

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

BETWEEN:

MARSHALLZEHR GROUP INC.

Applicant

– and –

2557386 ONTARIO INC. AND 2363823 ONTARIO INC. O/A MARIMAN HOMES

Respondents

IN THE MATTER OF AN APPLICATION UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, s 243(1), AS AMENDED; AND *THE COURTS OF JUSTICE ACT*, RSO 1990, c C. 43, s 101, AS AMENDED

FACTUM OF THE RECEIVER
(Motion Returnable October 1, 2024)

September 27, 2024

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PART I – OVERVIEW

1. This is a motion for an Approval and Vesting Order, and a subsequent Distribution and Discharge Order sought by KSV Restructuring Inc. (“**KSV**”), in its capacity as court-appointed receiver and manager (the “**Receiver**”) of all of the assets, undertakings and properties of 2557386 Ontario Inc. (“**2557**”) and 2363823 Ontario Inc. o/a Mariman Homes (“**Mariman**”, and together with 2557, the “**Companies**”).

2. The Receiver carried out a Sale Process for the Grand York Estates property, the Companies’ largest intended development, and received no bids. The only viable prospect of selling the York Property is through a credit bid by one of the Applicant’s affiliates, as set out in an Agreement of Purchase and Sale dated August 6, 2024. This Transaction, if approved, would result in the termination of the pre-construction sale agreements, such that homebuyers can begin to take steps to recover from Tarion for amounts owed for deposits paid to the Companies.

3. The Receiver understands that certain parties with pre-construction agreements believe that their interests supersede that of the Applicant as the registered secured creditor and mortgagee. While unfortunate for such purchasers, the Receiver believes that the law in this area is settled and that the interests of purchasers do not have priority over that of a mortgagee. That is of course only with respect to the claims over the land – purchasers may have claims against the Companies and/or its principals for deposits not kept in trust (among other things), which are and should be unaffected by this motion.

4. This motion also includes relief sought for a distribution to the Lien Claimant, VanRooyen Earthmoving Ltd., for \$171,909.00, which represents its priority interest for construction holdback from the York Property for grading and land development work. The Receiver understands that the Applicant does not dispute this distribution if it resolves all lien priority issues.

5. As to the Companies' other properties subject to mortgage claims, being the Moore's Property, Hunter Estates and Mariman Estates (collectively the "**Other Properties**"), the Receiver recommends that they be effectively removed from the Receivership proceeding upon discharge of the Receiver, as it has received requests for the mortgagees to exercise their enforcement rights separately. There would be no equity remaining from the sale of the Other Properties beyond the amounts owed to the mortgagees. The Receiver does not have funding to continue its mandate and so recommends that it be discharged.

6. Following the AVO and closing of the proposed transaction, the Receiver will have fulfilled its mandate in respect of the Companies and therefore requests that it be discharged with approval given for the Receiver's report and its fees and those of its counsel. On fees, the Receiver and its counsel have submitted fee affidavits, which will allow this Court to approve a Distribution and Discharge order as set out below.

PART II – FACTS

A. Background

1. As set out in previous proceedings in this matter, on January 16, 2024, MarshallZehr Group Inc., (the "**Applicant**" or "**MZ**") applied under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, ("**BIA**"), section 243(1) and the *Courts of Justice Act*, RSO 1990, c C.43, as amended ("**CJA**"), s 101 for an order appointing a Receiver over the Companies' property (the "**Receivership Order**").

2. 2557 is a single-purpose entity that owns the Grand York Estates (the "**York Property**"), whereas Mariman operated as a custom home builder. Mike Bettiol is the sole officer and director of each of the Companies.¹

¹ Third Report of the Receiver, dated 27 September 2024, p 1-3, **Motion Record**, at Tab 2 [MR] (the "**Third Report**"), pp [033-035](#).

