

Court File No.: CV-21-00668726-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)**

B E T W E E N:

THE MANUFACTURERS LIFE INSURANCE COMPANY

Applicant

- and -

RIVERSIDE PROFESSIONAL CENTRE INC.

Respondent

APPLICATION UNDER Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

FACTUM OF THE RECEIVER

December 13, 2021

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FACTUM OF THE RECEIVER

PART I - OVERVIEW¹

1. This factum is filed by MNP Ltd., in its capacity as the Court-appointed receiver (in such capacity, the “**Receiver**”), without security, of all of the assets, undertakings and properties (collectively, the “**Property**”) of Riverside Professional Centre Inc. (“**Riverside**”) acquired for, or used in relation to, a business carried on by Riverside, including all proceeds thereof, in support of the Receiver’s motion for an order for, among other things:

- (a) approving the first report of the Receiver dated December 7, 2021 (the “**First Report**”), and the actions, conduct and activities of the Receiver described therein;

¹ Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the first report of the Receiver dated December 7, 2021 (the “**First Report**”); Motion Record, Tab 2.

- (b) sealing the unredacted copies of the marketing and listing proposals (the “**Marketing and Listing Proposals**”) of Colliers Macauley Nicolls Inc. (“**Colliers**”) and CBRE Limited (collectively with Colliers and a third brokerage that did not authorize its proposal being included in the Receiver’s materials, the “**Brokers**”), which Marketing and Listing Proposals are appended to the First Report as Confidential Appendix “A”;
- (c) authorizing and directing the Receiver to execute the listing agreement appended to the First Report as Appendix “B” (the “**Listing Agreement**”);
- (d) approving a stalking horse sale process for the sale of the Property (the “**Sale Process**”);
- (e) approving the stalking horse asset purchase agreement between The Ottawa Hospital (“**TOH**”) and the Receiver dated as of December 7, 2021 (the “**Stalking Horse Agreement**”), solely for the purposes of being the “stalking horse” bid under the Sale Process (the “**Stalking Horse Bid**”); and
- (f) approving the payment of the Break Fee provided in section 4.2 of the Stalking Horse Agreement (the “**Break Fee**”).

2. Riverside’s primary asset is an approximately 48,000 square foot, four storey medical office building (the “**Building**”). The Building is located on approximately one acre of land owned by TOH (the “**Demised Premises**”) and currently leased by TOH to Riverside pursuant to a ground lease dated September 1, 1989 (the “**Ground Lease**”). The “Property” as herein defined consists principally of Riverside’s freehold interest in the Building and leasehold interest in the Demised Premises.

First Report at para 8; Motion Record, Tab 2.

3. The Ground Lease has an initial 49-year term that expires in 2038, with an option to renew for a further 49-year term. The Ground Lease includes provisions granting first rights of refusal to TOH, pursuant to which TOH has the right to meet the terms of any *bona fide* third party offer that Riverside is prepared to accept for the Building and/or the Demised Premises (the “ROFR”).

First Report at para 9; Motion Record, Tab 2.

4. With respect to developing a marketing and solicitation strategy for the Property, the Receiver sought and obtained assessments of potential value and marketing strategy proposals from each of the Brokers.

First Report at para 14, Appendix “C” & Confidential Appendix “A”; Motion Record, Tab 2 & 2C, & Brief of Confidential Appendices to the First Report, Tab A.

5. When formulating such marketing and sale proposals, the Brokers considered, among other factors, (i) that TOH owns the land on which the Building sits, (ii) that the initial 49-year term of the Ground Lease expires in 2038, with an option to renew for a further 49-year term, and (iii) that TOH holds the ROFR.

First Report at para 15; Motion Record, Tab 2.

6. After discussions with the Brokers and having regard to the foregoing issues, the Receiver determined that the most reasonable and commercially efficient approach to market and solicit interest in the Property would be to enter into a stalking horse agreement with TOH and to conduct a stalking horse sale process if satisfactory terms could be negotiated with TOH.

First Report at para 16; Motion Record, Tab 2.

7. The Receiver entered into discussions with TOH with the view of negotiating the terms of a possible stalking horse bid. These negotiations culminated in the Stalking Horse

Agreement. The Stalking Horse Agreement is conditional on, among other things, this Court approving and authorizing both it and the Sale Process.

First Report at paras 17–18; Motion Record, Tab 2.

8. The consideration in the Stalking Horse Agreement is within the range of estimated value for the Property that the Brokers provided to the Receiver and is sufficient to repay Riverside's only secured creditor in full, with additional proceeds available to distribute to any priority payables, and potentially to unsecured creditors and equity holders. The Stalking Horse Agreement also provides stability to the Sale Process while allowing the Receiver to canvass the market for higher offers, and ensures that there will be an ongoing landlord for the multiple tenants in the Building.

