

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

**IN THE MATTER OF SECTION 243 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**

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

- and -

HORSESHOE VALLEY LANDS LTD.
and HORSESHOE RIDGE HOMES INC.

Respondents

FACTUM OF THE RECEIVER

November 13, 2017

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FACTUM OF THE RECEIVER

PART I - INTRODUCTION

1. This is a motion by Rosen Goldberg Inc., in its capacity as receiver and manager (the “**Receiver**”) of the assets, undertakings and properties (the “**Property**”) of Horseshoe Valley Lands Ltd. (“**HVL**”), and Horseshoe Ridge Homes Inc. (“**HRH**”, and together with HVL, collectively, the “**Debtors**”), for an Order:

- (a) Approving the sale process proposed by the Receiver for the Remaining Property (as defined below), including approval of an Asset Purchase Agreement between the Receiver and Romspen Investment Corporation (“**Romspen**”) dated October 20, 2017 (the “**Stalking Horse Bid**”);

- (b) Approving the Receiver's Fifth Report dated October 23, 2017 (the "**Fifth Report**") and the Supplement to the Fifth Report dated November 8, 2017 (the "**Supplement**"), and the activities and proposed activities of the Receiver described therein; and
- (c) Approving the Receiver's Interim Statement of Receipts and Disbursements for the period from November 29, 2016 to October 20, 2017.

PART II - SUMMARY OF FACTS

A. Background

2. On the Application of Romspen, the Debtors' largest and first-ranking secured creditor, Rosen Goldberg Inc. was appointed as Receiver pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) dated November 29, 2016, as amended by Order dated December 22, 2016 (collectively, the "**Appointment Order**").
3. Prior to the Receiver's appointment, HVL had been developing certain vacant lands (the "**Lands**") in the township of Oro-Medonte for residential use. HRH, an affiliate of HVL, was registered as a builder with Tarion Home Warranty Corporation, and HVL granted HRH the exclusive right to build and sell homes on the Lands.
4. From August 2016, through January 2017, HVL had listed the Lands for sale with CBRE Limited Real Estate Brokerage at a listing price of \$29,000,000. No sales were concluded.
5. Subsequent to its appointment, the Receiver has undertaken significant work with respect to the development of the Lands in order to prepare them for sale and maximize realizations.

6. To date, the Receiver has sold certain of the Lands. The remaining property of the Debtors under the Receiver's administration (the "**Remaining Property**") is the subject of the Stalking Horse Bid and proposed sale process outlined in the Fifth Report and Supplement.

B. Stalking Horse Bid

7. Subject to approval of the Court, the Receiver and Romspen have negotiated the Stalking Horse Bid for the Remaining Property.

8. The Stalking Horse Bid involves an "as is, where is" sale by the Receiver to Romspen of substantially all of the assets, property and undertakings of the Debtors remaining under the Receiver's administration (the "**Purchased Assets**").

9. The Stalking Horse Bid is intended to provide a floor price for the Purchased Assets. If the sale process does not result in a Superior Bid (as defined in the Stalking Horse Bid), the Receiver will return to Court to seek approval to complete the transaction contemplated in the Stalking Horse Bid.

10. The Stalking Horse Bid is structured as a credit bid with a purchase price of \$20,000,000.00, subject to adjustments, to be satisfied by way of a substantial reduction in the secured indebtedness owing by the Debtors to Romspen. As of October 20, 2017, the amount owing to Romspen by the Debtors was \$21,400,069.63, plus legal fees, and interest accruing at the *per diem* rate of \$6,786.01.

11. The Stalking Horse Bid provides that if Romspen is not the Successful Bidder, Romspen will be entitled to a fee, including reimbursement of Romspen's expenses in connection with the

Stalking Horse Bid, equal to 1.75% of the final purchase price payable pursuant to the Successful Bid (the “**Break Fee**”).

12. The other material terms of the Stalking Horse Bid are as follows:

- (a) Purchase Price. The purchase price under the Stalking Horse Bid is the aggregate of \$20,000,000.00, subject to adjustments, less all amounts owing by the Receiver pursuant to Receiver’s certificates, secured by the Receiver’s Borrowing Charge under the Appointment Order, plus any and all surplus funds held by the Receiver as of the closing date.
- (b) Conditions. The closing of the transaction contemplated in the Stalking Horse Bid is subject to: (i) the approval by the Court of the proposed sales process and the Stalking Horse Bid, (ii) the Stalking Horse Bid being determined by the Receiver to be the Successful Bid, and (iii) the issuance by the Court of an Order vesting in Romspen all right, title and interest of the Receiver and the Debtors in the Purchased Assets, free and clear of all encumbrances (other than permitted encumbrances).
- (c) Determination of the Successful Bid. If no qualified Phase II bid other than the Stalking Horse Bid is received by the Phase II bid deadline, then the Stalking Horse Bid shall be declared to be the Successful Bid. If the Receiver determines that one or more qualified Phase II bids are greater than the Stalking Horse Bid, the Receiver will have the option to conduct an auction, or negotiate with the qualified Phase II bidders in order to determine the Successful Bid.

