

QBG 1693 of 2017 – JCS

In the matter of the *Companies' Creditors Arrangements Act*, RSC 1985, c C-36, as amended

And in the matter of a proposed plan of arrangement for the creditors of Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJI Developments & Investments Corp. and MDI Utility Corp.

Richard M. Van Beselaere, Q.C. for the applicant, 101297277 Saskatchewan Ltd. [7277]

Alexander K.V. Shalashniy for the applicant, Industrial Properties Regina Ltd. [IPRL]

Jeffrey M. Lee, Q.C. for the respondents, Copper Sands Land Corp., Willow Rush Development Corp., Midtdal Developments & Investments Corp., Prairie Country Homes Ltd., JJI Developments & Investments Corp. and MDI Utility Corp.

Craig P. Frith for the Monitor, Deloitte Restructuring Inc. [Deloitte]

FIAT - April 1, 2020 - GABRIELSON J.

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## **Introduction**

[1] This is an application by Industrial Properties Regina Ltd. [IPRL] and 101297277 Saskatchewan Ltd. [7277] (the senior secured lenders) for the following:

- (1) an order authorizing the selling officer to accept the offer to purchase made for the purchase of the assets of Copper Sands Land Corp. [CSLC] (offer) on a conditional basis, such condition being that if a better offer is received during the sales process as amended in this application, such better offer will be approved instead of the offer;
- (2) an order amending the sales process set out in the order of this Honourable Court granted December 7, 2018, to provide new timelines and revisions to the sales process to enable the selling officer to implement a sales effort, to disclose the existence of the agreement to sell the Copper Sands' assets for the price stated in the offer and disclosing the amount of the sale price, but not the identity of the proposed purchaser or its shareholders and principals;

- (3) an order replacing Deloitte Restructuring Inc. as monitor in these *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] proceedings with MNP Inc. (unless notice of withdrawal of this requested relief is provided by the applicants);
- (4) an order amending and restating the amended and restated initial order granted July 5, 2018 in these proceedings by the Honourable Mr. Justice N.G. Gabrielson (the initial order) pursuant to the CCAA, as more recently amended by the order of the Honourable Mr. Justice N.G. Gabrielson granted February 12, 2020, such amendments to include enhancing and expanding the powers of the monitor (unless notice of withdrawal of this relief is provided by the applicants);
- (5) an order sealing the affidavit of the representative of 7277 and the exhibit thereto and the order referred to in para. 1 above, until after the sale of the Copper Sands' assets have been sold;
- (6) an order extending the CCAA proceedings until a date that allows the sales efforts by the selling officer to be undertaken and completed; and
- (7) 7277 also seeks an adjournment of the applications made by it in its notice of application dated November 4, 2019.

[2] In response to the application by the senior secured lenders, the monitor filed the Seventh Report of the monitor dated February 21, 2020. In this report, the monitor provided the Court with the following information:

- (a) a summary of the monitor's activities since the Sixth Report;
- (b) the activities of the respondents and the secured creditors since the Sixth Report with respect to the companies' restructuring and sales efforts;
- (c) a possible issue with the sales process order as a result of the closure of the OKR refinancing transaction;
- (d) an update of the respondents' cash flows for the period January 7, 2019 to February 16, 2020;
- (e) the fees and disbursements of the monitor and its legal counsel, McDougall Gauley LLP; and

- (f) the secured creditors' requested relief and the monitor's recommendations regarding the same.

[3] In the report, the monitor recommended that, prior to the implementation of the revised sales process, the monitor engage an engineer and provide an independent report with respect to whether and to what extent the water treatment plant [WTP] and the waste water treatment plant [WWTP], collectively the utility facility, which is the subject matter of a service agreement between CSLC and MDI Utility Corp. [MDI] [service agreement], is operational, viable, licensed, and capable of servicing the CSLC mobile home park.

[4] The monitor further stated that the companies' restructuring under the CCAA proceedings will continue to maximize and preserve value for the stakeholders of the companies and affords the only opportunity for many of the stakeholders to achieve a recovery. Therefore, the monitor recommended an extension of the amended and restated initial order and a stay of proceedings therein.

[5] At the hearing of this matter on February 25, 2020, counsel for the senior secured lenders advised that as the monitor was not asking to withdraw from the file, they would not be proceeding with their application for replacement of the monitor or giving the monitor enhanced investigation powers. Counsel for the senior secured lenders stated that they were requesting that these issues be adjourned *sine die*, to be brought back on 14 days' notice. They were, however, still wanting to proceed with the remainder of the issues involved in their application. I, therefore, heard from the parties and reserved my decision on their application, plus the monitor's recommendations. Upon the agreement of counsel, I also made an extension of the amended and restated initial order granted July 5, 2018 as most recently amended by the order granted February 12, 2020 until 11:59 p.m. Saskatchewan time on Wednesday, April 15, 2020. This is my decision in respect to the amended applications and the monitor's recommendations.

### **Background Facts**

[6] Many of the background facts are referred to in the previous fiats rendered in this matter dated November 21, 2017, December 20, 2017, February 2, 2018 and June 28, 2019. In addition, I have issued many consent orders extending the original stay of proceedings granted under the CCAA.

[7] The property at issue in the current application is LSD5. It is owned by Copper Sands. MDI has title to LSD4 on which it has built the utility facility which will service both LSD4 and LSD5. MDI has registered the service agreement as an interest in land against both parcels. While originally the applicants' security had covered both LSD4 and LSD5, the Court approved a refinancing of LSD4 in order to allow the MDI

utility facility to be built on LSD4 and the senior secured lenders released their priority interest in favour of Old Kent Road Financial Inc. [OKR]. OKR lent money to MDI and as part of its security, took a security interest in the service agreement which MDI has with respect to LSD5.

