ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.:	**CV-24-00717917-00CL**	**DATE:**	**December 16, 2024**

NO. ON LIST: 2

TITLE OF PROCEEDING: **MARSHALLZEHR GROUP INC. v. SPOTLIGHT ON COURTLAND INC.**

BEFORE JUSTICE: **Justice OSBORNE**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Maya Poliak Laura Culleton	Court-Appointed Receiver	maya@chaitons.com laurac@chaitons.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Philip Cho Phil Wallner	Respondent, Spotlight on Courtland Inc.	pwallner@weirfoulds.com pcho@weirfoulds.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Alexander Soutter	Stalking Horse Bidder	ASoutter@tgf.ca

ENDORSEMENT OF JUSTICE OSBORNE:

1. The Court-appointed Receiver of the properties of Spotlight on Courtland (the Debtor) seek an order:

    a. approving the Transaction contemplated by the Stalking Horse Asset Purchase Agreement dated October 30, 2024 with Courtland Kitchener Inc. as Purchaser;

    b. transferring all of the rights, title and interest of the Debtor in and to the Purchased Assets to the Purchaser, following delivery of the Receiver's certificate, free and clear of encumbrances;

    c. approving the activities of the Receiver as described in the Second Report dated December 6, 2024;

    d. approving the fees and disbursements of the Receiver and its counsel;

    e. approving distributions of the net sale proceeds from the Transaction; and

    f. discharging the Receiver upon completion of the remaining tasks.

2. Defined terms in this Endorsement have the meaning given to them in earlier Endorsements made in this proceeding and/or in the motion materials, including the Second Report of the Receiver dated December 6, 2024 and the Supplement thereto dated December 13, 2024, unless otherwise stated.

3. The Service List has been served. The relief sought today is supported by the senior secured creditor, MarshallZehr, who is also the fulcrum creditor, in that if the Transaction is approved, and the corresponding distributions are authorized, it will still suffer a shortfall on its first ranking mortgage secured debt. It is also, naturally, supported by the proposed Purchaser.

4. The Debtor, Spotlight on Courtland, appears today and seeks what it candidly admits is one final opportunity to attempt to raise funds to pay out MarshallZehr. The Debtor does not seek an adjournment of the motion, but rather does not oppose the relief sought and consents to the order approving the Transaction, but requests that its effect be suspended for four days until Friday, December 20, 2024 to give it a very brief opportunity to demonstrate to the Receiver that its proposed financing commitment is firm and unconditional.

5. If the financing is firm, it requests that the Receiver accept the bid of the Debtor supported by committed financing as a bid in the Sale Process, with the result that the Sale Process would proceed to Phase 2 and continue as if the bid of the Debtor, with financing, had been received by the Bid Deadline.

6. If the financing commitment is not firm and unconditional by Friday, December 20, 2024, the Debtor submits that with its consent, the Transaction approval order would be effective immediately.

7. For the reasons below, I am satisfied that the proposed relief should be granted, the Transaction should be approved, and the approval should be effective immediately. In my view, it is not appropriate to reopen and/or extend the Sale Process.

8. The principal asset of the Debtor is the Real Property located at Courtland Avenue and Brockline Rd. in Kitchener, Ontario. It was approved for the development of four condominium towers with approximately 2500 residential units of affordable housing in addition to day care and social services facilities.

9. The Applicant is a senior secured creditor of the Debtor. The acquisition of the Real Property was financed in part by a loan from the Applicant in the principal amount of $19,950,000. As security for its loan, MarshallZehr was granted a first ranking mortgage, and a general security agreement from the Debtor. The balance of the purchase price for the Real Property was financed, as the Receiver learned after its appointment, by a vendor takeback mortgage. It was never registered on title and that mortgagee has acknowledged that it is not asserting priority over the Applicant's loan.

10. The Applicant brought this Application following on a default by the Debtor. That default is not disputed by the Debtor.

11. This Court approved a Sale Process for the Real Property on November 12, 2024 and authorized the Receiver to enter into the Stalking Horse APS.

12. The motion to approve the Sale Process was opposed by the Debtor who sought an adjournment to allow it to refinance the loan facility outstanding in favour of the Applicant pursuant to a commitment letter the Debtor had received from another lender.