3. The Companies were developing the York Property for residential homes and had received approximately \$10 million in deposits from homebuyers (the “**Pre-construction Agreements**”), none of which were held in trust; 2557 had intended to build 66 detached custom estate homes on the York Property.²

B. Timing of the Applicant’s mortgage and the development work on the York Property

4. In April 2022, the Companies hired A.J. Clarke and Associates Ltd., as surveyors, planners and engineers, and Landtek Limited as geotechnical engineers, to carry out initial development work. VanRooyen Earthmoving Ltd. (“**VRE**”) entered into a contract for site preparation and grading work on October 27, 2022.³

5. On June 30, 2022, the Applicant granted the Companies a first charge mortgage in the principal amount of \$35 million (the “**MZ Mortgage**”), which was registered on the title for the York Property. Upon default, the Applicant sought to enforce its mortgage.⁴

C. Sale Process

6. Pursuant to an Order dated March 27, 2024, the Court approved a sale process for the York Property (the “**Sale Process Order**”), including the retention of Colliers Macaulay Nicolls Inc. (“**Colliers**”) as listing agent (the “**Sale Process**”).⁵

7. Colliers marketed the York Property for sale in accordance with the Sale Process Order as follows:

² Third Report, p 4, MR Tab 2, [p 036](#).

³ Reconstruct LLP Memo dated July 31, 2024 on lien and mortgage priority, Third Report, Appendix D (the “**Reconstruct Memo**”), MR Tab 2D, [p 093](#).

⁴ Third Report, p 4, MR Tab 2, [p 036](#).

⁵ Third Report, p 5, MR Tab 2, [037](#).

- (a) It prepared an offering summary (the “**Offering Summary**”) and distributed it on April 4, 2024 to an extensive list of over 3,000 prospective purchasers, including local and national builders, developers and investors;
- (b) The York Property’s sale details were also listed on the Multiple Listing Service;
- (c) Colliers also directly contacted parties that it believed would be interested in the York Property;
- (d) It prepared a virtual data room (the “**VDR**”), with information provided to the Receiver by Mr. Bettiol, MZ, and representatives of the Companies, including their advisors. The VDR also included a template form of asset purchase agreement;
- (e) Colliers set May 17, 2024 as the date after which bids would be considered, rather than a bid deadline as based on market feedback. While 11 interested parties signed confidentiality agreements and were given access to the VDR, no offers were received from arm’s length parties; and,
- (f) Following the submission deadline, Colliers prepared a marketing report regarding its listing of the York Property (the “**Marketing Report**”).⁶

8. The Marketing Report indicates that the highest value suggested by an interested party for the York Property was \$11 million; however, that party did not submit an offer.⁷

9. The Receiver and Colliers provided regular updates to MZ on the sale process. During that time, MZ began discussions with Sunray Group, a builder and developer in North York, Ontario, toward an agreement to develop the York Project.

⁶ Third Report, pp 5-6, MR Tab 2, pp [037-038](#).

⁷ Third Report, p 6, MR Tab 2, [p 038](#).

D. APS and Transaction details

10. On August 6, 2024, the Receiver entered into an agreement of purchase and sale (“**APS**”) with 1000961999 Ontario Inc. (the “**Purchaser**”) and Sunray Estates Limited Partnership, by its general partner, Sunray Estates GP Inc. (the “**LP**”), which is an affiliate of the Applicant, MZ.⁸

11. The APS comprises the following terms (the “**Transaction**”):

- (a) The Purchaser will put forward a bid of \$16.5 million to receive all of the Receiver’s and Companies’ right, title and interest in the York Property, including certain contracts and permits;
- (b) The Purchase Price is \$16.5 million, payable (all capitalized terms defined in the APS):
 - (i) the Estimated Fees and all amounts secured by the Receiver’s charge;
 - (ii) Priority Payables, without duplication;
 - (iii) Receiver’s borrowings; and
 - (iv) the balance payable by assumption of the Secured Debt equal to the Purchase Price less the sum of the amounts set out in i), ii) and iii). The Purchase Price is to be adjusted on closing for adjustments standard for a real estate transaction, including property taxes;
- (c) The Purchaser is not assuming the pre-construction agreements of purchase and sale entered into by the Companies; and,

⁸ Third Report, p 6, MR Tab 2, [p.038](#).