9. The Sale Process is fair and reasonable and will enable the Receiver to undertake a comprehensive, transparent and efficient sale process for the Property on an appropriate timeline to maximize value for creditors. Accordingly, the Sale Process ought to be approved.

PART II - FACTS

10. Please refer to the First Report for a more fulsome description of the facts supporting the relief sought on this motion.

PART III - ISSUES

11. The following issues are before the Court on this motion:

- (a) should the Sale Process, including the entry into the Listing Agreement, be approved?

- (b) should the Stalking Horse Agreement, including the Break Fee, be approved for the purpose of constituting the Stalking Horse Bid?
- (c) should the information redacted from the Marketing and Listing Proposals be sealed?
- (d) should this Court approve the First Report and the Receiver's activities described therein?

12. In the Receiver's respectful submission, the answer to all five of the foregoing questions is yes.

PART IV - LAW & ARGUMENT

The Sale Process should be approved

13. Pursuant to section 243(1)(c) of the *Bankruptcy and Insolvency Act* (Canada), this Court has jurisdiction to approve the proposed Sale Process.

[Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 243\(1\)\(c\).](#)

14. As detailed further below, the Sale Process should be approved by this Court as it represents the most efficient and fair process to be administered in the circumstances and it will sufficiently expose the Property for sale to the marketplace and generate maximum value for Riverside's stakeholders.

First Report at para 29(a); Motion Record, Tab 2.

15. Although the decision to approve a particular form of sale process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sale process proposed

by a court-appointed receiver must be assessed in light of the factors that 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 v. Soundair*, namely:

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

Choice Properties Limited Partnership v Penady (Barrie) Ltd, 2020 ONSC 3517 [Choice Properties] at para 15; *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 [CCM Master] at para 6; *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 7 CBR (3d) 1 (Ont CA).

16. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should 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 sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

Choice Properties, supra at para 16; *CCM Master, supra* at para 6.

17. The proposed sale process need not be perfect, only reasonable, and a court should also give significant weight to the recommendation of its receiver, a court-appointed officer with significant expertise in insolvency proceedings.

[Marchant Realty Partners Inc v 2407553 Ontario Inc, 2021 ONCA 375 \[Marchant\] at paras 10, 15 & 19.](#)

18. The order of the Honourable Justice Koehnen dated October 29, 2021 by which the Receiver was appointed authorizes the Receiver to, among other things, market and sell the Property.

First Report at para 13 & Appendix “A”; Motion Record, Tab 2 and 2A.

19. As discussed above, in developing a marketing and solicitation strategy for the Property, the Receiver sought and obtained assessments of potential value and marketing strategy proposals from each of the Brokers.

First Report at para 14, Appendix “C” & Confidential Appendix “A”; Motion Record, Tab 2 & 2C, & Brief of Confidential Appendices to the First Report, Tab A.

20. When formulating such marketing and sale proposals, the Brokers considered, among other factors, (i) that TOH owns the land on which the Building sits, (ii) that the initial 49-year term of the Ground Lease expires in 2038, with an option to renew for a further 49-year term, and (iii) that TOH holds the ROFR.

First Report at para 15; Motion Record, Tab 2.

21. After discussions with the Brokers and having regard to the issues described above, the Receiver determined that the most reasonable and commercially efficient approach to market and solicit interest in the Property would be to enter into a stalking horse agreement with TOH and to conduct a stalking horse sale process if acceptable terms could be negotiated with

TOH. The Receiver was able to negotiate the Stalking Horse Agreement with TOH on terms that were acceptable to it. Among other considerations, the Receiver determined that proceeding with the Stalking Horse Agreement and the Sale Process was the preferred approach for the following reasons:

- (a) the Stalking Horse Agreement creates certainty by way of an unconditional bid and establishes a floor value for the Property while providing an opportunity to market the Property for superior realization;
- (b) the purchase price set out in the Stalking Horse Agreement is within the range of potential values for the Property given to the Receiver by the Brokers;
- (c) while TOH appears to be a natural purchaser for the Property because it owns the lands upon which the Building is located, the Brokers advised the Receiver that other parties may be interested in acquiring the Property;
- (d) the minimum overbid increment in the amount of \$25,000 provided in the Sale Process is not excessive and does not present a material hurdle that would prevent other potential bidders from submitting a bid in the Sale Process; and
- (e) TOH has agreed that the Sale Process will govern the conduct of the sale of the Property in all respects.

First Report at para 16; Motion Record, Tab 2.