[8] According to the monitor's report, the revised sale process referred to in the application filed by the senior secured creditors does not recognize the service agreement as a permitted encumbrance against LSD5. The revised sale process order would have the legal effect of disclaiming the contract between CSLC and MDI. The monitor has raised this as an issue and submits that OKR should, therefore, be given notice of the senior secured lenders' application.

### **Position of the Parties**

#### **(a) Position of the Applicants**

[9] Mr. Van Beselaere, on behalf of the senior secured lenders, submits that the request by the monitor to retain an engineer speaks to the commercial value of the MDI utility facility and is only of interest to MDI. If there is a shortfall after the sale of LSD5, which the applicants say could be as much as \$1.5 million, the cost of engaging the engineer by the monitor might ultimately be borne by the applicants. The applicants also say that their concerns are threefold: 1) to allow the monitor to engage an engineer will delay completion of the sale of the LSD5 and it has already been delayed too long; 2) that the process will be simplified if the selling officer does not have to deal with the value of the utility facility; 3) that 7727 gave up its priority claim to LSD4 and does not want to see the sale of LSD5 be compromised because of concerns about the value of utility facility.

[10] Mr. Shalashniy, on behalf of IPRL, states that IPRL opposes the monitor's application and says that the March 12, 2019 order was issued well after the service agreement was contemplated and therefore OKR ought to have known that the security interest registered against LSD5 was subject to the interests of the senior secured lenders. Any concerns regarding disclaimer should be the concerns of the debtor companies, not a third party which the applicants say is what OKR is. The senior secured lenders therefore say that OKR does not have to be served with the notice of the application.

#### **(b) Position of the Monitor**

[11] Mr. Frith, speaking on behalf of the monitor, submits that the point of the refinancing by OKR was to build the utility facility that would serve the mobile home occupants of LSD4 and LSD5.

[12] Furthermore, the relief sought by the monitor in the form of the ordering of an engineering report, which will determine whether the utility facility is operational, would be in the interests of all parties. In addition, Mr. Frith says that as part of the sales process, the monitor would be required to disclaim the service agreement and could not do so without knowing whether the utility facility is operational, viable, licensed, and capable of servicing the mobile home parks. Furthermore, an operational utility facility would add value to LSD5, which additional value will inure to the benefit of all parties.

**(c) Position of the Respondent Debtors**

[13] Mr. Lee, on behalf of the respondent debtors, supports the application of the monitor to obtain an independent assessment of the utility facility and an extension of the amended and restated initial order and the stay of proceedings. It is also the respondents' position that, if the assessment says that the WTP and the WWTP facility is operational, it will add value to the pool of assets which will inure to the benefit of all the parties.

**Analysis**

**1. Should there be an independent assessment of the utility facility?**

[14] Section 23 of the *CCAA* sets out the duties and functions of the monitor. It provides *inter alia*:

**23(1)** The monitor shall

...

**(c)** make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings:

**d)** file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any

...

**(iii)** at any other time that the court may order;

...

**(k)** carry out any other functions in relation to the company that the court may direct.

[15] As can be seen, the monitor has a duty to determine whether the WTP

and the WWTP, collectively the utility facility, is viable, licensed and capable of servicing the mobile home park and to what extent there is a business case to be made for including access to the utility facility among the assets to be sold in the revised sales process. I have reviewed the monitor's request and have determined that the hiring of an engineer would enable the monitor to carry out his proposed duty and provide the Court with a report. I am also satisfied that it is in the interests of all parties to determine this issue. If the report determines that the WTP and the WWTP, collectively the utility facility, is operational, viable and capable of servicing the mobile home park, it will add value to the sale of LSD5.

[16] The position of the senior secured creditors, as stated at para. 10(b) of the brief filed by IPRL is that they have concerns with "the true state of the water treatment and waste water treatment facilities". The true state of these facilities can be determined by the monitor engaging the engineer as aforesaid.

[17] The costs of engaging the engineer will be payable out of the monies held in trust by the MLT Aikens law firm from the rentals received in the first instance and will be added to the balance owing to the senior secured lenders by the debtors.

## **2. Extension of the amended and restated initial order**

[18] I am prepared to extend the amended and restated initial order granted July 5, 2018 and the stay of proceedings provided therein further until completion of the monitor's report following the receipt of the engineer's assessment which I expect will take no more than 30 days.

## **3. Should notice of the senior secured lender's application be given to OKR?**

[19] I am also satisfied that there may be an issue as to whether the monitor could disclaim the service agreement, which would be required if the sales process should proceed as requested, in the absence of such engineer's report. Without deciding the issue and out of an abundance of caution, I order that 7727 serve OKR with a copy of the notice of application by the senior secured lenders so that the issue of whether the revised sales process has any effect on the service agreement, which would be taken off the title to LSD5 upon the closing of the sale transaction under the revised sales process, could be determined.

## **Conclusion**

[20] I therefore order:

- (1) the monitor shall engage an engineer to determine whether the utility facility is operational, viable, licensed and capable of servicing the

CSLC mobile home park;

- (2) upon receipt of the engineer's report, the monitor shall file a copy with the Court, together with a copy of the monitor's recommendations with respect to it, including its effect, if any, upon the sales process proposed by the senior secured lenders;
- (3) the senior secured lenders shall serve and file notice of their application dated February 13, 2020 upon OKR;
- (4) the application by the senior secured lenders is adjourned *sine die*, to be brought back on seven days' notice after receipt of the monitor's further report; and
- (5) the amended and restated initial order and the stay of proceedings, last extended by me on February 25, 2020 to April 15, 2020, is further extended until June 5, 2020.

A handwritten signature in blue ink, appearing to read "N.G. Gabrielson", is written over a horizontal line.

N.G. GABRIELSON