- (d) Court Approval. As soon as possible after determination by the Receiver of the Successful Bid, the Receiver shall file a motion with the Court seeking an Order approving the Successful Bid.

C. The Proposed Sale Procedure

13. The Receiver plans to engage Cushman & Wakefield as marketing and listing agent to assist in the implementation of the sale process.

14. As detailed in the Fifth Report and the Supplement, the sale procedure will consist of two phases. In Phase I, interested parties who execute a confidentiality agreement will be provided with a confidential information memorandum and access to a confidential data room, to permit them to prepare and submit a bid by the Phase I bid deadline on December 15, 2017. To qualify as a Phase I bidder, an interested party must provide the Receiver, *inter alia*, with a non-binding indication of the proposed purchase price and written evidence of the interested party's financial ability to close the contemplated transaction.

15. Only qualified Phase I bidders will be entitled to submit a Phase II bid. A Phase II bid must be in the form of an agreement of purchase and sale, together with a black line against the Stalking Horse Bid, and include a binding and irrevocable commitment to close upon receipt of Court approval as the Successful Bid. The Phase II bid must also be accompanied by evidence satisfactory to the Receiver of the bidder's financial ability to consummate the transaction and a deposit equal to 5% of the purchase price.

16. Subsequent to service of the Fifth Report, James C. Cooper, a shareholder in HVL, expressed concerns that the time period for submitting bids proposed by the Receiver was

insufficient to elicit a Superior Bid. In response, the Receiver has negotiated an agreement with Romspen to extend the Phase II bid deadline from December 15, 2017 to January 31, 2018.

17. The Receiver does not support Mr. Cooper's view that completion of the approval process for certain parts of the Remaining Property, including approval of an interim temporary waste treatment plant, is essential to maximize the value of the Remaining Property. There is significant timing uncertainty associated with obtaining approval of a temporary waste treatment solution, and the Receiver is not prepared to defer the sale process for such an indefinite period of time.

18. The MOECC has advised that the interim sewage solution must be coordinated with a master servicing study involving other lands located within the vicinity of the Remaining Property, which is not complete at this time. Once the master servicing study is near completion, the engineers expect that the pre-consultation meeting will be scheduled. The Receiver understands that that there will be a public meeting in respect of the master servicing study in December 2017, after which there will be a period to allow for public input. Thereafter, HVL will have an opportunity to respond. Given this timeframe, the Receiver estimates that the master servicing study will not be completed until March or April of 2018, at the earliest.

19. Given the prior marketing of the Remaining Lands by CBRE, the Receiver is of the view that the 10 week sale process outlined above reasonably balances the time required to administer a commercially reasonable sale process with the available financial resources. The Receiver believes that the proposed sale process provides a reasonable opportunity for competing bidders to submit offers superior to the Stalking Horse Bid, and will enable the Receiver to maximize realizations in a timely manner.

20. In response to Mr. Cooper's assertion that the Stalking Horse Bid is in substance a bid for a purchase price of \$17,591,032 (as opposed to \$20 million), by virtue of \$2,408,968.20 worth of irrevocable letters of credit and cash security (the "**Accounts Receivable**") which form part of the Purchased Assets under the terms of the Stalking Horse Bid, the Receiver notes that the net present value of the Accounts Receivable is uncertain. In relation to the \$840,000 letter of credit which Tarion is holding, Tarion has advised that until the process of rectifying deficiencies in homes that were built and sold by HRH prior to the Receiver's appointment is completed, it is unwilling to commit to a position regarding the return of the letter of credit. Tarion has further advised that it may insist on retaining the letter of credit until the applicable 7 year warranty for major structural defects expires. In relation to the letter of credit held by the Township and the letter of credit and cash security held by Hydro One, the return of same is conditional upon the successful completion of infrastructure by the ultimate developer of the Remaining Property and it is unknown when that will occur.

