



SUPERIOR COURT OF JUSTICE

**COUNSEL SLIP/ENDORSEMENT**

COURT FILE NO.: BK-22-00299040-0031 DATE: November 15th 2022

NO. ON LIST: 5

TITLE OF PROCEEDING: **BRAMALEA INC. v MNP LTD**

BEFORE JUSTICE: **OSBORNE**

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown: DEBTOR**

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## **ENDORSEMENT OF JUSTICE OSBORNE:**

1. This is a somewhat unusual matter arising out of the long-ago completed proceedings involving Bramalea Inc.
2. MNP Ltd. moves in its capacity as licensed insolvency trustee of the bankruptcy estate of Bramalea for an order approving the Trustee's first report dated November 8, 2022 [the "First Report"] and for approval of a stalking horse agreement and a stalking horse sales process together with a charge against the assets of the estate, and related relief.
3. Defined terms in this Endorsement have the meaning given to them in the Notice of Motion and/or the First Report.
4. Bramalea became bankrupt on April 26, 1995. Ernst & Young Inc. was appointed trustee of the estate. Bramalea had been a real estate development company operating principally in Ontario.
5. Ernst & Young concluded its administration of the bankrupt estate and was discharged as trustee on September 15, 1997.
6. Over 20 years later, it was discovered that Bramalea apparently continued to hold title to two parcels of land in Brampton, Ontario. The position of the Trustee today is that those two properties appeared to have been forgotten in the bankruptcy administration or disclaimed or abandoned. Those lands are the remnants of a municipal road extension and appear to have formed part of a traffic turning circle on a dead-end street that was ultimately "squared off" when the road was extended.
7. Those lands were identified by Italpasta Group, an adjacent property owner which had believed, erroneously, that those lands formed part of its own property. That belief was based, in large part, on the fact that it had been taxed on those lands, seemingly for decades.
8. In connection with the redevelopment of its property, that adjacent landowner was required to revise its development plans or acquire those lands.
9. That was the backdrop as against which Itlapasta brought an application, pursuant to section 41(11) of the BIA, within which, on June 14, 2022, this Court made an order appointing MNP as Trustee of the estate of the bankrupt and approved a stalking horse agreement and expedited sales process to sell the land to Italpasta or a related entity, or to a higher bidder pursuant to the sales process.
10. Initially, the Trustee understood the lands referred to above to be the only unrealized assets of the Bramalea estate. However, shortly after completing the sale of the above lands to Italpasta, the Trustee was approached by RCC Enterprises Inc. ["RCC"], through counsel, as RCC had identified additional lands seemingly also retained by Bramalea and also overlooked in the earlier proceedings. It is these lands that are the subject of the motion today.
11. These additional lands consist of 21 parcels of railway corridor lands, of irregular shape and size. They are not contiguous nor adjacent to one another. Rather, they are spread out through various industrial areas.
12. RCC wishes to acquire these lands. It has entered into the Stalking Horse Agreement of Purchase and Sale with the Trustee, as fully described in the First Report. That Agreement contemplates a purchase price of \$1,600,000, with a nonrefundable [except in limited circumstances] 25% deposit of \$400,000.
13. The lands would be sold on an "as is, where is" basis, and the purchaser shall assume all environmental obligations and a prescriptive easement in favour of CNR or its successors and assigns.
14. The Agreement will be exposed to the market by way of a proposed stalking horse sales process which contemplates the consideration of offers for all, or (importantly), some but not all, of these lands. As a result, it contemplates the potential for multiple, if parallel, transactions. The Agreement is conditional on both being the winning bid in the Sale Process, and on Court approval. If it is not the winning bid, the Stalking Horse Bidder would be entitled to a break fee in the amount of \$64,000 and an expense reimbursement in the amount of 100,000.

15. In considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See *CCM Master Qualified Fund v. bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):
  - a. the fairness, transparency and integrity of the proposed process;
  - b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
  - c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
16. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):
  - a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
  - b. the interests of all parties;
  - c. the efficacy and integrity of the process by which the party obtained offers; and
  - d. whether the working out of the process was unfair.
17. The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Penny, J., it can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as it establishes a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).
18. In this case, the terms of the sales process have been developed by the Trustee in consultation with RCC. They are fully described in the First Report. Importantly, the process contemplates both public notice of the proposed sale of the lands and, as specifically confirmed by counsel for the Trustee in his submissions to this Court, direct approaches to the owners of the lands adjacent to each parcel proposed to be sold, since in my view those adjacent landowners may well be prospective purchasers or at least interested parties. A direct approach to them is important since they may or may not become aware of the sale of lands adjacent to their own through the public notice process.
19. The terms of the proposed bid process, including qualification of bids and an auction if such bids are received, is fully set out in the materials.
20. Pursuant to section 30 of the BIA, the Trustee may, with the permission of the inspectors, sell or otherwise dispose of all or any part of the property of the bankrupt. The Trustee may apply to the Court for directions pursuant to section 34.
21. As noted, this motion is unusual for two reasons. First, it is dealing with apparently overlooked assets that, it would appear, ought to have been part of the administration of the estate of Bramalea by Ernst & Young Inc. many, many years ago. Second, the 21 parcels of land that are the subject of this motion are in some respects awkward and unusual, in that they are thin strips of non-contiguous parcels of land in and around industrial areas.
22. In all the circumstances, I am satisfied that the proposed sales process and stalking horse agreement are appropriate and are approved. There seems no better or more efficient manner to deal with these properties now that they have been discovered. What happens to the net proceeds of the sale is for another day. I have directed the Trustee to put Ernst & Young Inc. on notice of this sales process, and provide it with a copy of this Endorsement, even though I recognize that it was previously discharged in its role relative to Bramalea. It may, however, have information and/or resources relevant to determining which creditors of Bramalea ought to be entitled to some or all of the net proceeds. Again, that is for another day.
23. Accordingly, the activities of the Trustee as set out in the First Report are approved. The sales process and Stalking Horse Agreement of Purchase and Sale are also approved. Order to go in the form signed by me today, which is effective without the necessity of issuing and entering.

Owen, J.