

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-041305-117

SUPERIOR COURT
Commercial Division
(Sitting as a court designated pursuant to the
Companies' Creditors Arrangement Act,
R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF
COMPROMISE OR ARRANGEMENT OF:

HOMBURG INVEST INC.

- and -

HOMBURG SHARECO INC.

- and -

CHURCHILL ESTATES DEVELOPMENT
LTD.

- and -

INVERNESS ESTATES DEVELOPMENT
LTD.

- and -

CP DEVELOPMENT LTD.

Debtors

- and -

THE ENTITIES LISTED ON ANNEX I

Mises-en-cause

- and -

SAMSON BELAIR/DELOITTE & TOUCHE
INC.

Monitor

- and -

STICHTING HOMBURG BONDS

- and -

STICHTING HOMBURG CAPITAL
SECURITIES

Petitioners

MOTION FOR THE PAYMENT OF FEES, DISBURSEMENTS AND EXPENSES OF
THE INDENTURE TRUSTEES AND THE INDENTURE TRUSTEES' ADVISORS
AND RELATED RELIEF

(Section 11.52 of the *Companies' Creditors Arrangement Act*, R.C.S. 1985 c. C-36)

TO THE HONOURABLE LOUIS GOUIN J.S.C. OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONERS RESPECTFULLY SUBMIT THE FOLLOWING:

I. PREAMBLE

1. On September 9, 2011, this Court issued an order (the "**Initial Order**") pursuant to the *Companies' Creditors Arrangements Act* (the "**CCAA**") in respect of Homburg Invest Inc. ("**HII**"), Homburg ShareCo Inc. ("**ShareCo**"), Churchill Estates Development Ltd. ("**Churchill**"), Inverness Estates Development Ltd. ("**Inverness**") and CP Development Ltd. ("**CP**", and together with HII, ShareCo, Churchill and Inverness, the "**Debtors**").
2. Pursuant to the Initial Order, Samson Belair/Deloitte & Touche Inc. was appointed as monitor of the Debtors (the "**Monitor**") and a stay of proceedings (the "**Stay of Proceedings**") was ordered until October 7, 2011 (the "**Stay Period**").
3. In addition to granting court protection in favour of the Debtors, the Initial Order extended the Stay of Proceedings to a number of limited partnerships¹ in which the CCAA Debtors hold interests.
4. The petitioners in the context of the present motion are two foundations incorporated under the laws of the Netherlands (collectively, the "**Trustees**" or the "**Petitioners**"), namely (i) Stichting Homburg Bonds, in its capacity as Trustee under the Corporate Bonds Indenture and under the Mortgage Bonds Indenture, and (ii) Stichting Homburg Capital Securities, in its capacity as Trustee under the Capital Securities Indenture (all undefined capitalized terms as defined below).
5. Together, the debt obligations represented by the Petitioners represents at least two-thirds of the Debtors' funded debt (excluding the indebtedness of the various limited partnerships).

II. ORDERS SOUGHT

6. The Petitioners request an order from this Court declaring that the Trustees are duly authorized representatives of the bondholders and debentureholders under the relevant trust indentures.
7. The Petitioners also request amendments to paragraphs [41] and [42] of the Initial Order in order to provide that:
 - (i) the Debtors be ordered to pay the Trustees' remuneration and expenses, as well as the fees and disbursements incurred by the Trustees' Advisors (as defined below) in connection with the Debtors' restructuring, on the same terms as the payment of the fees incurred by the legal counsel and financial advisors who are currently assisting the Debtors and the Monitor; and

¹ These limited partnerships are the Mises-en-Causes entities listed on Annex I hereto (the "**Applicant Partnerships**").

- (ii) the Trustees and the Trustees' Advisors be included, along with the legal counsel and financial advisors who are currently assisting the Debtors and the Monitor, in the category of beneficiaries of the Administration Charge, and the amount of said charge be increased by \$1 million.