13. Discussions ensued between the Debtor and the Receiver after the Sale Process Order was issued about the ability of the Debtor to repay the amounts owing to the Applicant and the Receiver in full. Payment was not received by the LOI Deadline and instead, counsel for the Debtor advised that Debtor (or an affiliate) would be submitting an LOI in the Sale Process.

14. As of the LOI Deadline established by the Sale Process Order, only one letter of intent (the "LOI") was received. It was from a business affiliate of the Debtor, was not conditional on financing and was for an amount that exceeded the Stalking Horse APS.

15. The LOI provided the payment of the purchase price would be satisfied by Cash consideration of $10 million with the balance to be financed by a US lender who was unnamed. To evaluate the LOI, the Receiver inquired of the Debtor and of the affiliate which had submitted the LOI, certain information to determine whether the LOI reflected a reasonable prospect of culminating in a Qualified Bid in accordance with section 8(d) of the Sale Process.

16. The information requested included the following:

    a. evidence of the bidder's $10 million equity investment;

    b. the unconditional commitment letter for the mortgage financing; and

    c. particulars of the relationship between the Debtor and the affiliate.

17. Ultimately, the Receiver was not satisfied by the bidder that it had the financial ability to close the proposed transaction, with the result that the Receiver determined that the LOI did not reflect a reasonable prospect of culminating in a Qualified Bid and therefore did not constitute an LOI in the Sale Process.

18. The further result was that the Sale Process was deemed to be terminated (since no other bid was received) and the Stalking Horse Bid was deemed to be the Successful Bid as defined in the Sale Process Order.

19. The Receiver therefore seeks approval of the Stalking Horse APS, and the Transaction contemplated therein.

20. If that approval is granted, the Receiver also seeks authorization to make the proposed distributions.

21. As noted above, the Debtor seeks an additional four days to allow it to demonstrate a firm financing commitment.

Transaction Approval

22. The *Court of Appeal for Ontario* set out the factors to be considered on a sale approval motion in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1:

    a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

b. the efficacy and integrity of the process by which offers are obtained;

c. whether there has been unfairness in the working out of the process; and

d. the interests of all parties.

23. I am satisfied that these factors have been met here. The Sale Process was carried out in accordance with the terms of the Sale Process Order of this Court. All potential purchasers were treated fairly and equitably, and all potential purchasers that executed the non-disclosure agreement were provided access to the virtual data room. The Receiver and its real estate broker, the experienced firm of Colliers, facilitated due diligence requests and responses.

24. The market was fully canvassed. The Receiver is of the view that exposing the Real Property to the market for additional time would not result in a superior transaction, and that the Transaction provides for the highest recovery available for the benefit of the Debtor's stakeholders in the circumstances. Ongoing carrying costs (colloquially referred to as the burn rate) are extremely high. Those costs are approximately $500,000 per month, which costs continue to accrue.

25. I defer to the judgment of the Receiver with respect to its analysis of the LOI and its determination, as contemplated in the Sale Process Order, that the LOI was unlikely to culminate in a Qualified Bid since the Receiver was not satisfied with the responses to its due diligence as set out above. This is consistent with the well-established reluctance on the part of courts to second-guess the expertise and considered business decisions of their receivers in arriving at their recommendations: see *Regal Constellation Hotel Ltd., Re,* (2004), 71 OR (3d) 355, CanLII 206 (ONCA) at para. 23, quoting with approval from *Soundair* at paras. 21 and 58.

26. I observe that the conclusion of the Receiver is not challenged today by the Debtor. The Debtor does not challenge any part of the Sale Process, including but not limited to the evaluation of its bid. Rather, its counsel submitted, with admirable candour and forthrightness, that the Debtor was seeking the indulgence of the court with respect to an additional period of time to demonstrate that it could raise sufficient funds to put in a bid capable of being accepted.

27. The Debtor has been provided with multiple opportunities to redeem the Applicant's mortgage here, and to date has not been able to secure alternative financing. I further observe that the LOI bidder is the same party that submitted the mortgage commitment dated October 31, 2024 just prior to the Sale Process referred to above, which did not close.

