

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

B E T W E E N :

MARSHALLZEHR GROUP INC.

Applicant

- and -

APPLEWOOD MARKETPLACE INC.

Respondent

**IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE
BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, c. B-3, AS AMENDED AND
SECTION 101 OF THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C-43, AS AMENDED**

**FACTUM OF THE RECEIVER
(Returnable December 15, 2022)**

December 8, 2022

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assets, undertakings and properties of Applewood
Marketplace Inc.

PART I - OVERVIEW

1. On the application of MarshallZehr Group Inc. (“**MarshallZehr**”), and by Order of Madam Justice Gilmore of the Ontario Superior Court of Justice, Commercial List dated August 3, 2022 (the “**Appointment Order**”), Ernst & Young Inc. was appointed as receiver and manager (in such capacities, the “**Receiver**”) over all of the assets, undertakings and property of Applewood Marketplace Inc. (the “**Debtor**”) pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*.¹

2. On September 23, 2022, the Court granted an order (the “**Sale Process Order**”) approving a sale process (the “**Sale Process**”) and associated bidding procedures (the “**Bidding Procedures**”) in the form attached as Schedule “A” to the Sale Process Order. The Sale Process was implemented in accordance with the Sale Process Order and has successfully concluded.

3. On October 14, 2022, the Court granted an order (the “**Claims Process Order**”), approving and establishing a procedure for the solicitation, resolution and barring of certain claims against the Debtor (the “**Claims Process**”), including the claims (“**Lien Claims**”) of any person who supplied services and/or materials to the Applewood Project (“**Lien Claimants**”) on or before the date of the Appointment Order, as outlined in the Second Report of the Receiver dated October 12, 2022 (the “**Second Report**”).

4. The Receiver seeks an Order (the “**Approval and Vesting Order**”), substantially in the form of the draft order attached at **Tab 3** of the within Motion Record:

¹ First Report of the Receiver dated September 16, 2022 (the “**First Report**”), Tab 2 to the Motion Record of the Receiver dated September 16, 2022 at para 1 and Appendix “A”.

- (a) approving the asset purchase agreement between the Receiver (in this capacity, the “**Vendor**”) and MarshallZehr Group Inc., on behalf of one or more of its nominees (in this capacity, the “**Purchaser**”) dated December 2, 2022 (the “**Purchase Agreement**”), and authorizing the Receiver to complete the transaction contemplated therein (the “**Transaction**”);
- (b) upon execution and delivery of a certificate by the Receiver containing confirmation of the closing of the Transaction, vesting in the Purchaser the Debtor’s rights, title and interest in and to the assets described in the Purchase Agreement (the “**Purchased Assets**”), free and clear of all liens, charges, security interests and encumbrances, except for permitted encumbrances;
- (c) approving the Third Report of the Receiver dated December 8, 2022 (the “**Third Report**”), and the conduct and activities of the Receiver as described therein; and
- (d) sealing Confidential Appendix 1 to the Third Report until further Order of the Court.

PART II - THE FACTS

A. Debtor’s Business and Property

5. The Debtor is an Ontario corporation. It is the owner and developer of a real estate development project known as the Applewood Project, located at the Property (as defined below) in London, Ontario (the “**Project**”).²

² First Report at paras 2 and 10.

6. The assets, undertakings and property of the Debtor include, among other things, the following real property, as more fully described in Schedule “A” to the Appointment Order:³

(a) “**Phase 1**”, being the development of the lands legally described in PIN 08145-1573 (LT) (the “**Phase 1 Property**”); and

(b) “**Phase 2**”, being the development of the lands legally described in PIN 08145-1588 (LT), PIN 08145-1589 (LT), PIN 08145-1591, PIN 08145-1592 (LT), and PIN 08145-1593 (the “**Phase 2 Property**”, and, together with the Phase 1 Property, the “**Property**”).

7. Prior to the granting of the Appointment Order, the Phase 1 Property was being developed by the Debtor as an apartment building with commercial space on the ground floor, which but for the financial issues of the Debtor, was expected to be completed by year-end. The Phase 1 Property is approximately 75% complete. At the time of the Appointment Order, construction at the Phase 1 Property had ceased for over two months.⁴

8. The Phase 2 Property is comprised of vacant land, which has had some servicing work undertaken to ready it for development, but active construction has not commenced.⁵

B. Secured Debt Obligations of the Debtor

9. As at the close of business on September 15, 2022, the indebtedness owing to MarshallZehr by the Debtor was \$60,072,600.47 (the “**Indebtedness**”), which amount continues to increase due to the accrual and non-payment of *per diem* interest of approximately \$39,775.75 and administration fees of \$20,000 per month.⁶

³ First Report at para 2.

⁴ First Report at paras 12 to 14.

⁵ First Report at para 15.

