



SUPERIOR COURT OF JUSTICE

ENDORSEMENT

COURT FILE NO.: CV-24-00715326-00CL
CV-24-00715321-00CL

DATE: July 10, 2024

NO. ON LIST: _____

TITLE OF PROCEEDING: CONSTANTINE ENTERPRISES INC V SAM M (180 SAW) LP
INC AND SAM M (180 SAW) INC.
CONSTANTINE ENTERPRISES INC. v. MIZRAHI (128
HAZELTON) INC. et al

BEFORE JUSTICE: JUSTICE W.D. Black

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Jane Dietrich Stephanie Fernandes	Lawyers for the Applicant, Constantine Enterprises Inc.	jdietrich@cassels.com sfernandes@cassels.com
Jennifer Stam	Lawyers for the Receiver	Jennifer.stam@nortonrosefulbright.com
Bobby Kofman	Receiver, KSV Restructuring Inc.	bkofman@ksvadvisory.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Steven J. Weisz W. Michael G. Osborne	Lawyers for the Respondents, Sam (180 Saw LP) Inc. and Sam M (180 Saw) Inc.	SWeisz@cozen.com MOsborne@cozen.com
David Trafford	Lawyers for Sam Mizrahi	dtrafford@morseshannon.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE W.D. BLACK:

- [1] This attendance followed from the hearing before me on June 21, 2024, and from my endorsement of that day.
- [2] At that time, I had approved a sale process (the “Sale Process” as defined therein) for the sale of the Property (as defined in that endorsement) and had approved the Stalking Horse APS (again as defined in the endorsement) in which CEI was the purchaser. My approval was expressly subject to a right of the Mizrahi Partner and the Mizrahi Shareholder (as defined in the endorsement, but hereinafter the “Mizrahi Parties”) to come back before me today to make further submissions concerning their position that the Sale Process and Stalking Horse APS were unfair to them and unreasonably favoured and facilitated the interests of CEI.
- [3] There was some debate as to whether the Mizrahi Parties’ submissions should be limited, pursuant to the findings in my June 21 endorsement, to concerns about the Stalking Horse APS (and not allowed to extend to the Sale Process). However, I did not limit the scope of submissions, and as it turned out, as discussed below, there was considerably more agreement between and among the parties on the relevant issues than was initially evident.
- [4] That is, by way of brief summary, the concern articulated by the Mizrahi Parties was that the Sale Process, including the Stalking Horse APS, gives CEI both an unfettered right to determine who can be a bidder, and a right to withhold its (required) consent to any transaction resulting from a bid. The Mizrahi Parties labeled this as a “dual veto” and argued that it gives CEI both the incentive and the ability to orchestrate a scenario in which the Stalking Horse APS is the resulting transaction. The Mizrahi Parties asserted that the process thereby creates the conditions for CEI to take over the interest of the Mizrahi Parties at a substantial discount from market value and exclude the Mizrahi Parties from a share of proceeds or any further interest in the project.
- [5] More specifically, the Mizrahi Parties observed that there is no explicit requirement in the Sale Process for CEI to act “reasonably” in exercising its dual veto, and no meaningful ability for the receiver (KSV) or the court to control the outcome or to ensure its fairness.
- [6] In the course of the receiver’s responding argument, echoed by CEI on the central issues, it became evident that CEI and the receiver felt constrained to act reasonably in assessing and considering bidders and any potential transaction(s), and that the receiver – who is an experienced receiver well-known to this court - would necessarily object to any improvident behaviour on the part of CEI and bring it to the attention of the court as required. The receiver and CEI agreed that, in addition, the receiver and ultimately the court will have to approve any proposed transaction, and, to the extent there are concerns about a given bidder or proposed transaction, such concerns will have to be aired when that approval is sought.
- [7] CEI and the receiver both readily acknowledged that, regardless of the precise language employed in the documentation underpinning the Sale Process, there is an implicit duty on them to act transparently and reasonably relative to that process. Counsel for CEI pointed out that, pursuant to section 4.2 of the BIA there is in fact an overriding duty for any interested person in any proceedings under the BIA to act in good faith. Consistent with those provisions, both CEI and the receiver agreed

that I could and should, in my endorsement, make explicit the duty that they acknowledge is at least implicit, to act reasonably and transparently. I do not view that proposition as controversial, and endorse it without reservation.