III. BACKGROUND

(1) Trust Indentures

8. The Trustees are trustees under the following trust indentures, the terms and conditions of which govern the issuance of several series of bonds by HII:
 - (i) a Trust Indenture made as of May 31, 2006, between HII and Stichting Homburg Bonds, as supplemented by several Supplemental Indentures (the "**Corporate Bonds Indenture**"). A copy of the Corporate Bonds Indenture is communicated as **Exhibit R-1**;
 - (ii) a Trust Indenture made as of December 15, 2002 between ShareCo and Stichting Homburg Mortgage Bond (the latter was renamed Stichting Homburg Bonds on or about April 5, 2006), as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture**"). HII has unconditionally and irrevocably guaranteed all amounts payable by ShareCo under the Mortgage Bonds Indenture pursuant to a Guarantee Agreement dated December 15, 2002.² A copy of the Mortgage Bonds Indenture, including the Guarantee Agreement, is communicated as **Exhibit R-2**; and
 - (iii) a Trust Indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities (the "**Capital Securities Indenture**" and together with the Corporate Bonds Indenture and the Mortgage Bonds Indenture, the "**Indentures**"). A copy of the Capital Securities Indenture is communicated as **Exhibit R-3**.
9. The Trustees' standing is plainly established under these Indentures.

(2) Status and Powers of the Trustees

10. The Trustees are the duly authorized representatives of the debtholders under the Indentures, and hold, in trust for the debtholders, all the "*rights, privileges and benefits*" conferred by the relevant Indentures and by law (s. 16.11 of the Corporate Bonds and Mortgage Bonds Indenture, s. 16.10 of the Capital Securities Indenture).
11. The Indentures grant broad powers to the Trustees, including the following:

² Certain partnerships provided additional guarantees in connection with bonds issuances under the Supplemental Indentures, which guarantees included collateral mortgages over specific partnership assets, as appears from the Mortgage Bonds Indenture.

- (a) upon the occurrence of an Event of Default (said term includes the insolvency of HII or ShareCo, as applicable) the Trustees may exercise their discretion to declare the principal and interest of all outstanding bonds or debentures to be due and payable (s. 13.2 of each Indenture);
 - (b) the Trustees may also waive a default if, in their opinion, the default was cured or adequately satisfied (s. 13.3(b) of each Indenture);
 - (c) the Trustees may agree to cure periods which are longer than 45 days in the event that certain covenants are breached (s. 13.1(h) of each of the Corporate Bonds and Mortgage Bonds Indentures).
12. In addition, the Trustees are tasked with exercising the rights of the debtholders under the Indentures:
- (a) all rights of action under the Indentures may be enforced by the Trustees without the possession of any of the debt obligations, *"or the production thereof at the trial or other proceedings relative thereto"* (s. 13.4(b) of the Corporate Bonds and Mortgage Bonds Indentures and s. 13.4(a) of the Capital Securities Indenture);
 - (b) as a general rule, the exercise of any rights or remedies lies with the Trustees, not with the debtholders (s. 13.5 of each Indenture);
 - (c) subject to certain conditions (described below), the Trustees may be directed by the debtholders to exercise remedies on their behalf.
13. The Mortgage Bonds Indenture also provide the Trustee with an independent right of action against the issuers of the bonds, stating that:
- (a) *"the Trustee shall be the joint and several creditor ('hoofdelijk schuldeiser')"* together with the bondholders of each series of Mortgage Bonds; and
 - (b) the Trustee has its *"own independent right to demand performance by the Corporation"* of the Corporation's obligations under the Indentures (s. 8.1 of the Mortgage Bonds Indenture and s. 7 of each Supplemental Mortgage Bonds Indenture).
14. The Mortgage Bonds Indenture further provides that the Trustee may take certain steps, including to enforce the rights of the Trustee and the Bondholders (s. 13.4) or generally proceed to take any authorized remedy, in which case ShareCo agrees that judgment may be rendered against it *"in favour of the Bondholders or in favour of the Trustee, as trustee for the Bondholders"* (s. 13.16). Furthermore, where applicable, only the Trustee (not the bondholders) may exercise the powers of sale or appointment of a receiver or receiver and manager (s. 13.5).