28. I accept the position of the Receiver that it has seen no evidence to suggest that having failed to complete that financing transaction, the LOI bidder will now be able to obtain funds necessary to complete a purchase of the Real Property. In my view, given that the LOI was unconditional, and further that it was received in the context of the challenging history of this matter, it was reasonable for the Receiver to request evidence of funds in an amount sufficient to satisfy the bid if successful. That evidence was not provided.

29. Accordingly, I am satisfied that the Receiver appropriately exercised its discretion in determining that the LOI did not qualify as an LOI in the Sale Process.

30. That brings us to today. Late yesterday, the Debtor filed an affidavit of Ms. Sherry Larjani, who is an officer of the Debtor. In that affidavit, it states that the bidder who submitted the LOI referred to above (and who was unable to provide evidence of its financial ability to close the Transaction) has now assigned the LOI to another entity, 16530567 Canada Inc. ("165").

31. That new entity, 165, wishes to enter into an agreement of purchase and sale to purchase the Property for the same amount contemplated in the LOI. I pause to observe, for completeness, that that amount would exceed the purchase price contemplated by the Stalking Horse APA by 10%.

32. The parties are related: Ms. Larjani is also a director of 165.

33. There is no affidavit from or on behalf of 165. However, the Debtor has filed email correspondence from an Ontario lawyer, Davide Di lulio, confirming that he has funds in the amount of $10 million in trust in respect of the proposed bid. Mr. Di lulio was not present in Court today. There is no affidavit from him.

34. Ms. Larjani's Affidavit states that 165 has obtained a letter of intent from "Daniel Green in trust for company to be incorporated, which confirms the interest of Mr. Greene in financing the Property". Attached to Ms. Larjani's Affidavit as Exhibit "C" is a copy of that letter of intent. It is at best a confirmation of interest and is highly conditional. Among other things:

    a. it is dated December 4, 2024 without any explanation as to what, if anything, has transpired in the intervening period of almost 2 weeks (i.e., have any of that due diligence conditions been satisfied or waived? There is no evidence either way.);

    b. the "Lender" is confirmed to be Mr. Greene in trust for company to be incorporated. "Without any personal liability". Accordingly, it is clear that Mr. Greene desires to have no exposure with respect to the document;

    c. it is described as a "Funding Proposal to confirm an interest." And states that "the general terms and conditions listed below shall, upon confirmation by Borrower, be incorporated into a Commitment to Fund, based on the requirements shown herein". That shall take place "upon completion of underwriting, submission of all current and future documentation on Project/Borrower, and site visit … and the Commitment to Fund will include "final underwriting conditions";

    d. importantly, it states that "this Letter of Intent is not an approval or commitment to fund but is the first step in our funding discussions. All calculations, pricing, downpayments, and rates are subject to Lender underwriting, site visit, project/borrower verification, and approved construction draw schedule";

    e. it states that "it is expressly understood and agreed that this is a letter of intent only, and that no liability or obligation of any nature whatsoever is intended to be related between the parties"; and

    f. it expires after December 5, 2024 unless accepted by signature and receipt of a wire transfer of $50,000. It is signed by Ms. Larjani as both "Borrower" and as "Guarantor". There is no evidence as to when the letter of intent was accepted (the date is left blank), there is no evidence of whether the $50,000 deposit to confirm acceptance was paid, and there is no evidence as to the terms of what appears to be a required guarantee.

35. In short, there is no evidence upon which I can conclude that there is any realistic, let alone likely, prospect of this financing being firm in the near future, or at all. It is very clear on the terms of the letter of intent itself that there is significant and substantive due diligence to be undertaken before the funding commitment would be firm. The actual lender is not identified at all. Mr. Green is clear that he does not wish to accept any personal liability. The proposed lender is, as noted above, related to the Debtor and its principals. The assignment agreement is in respect of the earlier LOI, and is therefore an assignment of a bid that had already been rejected by the Receiver as part of the Sale Process. They have had multiple opportunities to demonstrate a firm financing commitment, and regrettably have been unable to do so each time.

36. MarshallZehr, the fulcrum creditor, supports the Transaction, notwithstanding that it will still suffer a shortfall on its debt of approximately $3 million.