⁶ First Report at paras 19 and 20.

10. In addition to the outstanding Indebtedness, there are significant construction liens registered against the Property. As of November 8, 2022, the Receiver has received 30 Lien Claims from Lien Claimants.⁷

C. Sale Process and Successful Transaction

11. Pursuant to section 4(l) of the Appointment Order, the Receiver is empowered and authorized to, among other things, market any and all of the Property for sale.⁸ The Receiver implemented a Sale Process in accordance with the Sale Process Order, which Sale Process has now successfully concluded.⁹

12. As part of the Sale Process, the Receiver sent a teaser document outlining the details of the Property to 275 potential purchasers, and placed a “For Sale by Receiver” sign on the property on Sunningdale Road to attract even more potential purchasers.¹⁰ In addition, the Receiver prepared a data room containing information with respect to the Property, coordinated 10 tours of the Property with potential purchasers, and facilitated meetings between potential purchasers and, *inter alia*, the design professionals working on the Project.¹¹ The Receiver also extended the deadline for submissions of bids from November 8, 2022 to November 16, 2022, and then again to December 2, 2022.¹²

13. Following a rigorous Sale Process, the Receiver received nine bids from prospective purchasers. Of the bids received, the bid received from MarshallZehr (the “**MZ Offer**”) offers

⁷ Third Report of the Receiver dated December 8, 2022 (the “**Third Report**”), Tab 2 to the Motion Record of the Receiver dated December 8, 2022 at para 44.

⁸ Appointment Order, Appendix “A” to Third Report.

⁹ A copy of the Sales Process Order is at Appendix “C” to the Third Report.

¹⁰ Third Report at paras 20-21.

¹¹ Third Report at para 23-24.

¹² Third Report at para 27.

the highest recovery on the Property.¹³ The MZ Offer has no conditions and complies with the Sale Process.¹⁴

14. The MZ Offer contemplates the payment to the Receiver of all amounts ranking in priority to the Indebtedness, including: (i) the Receiver's borrowings, fees and costs (including the fees and costs of its legal counsel), as well as commitments entered into by the Receiver under the Receiver's Charge granted in the Appointment Order, (ii) the Statutory Holdback Amounts of the Lien Claimants, as to be determined by the Receiver under the Claims Process Order, and (iii) any all fees or taxes payable on transfer of the property to the Purchaser on the closing of the transaction.¹⁵

15. The Receiver entered into the Purchase Agreement with MZ on December 2, 2022.¹⁶ The Purchase Agreement separates the purchase price being paid for the Phase 1 Property and the Phase 2 Property. Based on a Closing Date of January 15, 2023, the Receiver estimates that the Phase 1 Purchase Price will be approximately \$34.7 million and the Phase 2 Purchase Price will be approximately \$32.1 million.¹⁷

16. The Purchase Agreement is conditional upon, among other things, the granting of an Approval and Vesting Order. The Receiver recommends that this Court approve the Purchase Agreement and direct the Receiver to carry out its terms, together with any amendments or other closing documents deemed necessary by the Receiver.

¹³ Third Report at para 29.

¹⁴ Third Report at para 33.

¹⁵ Third Report at para 34.

¹⁶ Third Report at para 35.

¹⁷ Third Report at paras 37-38.

PART III - ISSUES

17. There are two issues before the Court:

- (a) whether the Purchase Agreement and the Transaction should be approved; and
- (b) whether Confidential Appendix 1 to the Third Report should be sealed.

PART IV - LAW & ARGUMENT

A. The Purchase Agreement and the Transaction Should be Approved

18. Section 243 of the *Bankruptcy and Insolvency Act* provides jurisdiction to the Court to authorize a receiver to enter into an agreement to sell property and, in furtherance of that power, to grant an order vesting the purchased property in the purchaser.¹⁸ In addition, a court-appointed receiver has the powers set out in the order by which they were appointed. The Appointment Order in this proceeding authorizes the Receiver to market and sell the Property.

19. In Ontario, the power to grant a vesting order is conferred by section 100 of the *Courts of Justice Act*.¹⁹

20. In determining whether to approve a proposed sale of assets by a Court-appointed receiver, Ontario courts have consistently applied the factors set out by the Court of Appeal for Ontario in *Royal Bank of Canada v. Soundair Corp.*,²⁰ namely:

- (a) whether the receiver has made sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;

¹⁸ *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para [85](#).

¹⁹ *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 100](#).

²⁰ *Royal Bank of Canada v. Soundair Corp.* (1991), [83 DLR \(4th\) 76](#) (ONCA).

- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.²¹

21. The Receiver respectfully submits that the *Soundair* principles have been satisfied and the Transaction is commercially reasonable in the circumstances.

