaum sworn October 9, 2024 (the "Tannenbaum Affidavit"), totaling \$125,660.35 (\$111,206.61 in fees and disbursements, plus HST of \$14,453.75).

[22] During the period from June 3, 2024, to and including August 31, 2024, Chaitons expended a total of 14.60 hours in connection with this matter, giving rise to fees and disbursements totaling \$8,579.97 (\$7,603.25 in fees and disbursements, plus HST of \$976.72), as more particularly set out in the Affidavit of David Im sworn October 4, 2024 (the "Im Affidavit"). The Receiver is of the view that the fees and disbursements set out in the Im Affidavit, are reasonable in the circumstances.

[23] The Appointment Order at paragraphs 17 to 19 provide that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts. The fees and disbursements are fair and reasonable and have been properly incurred. The hourly rates charged by the Receiver and its counsel are consistent with comparable firms practicing in the area of insolvency in the Toronto market. The fees of the Receiver and its counsel for which approval is sought are supported by fee affidavits.

[24] I am satisfied that these fees and disbursements are fair and reasonable having regard to the relevant factors that the Court of Appeal identified in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII), at paras. 33 and 45. They are approved.

Order

[25] The Order signed by me today shall have immediate effect without the necessity of formal issuance and entry.

A handwritten signature in cursive script that reads "Kimmel J.".

KIMMEL J.