- (d) Following the granting of the AVO, the Purchaser will complete the APS within 15 days.⁹

12. The AVO is a material condition for the Transaction to close, and there will be no rights of appeal or proceedings to set aside or vary the AVO's terms.¹⁰

E. Lien Holdback

13. On October 13, 2023, VRE registered a claim for lien against the title of the York Property in the amount of \$1,709,901.54 because of amounts outstanding for construction grading at the York Property ("**Lien Claim**"). On October 30, 2023, it commenced a proceeding in respect of the Lien Claim.¹¹

14. Upon analysis of the VRE Statement of Claim, contracts and invoices issued for work performed at the York Property, it became evident that the Companies had not retained any holdback as required under s 78 of the *Construction Act*.¹²

15. Independent counsel for the Receiver reviewed the relative priorities between VRE and the Applicant and has opined that the holdback attributable to VRE's work should be in priority to the interests of the Applicant in the amount of \$171,909. The Receiver accordingly recommends that an amount of \$171,909.00 distributed to VRE from the proceeds of the Transaction (the "**Lien Holdback**").¹³

E. Pre-construction Agreements to be terminated

16. On September 23, 2024, concurrent with the filing of this motion, the Receiver sent out a second update (the "**Second Homebuyer Update**") to all homebuyers who had made deposits

⁹ Third Report, p 6, MR Tab 2, [p 038](#).

¹⁰ Third Report, p 6, MR Tab 2, [p 038](#).

¹¹ Reconstruct Memo, MR Tab 2D, [pp 091-092](#).

¹² Reconstruct Memo, MR Tab 2D, [pp 093 and 095](#).

¹³ Reconstruct Memo, MR Tab 2D, [p 095](#); Third Report, pp 6-7, MR Tab 2, [pp 038-039](#).

with the Debtors and entered into Pre-construction Agreements for lots at the York Property (“the **Homebuyers**”).¹⁴

17. The Second Homebuyer Update provided details about the Sale Process and the outcome of the APS, including details relating to the expected termination of the Pre-construction Agreements, and referred Homebuyers to the Receiver’s website, where its Third Report dated September 23, 2024 is posted (the “**Third Report**”). The Receiver advised Homebuyers about possible Tarion deposit protection for such terminated Pre-construction Agreements and their ability to make claims once the APS is closed and the Receiver’s Certificate is filed.¹⁵

18. Following the Second Homebuyers Update, on September 24 and 25, 2024, the Receiver was contacted by several Homebuyers who believed that their interests in the York Property should take priority over the interests of the Applicant as mortgagee. On September 27, 2024, the Receiver issued a supplement to its Third Report (the “**Supplementary Report**”), where it set out its view that the Homebuyers’ positions do not reflect the priorities set out in the applicable case law (as canvassed further below). It recommended that the interests of the MZ Mortgage take priority such that a vesting order excluding the Pre-construction Agreements from the Transaction is appropriate.¹⁶ A complete description of the correspondence received from Homebuyers is appended to the Supplementary Report.

F. Other properties to be excluded

19. As set out in the Third Report, the Receiver has learned that Mariman was the registered owner of three other properties comprising the Other Properties.¹⁷

¹⁴ Update #2 to Home Buyers of Grand York Estates, 23 September 2024 (“**Second Homebuyer Update**”), Third Report, p 6 and Appendix H, MR Tab 2H, [p 038](#) and [p 132](#), respectively.

¹⁵ Second Homebuyer Update, MR Tab 2H, [p 132-133](#).

¹⁶ Supplement to the Third Report of the Receiver dated 26 September 2024 (the “**Supp Report**”), Supplementary Motion Record, Tab 1 (the “**Supp MR**”).

¹⁷ Third Report, p 9, MR Tab 2, [p 040](#).

20. The Receiver has received requests from mortgagees on the Other Properties to exercise their enforcement rights outside of this receivership proceeding through power of sale proceedings. The senior mortgages appear to be validly registered on title. There is no indication that there is equity available from these Other Properties beyond the amounts owed to the mortgagees.¹⁸

21. Since the Receiver does not have funding to continue its mandate or, in the case of the Mariman Estates, move to set aside certain lot transfers, it recommends that these Other Properties be effectively removed from the Receivership by discharging the Receiver without taking any further action in respect of them. At that point, the stay of proceedings would end, the ranking secured creditors could taken power of sale or other enforcement steps, and the claims of other stakeholders could be pursued against the Companies, their principals or otherwise, including with Tarion, as appropriate.¹⁹

G. Receiver's Third Report and fees of the Receiver and its counsel

22. The Third Report describes the Receiver's actions and activities since the granting of the Sale Process Order. All actions and activities of the Receiver have been undertaken in accordance with the Receivership Order and in the best interests of the Companies' estate.²⁰

23. The fees of the Receiver and its counsel are set out in fee affidavits in the normal fashion.²¹

¹⁸ Third Report, pp 9-12, MR Tab 2, [pp 040-044](#).