22. The details of the Sale Process, as set out in the Third Report, reflect the significant efforts of the Receiver to obtain the best possible price while acting fairly, efficiently and with integrity in considering the interests of all stakeholders. The market was widely canvassed for prospective purchasers and the Sale Process did not generate any offers better than the MZ Offer.²²

23. In view of rapidly changing dynamics in the real estate sector, including rising interest rates and increases in construction costs, and the offers generated by the Sale Process, there is no evidence that further time spent marketing the Property would result in a superior transaction. In any event, the possibility of generating a superior offer upon remarketing of the Property must be weighed against the fact that the Receiver is incurring significant holding costs of approximately \$60,000 per week for security, insurance, property taxes, energy costs, staffing, as well as professional fees for the Receiver and its legal counsel.²³

24. There has been no unfairness in the process, and no party has been prejudiced or excluded. The range of competitive offers submitted to the Receiver evidences the Receiver's significant marketing efforts and supports the Receiver's conclusion that the proposed Transaction is the highest and best offer available in the circumstances.

25. The Court's approval of the Purchase Agreement and the Transaction, and the associated vesting in favour of the Purchaser's nominee(s), are in the stakeholders' best economic interest. The Receiver's request for the Approval and Vesting Order falls within the "*general principle that the Court will be loathe to interfere with the business judgment of a Receiver and refuse to approve a transaction recommended by a Receiver acting properly in the fulfilment of its obligations as an officer of the Court.*"²⁴

B. Sealing Order

26. The Receiver seeks a sealing order in respect of Confidential Appendix 1 to the Third Report, which contains a summary of the offers received during the Sale Process.

27. A Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and as not forming part of the public record.²⁵

28. The test for determining whether a sealing request ought to be granted in a commercial context was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, namely:

- (a) when such a request is necessary 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) when the salutary effects of the confidentiality request, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the

²¹ *Royal Bank of Canada v. Soundair Corp.* (1991), [83 DLR \(4th\) 76](#) at para 16 (ONCA).

²² Third Report at para 40.

²³ Third Report at para 40.

effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.²⁶

29. In *Sherman Estate v Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that: (i) the openness poses a risk to an important interest of the public; (ii) the request sought is necessary to prevent the risk to the identified interest as reasonable alternative measures will not prevent said risk; and (iii) the benefits of the request outweigh the negatives as a matter of proportionality.²⁷

30. In the insolvency context, when assets are being sold pursuant to a court process, it is common to seal bids and other commercially sensitive material, such as valuations and sale price, in the event that a further listing is required should the contemplated proposed transaction not close.²⁸

31. The disclosure of commercially-sensitive information in this case would likely have a detrimental impact on any future sale efforts of the Receiver, in the event that the proposed Transaction does not close. The Receiver respectfully submits that there is no other reasonable way to preserve and ensure the viability and integrity of any future remarketing and sale process. The benefits of the protective order sought outweigh any deleterious impact on the “open court” principle. No stakeholder will be materially prejudiced by such an order.

²⁴ *Royal Bank of Canada v. Soundair Corp.* (1991), [83 DLR \(4th\) 76](#) at para 16 (ONCA).

²⁵ *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 137\(2\)](#).

²⁶ *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), [2002] 2 S.C.R. 522 at para [53](#) (SCC).

²⁷ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para [38](#).

²⁸ *Romspen Investment Corporation v. Hargate Properties Inc.*, [2012 ABQB 412](#) at paras [2](#), [11](#), and [13](#).

32. Finally, the request for a sealing order embodies the principle of proportionality. The Receiver seeks to protect only the material terms of the offers received in the Sale and only until the closing of the proposed Transaction.

PART V - ORDER REQUESTED

33. For the reasons stated herein, the Receiver respectfully requests that the Court grant the Approval and Vesting Order, substantially in the form of the draft order at Tab “3” of the Receiver’s Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of December, 2022.



Steven L. Graff
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Lawyers for Ernst & Young Inc., in its capacity as Court-appointed receiver and manager of all of the assets, undertakings and properties of Applewood Marketplace Inc.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Romspen Investment Corporation v. Hargate Properties Inc.*, [2012 ABQB 412](#);
2. *Royal Bank of Canada v. Soundair Corp.* (1991), [83 DLR \(4th\) 76](#) (ONCA);
3. *Sherman Estate v. Donovan*, [2021 SCC 25](#);
4. *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), [2002] 2 S.C.R. 522 (SCC);
5. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#).

**SCHEDULE “B”
RELEVANT STATUTES**

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. R.S.O. 1990, c. C.43, s. 100.

Sealing documents

137 (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.

MARSHALLZEHR GROUP INC.
Applicant

and

APPLEWOOD MARKETPLACE INC.
Respondent

Court File No.: CV-22-00684562-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE RECEIVER
(Motion returnable on December 15, 2022)**

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