- [8] The submissions about the relevant duties, and the discussion in relation to them, appears to have considerably allayed the stated concerns of the Mizrahi Parties.
- [9] I confirm the court's expectation that the receiver and CEI (and indeed all parties and interested persons) will act in good faith relative to the Sale Process, the Stalking Horse APS, and these proceedings generally.
- [10] Without limiting that general expectation, the court specifically expects the receiver and CEI to reasonably consider the attributes of any and all potential bidders, and to consider the terms of any proposed transaction in a reasonable and deliberate way, with a view to the best interests of all stakeholders.
- [11] In that regard, I note the encouraging evidence that, as at the time of the hearing before me today, some 36 CEI Acceptable Bidders (as defined in the materials filed on this motion) have been identified by CEI with the assistance of CBRE (the sales agent), and that CEI has expressed a willingness to consider any additional prospective bidders who may come forward.
- [12] I note also that the marketing materials in the data room for the Sale Process explicitly disclose the requirement for CEI to consent to any proposed transaction, and that this disclosure does not seem to have dissuaded bidders to this point.
- [13] CEI asserts, fairly in my view, that as the senior secured lender, with the majority stake in the project at issue, it is reasonable for it to have a say relative to any proposed investor/transaction, inasmuch as a successful bidder will then become CEI's partner in the ongoing development. CEI and the receiver point to Morawetz CJ's decision in *Urbancorp Toronto Management Inc.*, upheld by the Court of Appeal for Ontario, 2021 ONCA 613, in which His Honour approved a "veto" role for the senior secured creditor in somewhat similar circumstances to those before me.
- [14] Moreover, CEI argues, again credibly, that there would be substantial benefit to it if an experienced and well-funded investor becomes involved in the project through the Sale Process, and that there would be no benefit to CEI to foreclose the possibility of such an investor and investment.
- [15] The receiver, for its part, specifically acknowledges its duties as an officer of the court and confirms that it will be directly involved in assessing bidders and bids in order to allow it to discharge its obligations to the court and to the process.
- [16] Again, I confirm the expectation of the court that the matter will proceed on this basis and note the agreement of all parties that it should be so.
- [17] As noted, it appeared to me that, based on the discussion during the hearing, and these conclusions flowing from the discussion, the Mizrahi Parties were considerably reassured that the process will be fair, reasonable and transparent and that, to the extent they have concerns about any steps taken or conclusions reached by CEI and/or the receiver in that context, they will have the opportunity to raise any such concerns in the setting of the hearing in which the court will be asked to approve a proposed transaction.

- [18] For these reasons, I find it unnecessary to grant the relief sought by the Mizrahi Parties to amend or rewrite the Sale Process, and also decline the request by the receiver to dismiss the objections of the Mizrahi Parties.
- [19] Instead, I confirm that, based on the discussion at the hearing as summarized above, each party appears to have a clearer understanding of one another's intentions, and each party appears to accept that their overriding duties to the court in this context attenuate the force of their respective concerns. I am optimistic that this will ensure that the matter proceeds fairly and transparently.
- [20] If not, of course it is open to any party to raise any significant concerns with the court.
- [21] I should observe that it seems to me that, had the parties engage in a fulsome discussion about their respective intentions and views, it would and should have been possible to obviate the need for this hearing.
- [22] I accept counsel's explanation that they were operating within a compressed timeframe, which hindered the ability for expansive discussions.
- [23] That said, and without attributing fault, I expect that in future, before coming to court, the parties through counsel will ensure a thoroughgoing discussion about their respective positions.
- [24] If they do so, they may find, as happened today, that there is common ground between them.



W.D. BLACK J.

DATE: July 10, 2024