¹⁹ Third Report, p 12, MR Tab 2, [p 044](#).

²⁰ Third Report, p 13, MR Tab 2, [p 045](#).

²¹ Fee Affidavits of KSV, Chaitons LLP and Reconstruct LLP, Third Report, Appendices T, U and V respectively, MR Tabs [2T](#), [2U](#) and [2V](#).

H. Completion of Receiver's duties and proposed distributions

24. Given the completion of the Sale Process, the Receiver has completed its duties as set out in the Receivership Order and subsequent orders of the Court, save and except for the following (the "**Remaining Activities**"):

- (a) payment of the Lien Holdback to VRE;
- (b) payment of the outstanding fees and disbursements of the Receiver and its counsel (the "**Remaining Fees and Disbursements**");
- (c) the filing of any outstanding HST returns and pursuing potential recovery of any unclaimed HST input tax credits resulting from these receivership proceedings;
- (d) payment of any distribution to the Purchaser; and
- (e) other administrative matters incidental to these proceedings such as filing the Receiver's final statutory report pursuant to section 246(3) of the BIA.²²

25. Based on the net proceeds from the realization of the Property, there are not sufficient funds to repay the entirety of the Purchaser's Debt. Therefore, it is not anticipated that the Purchaser will be paid in full, nor that any creditors ranking below the Purchaser will receive any repayments.²³

PART III – ISSUES

26. The issues on this motion are:

- (a) Should the Court approve the Transaction and grant the AVO?
- (b) Should the Court approve the distributions sought, including the Lien Holdback?
- (c) Should the Court approve the Receiver's Third Report and professional fees and order the Receiver's discharge?

²² Third Report, p 13, MR Tab 2, [p 045](#).

²³ Third Report, p 13, MR Tab 2, [p 045](#).

PART IV – LAW & ARGUMENT

A. The Transaction should be approved per the *Soundair* Test

27. As set out in *Royal Bank of Canada v Soundair Corp.*,²⁴ the court must consider the following four factors when considering whether to approve the sale of a property subject to a receivership:

- (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, not just the interests of the creditors of the debtor;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) the final factor of whether there has been unfairness in the working out of the process.

28. The Receiver submits that the *Soundair* Test has been fulfilled and that the Transaction is fair and reasonable in the circumstances.

29. The Sale Process undertaken by the Receiver was commercially reasonable and conducted in accordance with the terms of the Sale Process Order and as set out in the First Report of the Receiver. The Receiver and its listing agent, Colliers, made sufficient efforts and have not acted improvidently, as Colliers has extensive experience selling commercial properties in and around the Haldimand area and widely canvassed the market for prospective purchasers for over four months.

30. The Transaction represents the best and only offer for the York Property, and will maximize recoveries for the York Property in the circumstances. The Receiver does not believe

²⁴ *Royal Bank v. Soundair Corp.*, 1991 [CarswellOnt 205](#) at para 16 [“*Soundair*”].

that further time spent marketing or continuing the Sale Process will result in a superior transaction.

31. The Sale Process was conducted with efficiency and integrity, as it expressly contemplated that MZ (or its affiliates) would have the right to credit bid the debt owing to it at the conclusion of the Sale Process if the offers received were not sufficient to repay the MZ Mortgage in full. MZ has also advised that it is not prepared to continue to fund a further Sale Process.

32. Further, the Transaction is unconditional except for Court approval. Both the Lien Claimant and the Applicant agree with the Receiver's approach. The Receiver submits that the Transaction is fair and reasonable as per the *Soundair* test and represents the only alternative available for the sale of the York Property.

B. The Pre-construction Agreements

33. As to the interests of all parties and not just creditors, the Receiver has duly considered the best possible outcome in the circumstances. Although not specifically part of the *Soundair* test, the Receiver has also anticipated the effect of the Transaction on the Homebuyers whose deposits pursuant to the Pre-construction Agreements were not registered on title or otherwise secured.