22. The duration of the Sale Process is reasonable and will provide all potential bidders sufficient time to assess the Stalking Horse Bid and potentially submit a superior bid. The Sale Process balances the need to have a sale accomplished in a reasonable timeframe to

limit the carrying costs associated with the Property with the desire to properly expose the Property to the marketplace to maximize recoveries for the stakeholders;

First Report at para 29(e); Motion Record, Tab 2.

23. The estimated sale proceeds will be sufficient to fully repay Riverside's senior secured creditor, The Manufacturers Life Insurance Company ("Manulife"), the Receiver's Charge, the charge securing the Break Fee, and any priority payables, with a potential pool of funds for distribution to any proven unsecured creditors and possibly equity holders.

First Report at para 29(f); Motion Record, Tab 2.

24. The Stalking Horse Sale Process is supported by Manulife.

First Report at para 29(g); Motion Record, Tab 2.

25. For all of the foregoing reasons, it is commercially reasonable and appropriate to approve the Sale Process.

The Stalking Horse Agreement should be approved as the Stalking Horse Bid

26. The use of a sale process that includes a stalking horse agreement maximizes value of an asset for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties

[Re Danier Leather Inc, 2016 ONSC 1044 \[Danier Leather\] at para 20; CCM Master, supra at para 7.](#)

27. The Stalking Horse Agreement creates certainty by way of an unconditional bid and establishes a floor value for the Property while providing an opportunity to market the Property for superior realization.

First Report at para 16(a); Motion Record, Tab 2.

28. As discussed above, and as is evident from the information redacted from the Marketing and Listing Proposals, the purchase price set out in the Stalking Horse Agreement is within the range of potential values for the Property given to the Receiver by the Brokers.

First Report at paras 16(a), 20 & 29(b), & Confidential Appendix "A"; Motion Record, Tab 2 and Brief of Confidential Appendices to the First Report, Tab A.

29. TOH has agreed that the Sale Process will govern the conduct of the sale of the Property in all respects.

First Report at paras 16(e) & 29(c); Motion Record, Tab 2.

30. The approval of a Sale Process and the acceptance of the Stalking Horse Agreement as the Stalking Horse Bid would, among other things, (i) provide the Receiver a means to test the market for the Property, (ii) establish a floor value for the Property and (iii) assure recovery for Riverside's creditors.

First Report at para 16(a); Motion Record, Tab 2.

31. Also, for the reasons set out below, the Break Fee is reasonable in the circumstances.

32. The Receiver submits that it is commercially reasonable and appropriate to approve and accept the Stalking Horse Agreement as the Stalking Horse Bid.

The Break Fee should be approved

33. Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected.

Danier Leather, supra at para 41.

34. In reported decisions on motions to approve stalking horse sale processes, this Court has considered and approved break fees between 1.8% and 5%.

Danier Leather, supra at paras 42–43; CCM Master, supra at para 13.

35. The Break Fee in the Stalking Horse Agreement is approximately 2.64% of the purchase price stipulated therein and is commercially reasonable for a transaction of this size. In the event that the Break Fee is paid, it will be given (i) as consideration for the stability brought to the Sale Process by the Stalking Horse Bid; and (ii) in reimbursement of TOH's out of pocket costs incurred in preparing and negotiating the Stalking Horse Agreement and its role in the Sale Process.

First Report at para 21 and 29(d); Motion Record, Tab 2.

36. The adverse sale deterrent effect that the Break Fee could potentially cause is balanced by the salutary effects entailed by having the Stalking Horse Agreement as a sale stimulator, as well as the stability brought to the Sale Process. The Break Fee will not jeopardize other potential purchasers' ability to bid in the Sale Process.

First Report at para 22 and 29(d); Motion Record, Tab 2.

37. In the circumstances, the Break Fee is appropriate and should be approved.

The Listing Agreement should be approved

38. The Receiver is seeking to engage the services of a listing agent to assist it with the Sale Process. Listing agents are experts in selling real estate and the Receiver is of the view that a listing agent will be beneficial in the Receiver's attempt to identify bids that are higher than the Stalking Horse Bid in an attempt to maximize value for stakeholders.

39. Receivers commonly engage real estate consultants when selling real property.

[Marchant, supra at para 8; Choice Properties, supra at para 39.](#)

The redacted information in the Marketing and Listing Proposals should be sealed

40. In *Sherman Estate v. Donovan*, the Supreme Court of Canada recast the test that a party seeking an exception to the open court principle must meet. In order to succeed with such a request, the party must establish that:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

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

41. In *Sherman Estate*, the Supreme Court of Canada held that “important interest” can capture a broad array of public objectives, including commercial interests.