(3) Trustees' Advisors

15. The Indentures provide that the Trustees may employ or retain such experts or advisors, including counsel, auditors or accountants, as they may reasonably require for the purposes of discharging their duties under the Indentures and that the Trustees may pay remuneration for services rendered (s. 16.4 of each Indenture).
16. In light of the foregoing, the Trustees have retained the services of:
 - (a) Mr. Henk Knuvers and Mr. Thom Dijksman, to act as directors of each Trustee;
 - (b) the undersigned attorneys ("**Stikeman**") and Cox & Palmer ("**C&P**"), as Canadian counsel, and Van Doorne N.V. ("**Van Doorne**"), as Dutch counsel, in order to assist in connection with these CCAA proceedings and advise the Trustees as to their duties, rights and remedies, as well as, in the case of Stikeman, to represent the Trustees before this Court;
 - (c) PricewaterhouseCoopers Inc. ("**PwC**"), through Stikeman, to act as financial advisors in connection with these CCAA proceedings and assist the Trustees in reviewing financial data, evaluating available options and preparing for discussions and negotiations with the stakeholders involved in these proceedings;

(together with any other experts or advisors who may be retained from time to time by the Trustees (including one or more additional directors who may join the boards of directors of the Trustees), the "**Trustees' Advisors**").

17. On September 28, 2011, the undersigned counsel to the Trustees wrote to the Debtors' counsel in order to request that HII and ShareCo cover the fees and expenses of the Trustees both before and after the CCAA filing, as appears from a copy of a letter communicated as **Exhibit R-4**.
18. On October 3, 2011, counsel to the Debtors rejected this request, going as far as stating that "*the Trustees have not been incurring legal fees in advancing the interests of the bondholders, but rather have incurred these fees in advancing certain shareholder interests*", a unsupported allegation which completely overlooks the debtholders' interests and Trustees' duties under the aforementioned Indentures, as well as the purposes and intent of the Heads of Agreement and Power of Attorney entered into in favour of the Trustees on September 8, 2011 (Exhibits P-8 and P-9 to the Petitioners' *De Bene Esse Motion to Lift the Stay*).

(4) Obligations of the Corporation

19. The "Corporation" under the Indentures is either HII (in the Corporate Bonds and Capital Securities A Indentures) or ShareCo (in the Mortgage Bonds Indenture).

20. All Indentures impose on the relevant Corporation a payment or reimbursement obligation in respect of the Trustees' Advisors in the following terms:

To Pay Trustee. That the Corporation will pay to the Trustee reasonable remuneration for its services hereunder and will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in the administration or execution of the trusts hereby created (including the reasonable compensation and the disbursements of its counsel and all other advisers and assistants not regularly in its employ), both before any default hereunder and thereafter until all duties of the Trustee under the trust hereof shall be finally and fully performed, except any such expense, disbursement or advance as may arise from its negligence or bad faith.

(s. 12.1(e) of the Corporate Bonds and Mortgage Bonds Indentures and s. 12(c) of the Capital Securities Indenture, our emphasis)

21. Finally, the Guarantee Agreements executed by HII under the Mortgage Bonds Indenture and by certain partnerships under the Supplemental Indentures provide that the Guarantor shall reimburse the Trustee for "all costs and expenses including, without limitation, reasonable attorney's fees and disbursements" incurred in connection with the enforcement of said guarantees (s. 15 of the main Guarantee Agreement and ss. 14 of the Guarantee Agreements under each Supplemental Indenture).

(5) The CCAA Initial Order

22. The Debtors and the Monitor have respectively retained Osler Hoskin & Harcourt LLP and McCarthy Tetrault LLP to advise and represent them in these CCAA proceedings. Furthermore, the Debtors and the Monitor have also respectively retained Allen & Overy LLP and Clifford Chance LLP as Dutch counsel.
23. The Initial Order issued by this Court ordered the payment of the fees and disbursements incurred by the Monitor and the Debtors' legal and financial advisors in connection with this restructuring in the following terms:

[41] **ORDERS** that the Petitioners shall pay the fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisors, incurred in connection with or with respect to the Restructuring, whether incurred before or after the Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

24. The Initial Order also created, at paragraph [42], a \$2 million Administration Charge on the Property in order to guarantee the payment of these professional fees:

[42] **DECLARES** that the Monitor, the Monitor's legal counsel, if any, the Petitioners' legal counsel and the Monitor and the Petitioners' respective

advisers, as security for the professional fees and disbursements incurred both before and after the making of the Order in respect of these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of \$2,000,000 (the "Administration Charge"), having the priority established by paragraphs [43] and [44] hereof.

25. Paragraphs [43] and [44] of the Initial Order provide that the Administration Charge created in the above paragraph shall rank after "*any and all other hypothecs, mortgages, liens, security interests, priorities, charges, encumbrances or security of whatever nature or kind*" but before the Directors' Charge created in paragraph [26] and before unsecured claims.