34. A receiver is permitted to repudiate such subordinated or unregistered purchase agreements and be entitled to a vesting order that terminates parties' interests in pre-construction or unfinished housing units. It can do so in situations where it has taken into account equitable considerations for all stakeholders, which means considering whether there are any equities in favour of such purchasers that would justify overriding a mortgagee's first priority.²⁵

35. A significant aspect of the relative priorities at issue is that such agreements of purchase and sale are not registered (nor registrable) under the *Land Titles Act*, with the result that s. 93(3)

²⁵ *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 ([CanLII](#)) [*"Firm Capital"*].

of that Act gives priority to a registered mortgage “free from any unregistered interest in the land”.²⁶

36. The Receiver is cognizant of this impact on Persons with Pre-construction Agreements. The Receiver notes that they are not without remedies. For example, part of Tarion’s mandate is to insure up to certain limits the deposits made by buyers of new builds under the *New Home Warranties Plan Act*. Tarion notifies homebuyers that, in the event that a developer goes bankrupt and is unable to return the deposit, it provides for a claims process.²⁷

37. Although it is an unfortunate situation, the Court should terminate the Pre-construction Agreements so that the Homebuyers can proceed with enforcing their rights through the Tarion deposit protection process. The Receiver has advised the Homebuyers of their rights in the circumstances, although it is aware that there are some Homebuyers whose deposits exceed the Tarion-protected limits. This is the most fair and effective way for the Homebuyers to begin the process of recovering deposits made pursuant to the Pre-construction Agreements, as no interest was registered on title.

38. For the sake of ease of making a claim to Tarion, the Receiver seeks an express term in the Approval and Vesting Order deeming that the Pre-construction Agreements are terminated upon the filing of a Receiver’s Certificate to evidence the closing of the Transaction.

C. The Court should approve all distributions

i. The Lien Holdback priority should be approved

39. The *Construction Act*, s 78 provides that liens arising from improvements have priority over all mortgages.²⁸ If a mortgage is registered on title after the first lienable work on the project

²⁶ *Firm Capital* at [paras 22](#) and [27](#), citing *Land Titles Act*, RSO 1990, c L.5, s 93(3).

²⁷ Tarion, “Coverage & claims before you move in” at <https://www.tarion.com/homeowners/pre-possession-coverage>, accessed 2024-09-24.

²⁸ *Construction Act*, RSO 1990, c C.30, s 78(1) (“**Construction Act**”).

is performed, which the Receiver has concluded is the case here, then that mortgage is subordinate to any claims to the extent of any deficiency in the holdback that should have been kept pursuant to the *Construction Act*.²⁹

40. As engineering work related to the site development and grading was undertaken at the York Property as early as March or April 2022, which included specifications for the earth-moving later performed by VRE, all of VRE's later work in 2022-2023 on the York Property appears to be part of the same project for purposes of the *Construction Act*. Since the MZ Mortgage was not registered on title until June 30, 2022, it is likely that VRE holds a priority over the MZ Mortgage on the York Property to the extent of the Lien Holdback.

41. The Receiver recommends on the records available to it that the quantum of the Lien Holdback be \$171,909, being a straightforward 10% of the work claimed by VRE without any apparent payments by the Companies.

42. The Receiver is of the view that it is just in the circumstances to distribute the Lien Holdback to VRE.

D. The Receiver's Third Report and all professional fees should be approved

43. The Receiver's activities, as set out in detail in the Third Report, were all necessary and undertaken in good faith, and in furtherance of the Receiver's duties and powers pursuant to the Receivership Order and the BIA. The Receiver submits that the Court should approve its activities.

44. The accounts set out in the Fee Affidavits for the Receiver and for its counsel at Chaitons LLP, and for its independent counsel at Reconstruct LLP each meet the technical requirements established by prior case law:

²⁹ *Construction Act*, s 78(3).

- (a) the accounts disclose in detail the name of each person who rendered services, the date on which the services were rendered, the time expended each day, the rate charged, and the total charges for each of the categories of services rendered can be easily discerned; and
- (b) notwithstanding the redaction of some entries for the preservation of solicitor-client privilege, the accounts are in a form that can be easily understood by those affected by the receivership or by the judicial officer required to assess the accounts; and, the accounts are verified by affidavits.³⁰

45. A Receiver is entitled to be paid its fees and disbursements, along with those of its counsel, where the amount charged is fair and reasonable in the circumstances. As set out in *Belyea v. Federal Business Development Bank*, courts will consider the following factors in making this determination:

- (a) the nature, extent and value of the assets handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the company, its officers or its employees and the time spent;
- (d) the Receiver's knowledge, expertise and skill;
- (e) the diligence and thoroughness displayed;
- (f) the responsibilities assumed;
- (g) the results of the receiver's efforts; and
- (h) the cost of comparable services when performed in a prudent and economical manner.³¹

³⁰ *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059](#) (ONCA) at [paras 37-41](#) [**"Confectionately"**].

