

TAB 6

CITATION: PCAS Patient Care Automation Services Inc. (Re), 2012 ONSC 2840
COURT FILE NO.: CV-12-9656-00CL
DATE: 20120514

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended;

AND IN THE MATTER OF a plan of compromise or arrangement of PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc., Applicants

BEFORE: D. M. Brown J.

COUNSEL: S. Babe, for the Applicants

M. Wasserman, for the Monitor, Pricewaterhouse Coopers Inc.

R. Thornton and A. Shepherd, for 2320714 Ontario Inc., the DIP Lender

D. Bulas, for Castcan Investments

R. M. Slattery, for Royal Bank of Canada

HEARD: May 14, 2012

REASONS FOR DECISION

I. Request for increase in DIP Lending Facility and approval of a Sale and Investor Solicitation Process

[1] PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. move under the *Companies' Creditors Arrangement Act* for an increase in the DIP Lending Facility and the approval of a Sale and Investor Solicitation Process ("SISP"). At the hearing I granted and signed the order sought, subject to a few modifications. These are my reasons for so doing.

II. Background to this motion

[2] The history of this matter is set out my Reasons of April 20, 2012 (2012 ONSC 2423), May 5, 2012 (2012 ONSC 2714) and May 8, 2012 (2012 ONSC 2778),

III. Increase in DIP Lending Facility

[3] At present the approved DIP Lending Facility stands at \$5,350,000. The DIP Lender has received commitments to increase that facility by an additional \$10,000. The DIP Lender, through the applicants, renews its request to increase the facility by further \$640,000 to account for fees and expenses of counsel to the DIP Lender payable pursuant to the terms of the DIP Facility. Lender's Counsel has agreed to contribute the fees and expenses to the funding of the DIP Lender instead of requiring payment would could impact the applicants' cash flows. In total, the applicants seek an increase in the DIP Lending Facility to \$6 million.

[4] In its Fifth Report dated May 11, 2012, the Monitor, PricewaterhouseCoopers Inc., reported that it had reviewed and approved the fees submitted by Lender's Counsel. The Monitor concluded that the work performed by Lender's Counsel was "necessary to raise the required DIP financing in order to implement the expedited SISP". The Monitor stated:

Given the challenges of raising a DIP Facility for a pre-commercialization technology company and the need of the Company to continually increase its DIP Facility in the weeks since March 23, 2012, the amount of time and effort expended by counsel to the DIP Lenders does not seem unreasonable in the circumstances.

The Monitor will review the relevant invoices of the DIP Lender's counsel detailing the fees and expenses of the DIP Lender incurred after May 7, 2012 (which are included in the estimate of fees discussed above) prior to any such fees and expenses being added to the DIP Facility.

[5] Pursuant to the Initial Order the DIP Lender's Charge ranked in priority to all other interests "with the exception of valid, enforceable and perfected Encumbrances existing as at the date of filing". The proposed increase in the amount of the DIP Lending Facility will not affect those priorities. The two general secured creditors, RBC and Castcan, did not oppose the increase in the DIP Lending Facility.

[6] Taking into account the factors set out in *CCAA* s. 11.2(4), I approved an increase in the DIP Lending Facility to \$6 million.

IV. Sales and Investor Solicitation Process

A. Overview of the proposed SISP

[7] The applicants seek approval of a Sales and Investor Solicitation Process which has four main features:

- (i) A short time frame – the deadline for bids will be May 24, 2012, a few days before the current Stay Period expiry date of May 28, 2012;
- (ii) Primary control of the SISP by the applicants, not the Monitor;

(iii) The submission of a stalking horse credit bid by the DIP Lender; and,

(iv) The solicitation and consideration by the applicants of any Qualified Bids in consultation with the Monitor.

[8] According to Mr. Loreto Grimaldi, the Chief Legal Officer of PCAS, the SISP has been developed by the applicants in conjunction with the Monitor. The SISP is intended to maximize stakeholder value through either a going-concern sale of the applicants' business or the attraction of new investment, with a plan of compromise or arrangement.

B. The solicitation and bidding process

[9] The SISP will commence with the distribution of a "teaser" letter. Interested parties may sign a confidentiality agreement to secure access to an online data room and updated business plan. The proposed SISP stipulates the technical requirements for any bid to be considered a Qualified Bid. The terms of the SISP permit the applicants to waive compliance with the requirements for a Qualified Bid, but only with the consent of the Monitor.

[10] Mr. Grimaldi deposed that given the efforts of the applicants over the past number of months to generate interest in the company by contacting a large number of potential investors, the applicants believe that the short SISP time frame – basically 10 days – is justified and practicable. The reality of the situation is that given the applicants' past marketing efforts, a number of potentially interested bidders will be much further along the due diligence and bid preparation curve than those who enter the process at this stage. Nonetheless, the liquidity problems facing the applicants necessitate this abbreviated SISP process.