[Sherman Estate, supra at para 41.](#)

42. The *Sherman Estate* test has been recently employed in the insolvency context to authorize sealing orders over confidential or commercially sensitive documents.

[Ontario Securities Commission v Bridging Finance Inc, 2021 ONSC 4347 at paras 23–27; Laurentian University of Sudbury, 2021 ONSC 4769 at paras 12–14.](#)

43. The unredacted information provided in Confidential Appendix “A” contains information pertaining to the Brokers’ assessments of the potential value of the Property. Were such information made public prior to the completion of the Sale Process, such disclosure could impair the value maximizing purpose of the Sale Process.

First Report at para 30 & Confidential Appendix “A”; Motion Record, Tab 2 and Brief of Confidential Appendices to the First Report, Tab A.

44. To avoid such prejudice, receivers commonly seek and are granted orders sealing appraisals or proposed listing prices obtained in contemplation of selling real property.

[Marchant, supra at para 30; Choice Properties, supra at para 10.](#)

45. The Receiver has filed unredacted versions of the Marketing and Listing Proposals to provide the Court with the benefit of the redacted information to allow the Court to determine whether it should approve the Stalking Horse Agreement and the Sale Process.

First Report at para 31 & Confidential Appendix “A”; Motion Record, Tab 2 and Brief of Confidential Appendices to the First Report, Tab A.

46. However, rather than seeking to seal the Marketing and Listing Proposals in their entirety, in the interests of disclosing as much information as is reasonably possible to

stakeholders, the Receiver has appended redacted copies of the Marketing and Listing Proposals to the First Report and has limited the redactions to information that is commercially sensitive.

First Report at para 32 & Appendix “C”; Motion Record, Tab 2 and 2C.

47. The approach taken by the Receiver aligns with the holding in *Sherman Estate*, the purpose of the Sale Process and the interests promoted thereby, is fair and reasonable in the circumstances, and will achieve the desired benefit without unduly impairing the openness of the Court’s process.

First Report at para 32 & Appendix “C”; Motion Record, Tab 2 and 2C.

48. In the circumstances, the sealing order is appropriate and should be approved.

The First Report and the Receiver’s activities described therein should be approved

49. This Court has held that there are good policy and practical reasons for approving receiver’s reports and the activities described therein, including:

- (a) allowing the receiver to bring its activities before the Court;
- (b) allowing an opportunity for stakeholders’ concerns to be addressed;
- (c) enabling the Court to satisfy itself that the receiver’s activities have been conducted in a prudent and diligent manner;
- (d) providing additional protection for the receiver; and
- (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by the receiver.

[Re Hangfen Evergreen Inc, 2017 ONSC 7161 at para 15.](#)

50. The activities of the Receiver, as set out in the First Report, were necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order and were in each case in the best interests of Riverside's stakeholders generally. The First Report and the Receiver's activities described therein should be approved.

PART V - ORDER REQUESTED

51. The Receiver respectfully requests that this Honourable Court grant:

- (a) the order substantially in the form attached as Schedule "B" to the notice of motion, among other things:
 - (i) approving the First Report and the actions, conduct and activities of the Receiver described therein;
 - (ii) sealing the unredacted copies of the Marketing and Listing Proposals;
 - (iii) authorizing and directing the Receiver to execute the Listing Agreement;
 - (iv) approving the Sale Process;
 - (v) approving and accepting the Stalking Horse Agreement solely for the purposes of being the Stalking Horse Bid; and
 - (vi) approving the payment of the Break Fee; and
- (b) such further and other relief as counsel may advise and this Honourable Court may deem just.

RESPECTFULLY SUBMITTED THIS 13th DAY OF DECEMBER, 2021

Daniel Richer

Dylan Chochla & Daniel Richer

Lawyers for the Receiver

SCHEDULE “A”

AUTHORITIES CITED

1. *Choice Properties Limited Partnership v Penady (Barrie) Ltd*, 2020 ONSC 3517;
2. *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750;
3. *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 7 CBR (3d) 1 (Ont CA);
4. *Marchant Realty Partners Inc v 2407553 Ontario Inc*, 2021 ONCA 375;
5. *Re Danier Leather Inc*, 2016 ONSC 1044;
6. *Sherman Estate v Donovan*, 2021 SCC 25;
7. *Ontario Securities Commission v Bridging Finance Inc*, 2021 ONSC 4347;
8. *Laurentian University of Sudbury*, 2021 ONSC 4769; and
9. *Re Hangfen Evergreen Inc*, 2017 ONSC 7161.

SCHEDULE “B”

LEGISLATION

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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.

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