³¹ *Federal Business Development Bank v. Belyea and Fowler*, [1983 CanLII 4086](#) (NBCA) at para 9; *Confectionately* at [para 42](#).

46. The Receiver submits that it has exercised the powers of its office with due diligence and care, and with full consideration of, and with a view to keeping costs reasonable in the circumstances. Similarly, the Receiver has worked with Chaitons and Reconstruct to ensure that costs are reasonable.

E. The Other Properties and discharge

47. Subject to closing the Transaction, the Receiver will have substantially completed its mandate in respect of the York Property.

48. The Receiver has no funding to administer the Other Properties, and the amounts owing to the ranking secured creditors appear to exceed their value. In the circumstances, the Receiver recommends that the Other Properties be effectively removed from the Receivership by discharging the Receiver without any further action in respect of them. Upon the stay of proceedings being so removed, secured creditors and other stakeholders will be at liberty to exercise whatever rights they have and choose to take.

PART V – RELIEF REQUESTED

49. Based on the foregoing, the Receiver respectfully recommends and requests that the Court grant the orders:

- (a) Approving the Transaction and granting the AVO;
- (b) Approving the disbursements and fees, including the Lien Holdback; and
- (c) Discharging the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th DAY OF SEPTEMBER, 2024



RECONSTRUCT LLP

SCHEDULE A**List of Authorities**

1.	<i>Royal Bank v. Soundair Corp.</i>, 1991 CarswellOnt 205
2.	<i>Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.</i>, 2012 ONSC 4816 (CanLII)
3.	<i>Confectionately Yours Inc. (Re)</i>, 2002 CanLII 45059 (ONCA)
4.	<i>Federal Business Development Bank v. Belyea and Fowler</i>, 1983 CanLII 4086 (NBCA)

SCHEDULE B

Statutory Authorities

Land Titles Act, RSO 1990, c L.5, s 93.

Charges

93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Statement of principal

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

Where advances under registered charge to have priority over subsequent charges

(4) A registered charge is, as against the chargor, the heirs, executors, administrators, estate trustees and assigns of the chargor and every other person claiming by, through or under the chargor, a security upon the land thereby charged to the extent of the money or money's worth actually advanced or supplied under the charge, not exceeding the amount for which the charge is expressed to be a security, although the money or money's worth, or some part thereof, was advanced or supplied after the registration of a transfer, charge or other instrument affecting the land charged, executed by the chargor, or the heirs, executors, administrators or estate trustees of the chargor and registered subsequently to the first-mentioned charge, unless, before advancing or supplying the money or money's worth, the registered owner of the first-mentioned charge had actual notice of the execution and registration of such transfer, charge or other instrument, and the registration of such transfer, charge or other instrument after the registration of the first-mentioned charge does not constitute actual notice.

Bond mortgage may be registered as charge upon authorization of parties

(5) An instrument in the nature of a deed of trust and mortgage that provides for the issuance of bonds or debentures may be registered as a charge upon the lands of the grantor, and the entry in the register shall state the aggregate principal sum and the rate of interest of such bonds or debentures.

(6) REPEALED

(7) REPEALED

Cessation

(8) A charge registered under subsection (5) may be discharged by a cessation in the prescribed form.

Debentures

(9) A charge in the form of a debenture or similar instrument shall not be registered unless the name of the person entitled to receive the money payable thereunder and to give a discharge thereof is set out in the instrument.

Construction Act, RSO 1990, c C.30, s 78*Priority over mortgages, etc.*

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

- (a) the actual value of the premises at the time when the first lien arose; and
- (b) the total of all amounts that prior to that time were,
 - (i) advanced in the case of a mortgage, and
 - (ii) advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

- (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
- (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

- (a) the postponed lien; and
- (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

- (a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or
- (b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

MARSHALLZEHR GROUP INC.

and

2557386 ONTARIO INC. and
2363823 ONTARIO INC. O/A MARIMAN HOMES

Applicant

Respondents

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

Proceedings commenced at Toronto

FACTUM OF THE RECEIVER
(Motion Returnable October 1, 2024)

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