PART III - LAW & AUTHORITIES

21. The use of stalking horse bids, including credit bid stalking horses, to set a baseline for the bidding process, has been recognized by Canadian courts as a reasonable and useful element of a sales process in the context of many insolvency proceedings. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.¹

22. Although approval of a particular form of sale process is distinct from approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-

¹ *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012) CarswellOnt 3158, at para 6

appointed receiver must be assessed in light of the factors which a court will consider when approving a sale.²

23. The criteria to be applied when considering the approval of a sale by a Receiver are well established, and are summarized as follows:

- (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 workout of the process.³

24. In *Brainhunter Inc.*, Mr. Justice Morawetz (as he then was) set out four factors that the court should consider in exercising its discretion to determine whether to authorize a stalking horse sale process in the context of proceedings under the CCAA:

- (a) Is a sale transaction warranted at this time?
- (b) Will the sale benefit the whole “economic community”?
- (c) Do any of the debtor’s creditors have a *bona fide* reason to object to a sale of the business?
- (d) Is there a better viable alternative?⁴

25. In *Crate Marine*,⁵ the Court held that these same factors also applied when considering stalking horse bids in the context of receivership sales.

² Ibid at para 7

³ *Royal Bank of Canada v. Soundalr Corporation*, 1991 CanLII 2727 (Ont. C.A.)

⁴ *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC) at para 13

26. In *CMM Master Qualified Fund Ltd. v. Blutip Power Technologies*, Brown J. adopted the following comments with respect to the stalking horse credit bid:

To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.⁶

27. In appropriate circumstances, an accelerated sale process satisfies the requirements of *Soundair*. For example, in *Laurentian Bank of Canada v. World Vintners Corp.*, the court granted a period of only six days to allow interested parties to complete the necessary due diligence and submit offers, despite the fact that there had been no previous marketing of the business by the debtor. In that case, the Honourable Mr. Justice Cumming stated as follows:

Considering all the circumstances, in my view it is reasonable to achieve some greater assurance that the sale process is seen to be fair by keeping the bidding process open for some further period of time ...

While this extension of six days is itself less than ideal, considering all the circumstances it is a fair balancing of interests of all the stakeholders given the present difficult situation.⁷

28. In the case at bar, an extended sale process beyond the 10 week period proposed by the Receiver will potentially erode value for all stakeholders by increasing professional costs and interest accruing on the secured indebtedness owed to Romspen.

⁵ *Crate Marine*, 2015 ONSC 1062 at para 14

⁶ *CMM Master Qualified Fund Ltd. v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII) at para 8

⁷ *Laurentian Bank of Canada v. World Vintners Corp.*, 2002 CanLII 49605

29. The revised sale process proposed by the Receiver, as outlined in the Supplement provides a suitable balance which will facilitate a realization of the Remaining Property by providing interested parties with a reasonable period in which to conduct due diligence and submit an offer superior to the existing Stalking Horse Bid, while minimizing professional fees, and accrual of interest on the first-ranking secured indebtedness of Romspen.

30. With respect to the Break Fee of 1.75%, the Receiver respectfully submits that it is reasonable, and consistent with the range of break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid. For instance, in *Brainhunter*, Mr. Justice Morawetz approved a 2.5% break fee. Similarly, in *CCM Master Qualified Fund*, the Court approved a stalking horse agreement which contained an expense reimbursement provision in the event that the stalking horse bidder was not the successful bidder of approximately 2 percent of the purchase price.⁸

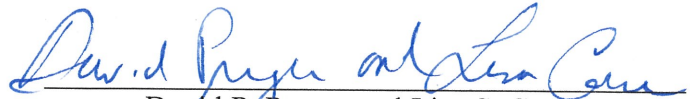
PART IV - ORDER REQUESTED

31. For the reasons set out above, the Receiver respectfully requests, among other things, the following relief:

- (a) an Order approving the Revised Sales Process, including the Stalking Horse Bid and authorizing and directing the Receiver to carry out the Sale Process as described in the Fifth Report and Supplementary Report; and
- (b) an Order approving the Fifth Report, the Supplement and the activities of the Receiver as set out therein.

⁸ *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ON SC) at para 20. *CCM Master Qualified Fund v. blutip Power*, 2012 ONSC 1750 (CanLII), at paras 13 to 15

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2017.


David P. Preger and Lisa S. Corne

November 13, 2017

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies*, 2012 ONSC 1750 (CanLII)
2. *Royal Bank of Canada v. Soundalr Corporation*, 1991 CanLII 2727 (Ont. C.A.)
3. *Laurentian Bank of Canada v. World Vintners Corp.*, 2002 CanLII 49605
4. *Brainhunter Inc. (Re)*, 2009 CanLII 72333 (ONSC)
5. *Crate Marine*, 2015 ONSC 1062

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