C. The DIP Lender's stalking horse credit bid

[11] The SISP terms which I approved described the stalking horse credit bid which the DIP Lender will submit as follows:

10. The Applicants have agreed with the DIP Lender that the DIP Lender shall submit a stalking horse bid for the purchase of substantially all of the property, assets and undertaking of the Applicants on an "as is, where is" basis (the "Stalking Horse Bid"). The Stalking Horse Bid will allow the DIP Lender to credit bid its debt in exchange for the purchase of the Applicants' Property. The Stalking Horse Bid will provide for a purchase price equal to the amount of outstanding secured liabilities owing by the Applicants to the DIP Lender (being the principal amount of the DIP Loan advances and all interest and all reasonable fees and expenses to the closing) plus the assumption of all senior secured indebtedness of the Applicants (the "Secured Indebtedness"), estimated to be approximately CDN \$7.9 million. The purchase price contained in the Stalking Horse Bid will be satisfied by the release of the liabilities owed to the DIP Lender by the Applicants plus the value of the assumed senior secured indebtedness. The Stalking Horse Bid shall not be permitted to be in an amount in excess of the Secured Indebtedness.

[12] In the event that no Qualified Bid is received from another person, under the SISP the Stalking Horse Bid will be treated as the Successful Bid for which the applicants shall seek court approval.

[13] Counsel for the applicants and the DIP Lender explained that this Stalking Horse Bid is designed to operate primarily to give an indicative price to other bidders for the company's business and assets. The terms and conditions of the actual Stalking Horse Bid will be available in the applicants' online due diligence room.

D. The treatment of Qualified Bids

[14] In the event that the SISP results in the submission of one or more Qualified Bids, the following rules will apply:

15. If one or more Qualified Bids other than the Stalking Horse Bid are received in accordance with the Bidding Procedures, the Applicants, in consultation with the Monitor, may choose to:

- (a) accept one Qualified Bid (the "Successful Bid" and the Qualified Bidder making the Successful Bid being the "Successful Bidder ") and take such steps as are necessary to finalize and complete an agreement for the Successful Bid with the selected bidder; or
- (b) continue negotiations with a selected number of Qualified Bidders (collectively, "Selected Bidders ") with a view to finalizing an agreement with one of the Selected Bidders.

16. The Applicants shall be under no obligation to accept the highest or best offer and the selection of the Selected Bids and the Successful Bid shall be entirely in the discretion of the Applicants, after consultation with the Monitor.

[15] As can be seen, the contemplated SISP contains significant discretion and flexibility, as well as the risk that a successful transaction may not be negotiated prior to the expiry of the Stay Period. However, I accept the submission of counsel for the DIP Lender that the applicants anticipate a diversity of forms of bids and therefore require sufficient flexibility in the process in order to be able to compare "apples to oranges to fish".

[16] The SISP provides that the applicants will apply to the court for approval of the Successful Bid.

E. Analysis

[17] In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750, I attempted to summarize the jurisprudence on the approval of sales and investment solicitation processes as follows:

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which 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*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

- (i) the fairness, transparency and integrity of the proposed process;
- (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
- (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

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

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

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.

[18] In the present case two key factors have shaped the proposed SISP: (i) the liquidity problems facing the applicants, and (ii) the extensive efforts taken by the company prior to the CCAA process to market and solicit interest in the business of the applicants. I accept, as an accurate statement of the business reality facing the applicants, the following statements made by the Monitor in its Report:

The proposed expedited SISP considers the urgent need of the Company to effect a transaction which will result in the sale of the Company's Property or an investment in the Company's business. The Company is in the midst of a liquidity crisis and will likely be unable to commercialize the MedCentres if the SISP is unsuccessful.

Under the circumstances, the expedited SISP is likely the most viable process to maximize the value of the Company for the benefit of its stakeholders. In light of this situation, the Monitor supports the Company's request for approval of the proposed expedited SISP to permit interested parties with an opportunity to invest in the Company or make an offer to acquire the Company's assets.

[19] Given the extensive efforts to date by management of the applicants to solicit interest in the business and given the liquidity crunch facing the applicants, I was satisfied that the proposed SISP would result, in the specific circumstances of this case, in a fair, transparent and commercially efficacious process which should allow a sufficient opportunity for interested parties to come forward with a superior offer and thereby optimize the chances of securing the best possible price for the assets up for sale or the best possible investment in the continuing operations of the applicants. For those reasons I approved the SISP.

[20] Finally, the applicants did request, at the instance of the Monitor, amendments to the powers of the Monitor which I had granted in my May 7, 2012 order. As counsel explained to me during the hearing, the applicants, DIP Lender and Monitor concurred that the applicants, not the Monitor, should take the lead in soliciting Qualified Bids, in large part due to the past efforts by members of the Board to interest various investors in the business. In light of that "game plan", the Monitor concluded that it would not need to exercise some of the expanded marketing powers which I had approved on May 7. That order simply granted the Monitor expanded powers; it did not require the Monitor to exercise them. In the result, the Monitor has elected not to exercise those powers, I accepted the Monitor's explanation for its decision, and therefore saw no need to amend my May 7 order.

V. Summary

[21] For those reasons I approved (i) an increase in the DIP Lending Facility to \$6 million, (ii) the SISP, and (iii) the Fifth Report of the Monitor and the activities described therein.

(original signed by)

D. M. Brown J.

Date: May 14, 2012