37. In my view, the Sale Process was conducted fairly, transparently, and in accordance with the earlier order of the Court authorizing it. None of that is challenged by the Debtor. I am not persuaded that it is just, equitable or fair to reopen the Sale Process, effectively extend the bid deadline, and then rerun the process at the request of an unsuccessful bidder who wishes to simply improve its bid after the fact, and over the objections of the fulcrum creditor, and in circumstances where the monthly burn rate is approximately $500,000. The proposed Transaction has a closing date of January 7, 2025, and will therefore minimize additional costs and losses.

38. The Court of Appeal for Ontario has clearly stated that, in considering a request by an encumbrancer to redeem a mortgage on property in receivership (which is effectively what the Debtor here is), a court should consider the impact that allowing that encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process. Where a court-approved sales process has been carried out in a manner consistent with the *Soundair Principles*, a court should not permit a later attempt to redeem to interfere with the completion of the sales process. The court should engage in a balancing analysis of the right to redeem (again, effectively, what the Debtor here is seeking to do) against the impact on the integrity of the Court-approved receivership process: *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, quoting with approval from *B&M Handelman Investments Limited v. Mass Properties Inc.* (2009), 2009 CanLII 37930 (ON SC), 55 C.B.R. (5th) 271 (Ont. S.C.), where the court stated:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is commonplace, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

39. For all of these reasons, the Transaction is approved.

Proposed Distribution and Lien Claim

40. I am also satisfied that the proposed Distribution should be approved.

41. The Receiver has obtained a legal opinion from its counsel to the effect that, subject to standard assumptions, the security in favour of MarshallZehr, including the mortgage, is valid and enforceable.

42. As noted above, mortgagee who holds the unregistered vendor takeback mortgage does not challenge the priority of the Applicant's mortgage.

43. Following the appointment of the Receiver, three companies (185119 Ontario Inc., 2381509 Ontario Limited and 2427499 Ontario Limited), operating collectively as a partnership under the name of Barry Bryan Associates, issued a claim against several parties, including the Debtor and registered a lien against the Real Property in the amount of $84,507.

44. I am advised by counsel for the Receiver that the Receiver and the construction lien claimant defined in the Supplement to the Receiver's Second Report as "Barrie Associates" have reached a settlement with respect to the lien claimant's claim. The parties agree that notwithstanding the distributions prescribed in the Ancillary Order granted today, the Receiver is authorized and directed to distribute to Barrie Associates, on closing of the Transaction, the sum of $6,000 in full and final satisfaction of their claim.

45. Accordingly, there is no reason why the proposed Distribution, with the above amendment, ought not to be approved. As noted above, MarshallZehr, the fulcrum creditor, will still suffer a shortfall.

Approval of Activities and Fees of Receiver

46. The activities of the Receiver are fully described in the Second Report. I am satisfied that they were undertaken in good faith, were reasonable, appropriate, accretive to the progress of this receivership, and consistent with the mandate given to the Receiver in the original Appointment Order.

47. The stakeholders have had the opportunity to raise any concerns.

48. The activities are approved.

49. The fees of the Receiver and its counsel, inclusive of disbursements, are set out in the fee affidavits appended to the Second Report. I am satisfied that the fees are fair and reasonable in the circumstances, consistent with the activities that I have approved and represent rates that are consistent with and comparable to rates charged by similar firms. For all of these reasons, the fees are reasonable and appropriate, and they are approved: *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 at paras. 44-45.

Discharge and Release

50. The Real Property is the primary asset of the Debtor. Given the approval of the Transaction, the administration by the Receiver will be substantially complete following closing. It makes good practical sense to avoid incurring the costs of making a further motion to the Court for discharge and instead, seeking a discharge now to be effective upon the filing by the Receiver of its certificate confirming that it has completed its remaining duties as fully described at paragraph 42 of the Second Report.

51. Accordingly, the Receiver is discharged upon the filing of its certificate.

Result and Disposition

52. For all of these reasons, the motion is granted. Both the Approval and Vesting Order and the Ancillary Relief Order I have signed today are effective immediately and without the necessity of issuing and entering.