IV. GROUNDS FOR THIS MOTION

26. The Petitioners rely on s.11.52(1)(c) of the CCAA to seek amendments to the Initial Order which will ensure that the debtholders, a dispersed, essentially non-Canadian group of stakeholders, are adequately represented in these CCAA proceedings.
27. The approximately €440 million of indebtedness represented by the Trustees constitutes more than two-thirds of the Debtors' funded debt obligations, excluding the debt at limited partnerships level. Any restructuring necessarily entails the participation of the debtholders under the Indentures.
28. There are approximately 9,500 debtholders currently represented by the Trustees. Preliminary indications are that the debt obligations under the Indentures are not concentrated in the hands of institutional or other funds, but are rather widely held by individual holders with relatively small positions. In this regard the largest position held by a single holder is in the principal amount of €2,340,000 and the average holding is approximately €31,999.
29. Preliminary indications show that a large number of debtholders are retirees residing in the Netherlands. These individuals will rely on the Trustees in connection with these CCAA proceedings.
30. The current situation is distinct from those encountered in most CCAA proceedings, where the indenture trustee is a trust company and a core group of institutional debtholders holding significant blocks of debt obligations and with sufficient resources to retain and instruct counsel at the outset of a CCAA filing are in a position to organize themselves.
31. It is respectfully submitted that in order for any meaningful restructuring efforts of the Debtors under the CCAA to take place, the debtholders which are represented by the Trustees must be properly informed, consulted and represented by the Trustees. In order to achieve this goal, the Trustees need to take an active role in these proceedings.

32. The Trustees do not believe that the debtholders which they represent have the resources required to individually represent their own interests, or to organize themselves into cohesive groups which could purport to do so in a timely manner, hence the importance of ensuring that the legal representatives of the debtholders under the Indentures participate fully in these proceedings with the assistance of insolvency professionals.
33. In this particular case, the Trustees are two Dutch special purpose foundations which do not have activities or purposes other than acting as such under the Indentures. Accordingly, they do not have the resources to fund the participation of the Trustees' Advisors in the short, medium or long term.
34. There is a genuine risk that unless the relief sought herein is granted, the debtholders will be denied an informed voice in these CCAA proceedings. This is all the more peculiar given the fact that these small creditors represent, as a whole, a debt load sufficient to determine the fate of any restructuring plan.
35. The Petitioners submit that the orders sought herein, by providing the required funding for the Trustees' Professionals, will ensure that the Trustees - and ultimately the bondholders - are fully and adequately represented throughout these proceedings.
36. Without the issuance of these orders, the Trustees may not be in a position to continue retaining and instructing legal counsel in the context of these proceedings, or continue retaining financial advisors to prepare for meaningful negotiations with respect to this restructuring.
37. Any restructuring plan is expected to provide recovery for debtholders, who are in fact the most significant parties in interest in these proceedings. It would be inappropriate and unfair to deny them the means to participate in a CCAA process which will profoundly impact their rights and interests (the outcome of which is incidentally likely to result in their ownership of the emerging company) on the basis of a mere timing issue with respect to recovery.
38. It is fair and reasonable that the Trustee and the Trustee's Advisors benefit from the Administration Charge to the same extent as the legal counsel and financial advisers who are currently assisting the Debtors and the Monitor and a \$1 million dollar increase in this charge appears adequate in the circumstances.
39. The Petitioners' requests will not prejudice the Debtors' secured creditors in light of the fact that the Administration Charge ranks after any and all secured claims pursuant to paragraphs [43] and [44] of the Initial Order.

V. CONCLUSIONS

40. The amendments to the Initial Order sought herein are fair and reasonable and in the interest of the Debtors and their stakeholders.

41. Considering the urgency of the situation, the Petitioners request the provisional execution of the orders sought herein to be rendered notwithstanding any appeal.
42. This motion does not limit and should not be construed to limit any other rights the Petitioners may have in connection with the Initial Order, all of which are hereby expressly reserved.
43. The present motion is well founded in fact and in law.

WHEREFORE, MAY THIS COURT:

[1] **GRANT** the Petitioner's *Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* (the "**Motion**");

[2] **DECLARE** that:

- (i) Stichting Homburg Bonds, in its capacity as Trustee, is the duly authorized representatives of the bondholders under (a) a Trust Indenture made as of May 31, 2006, between HII and Stichting Homburg Bonds, as supplemented by several Supplemental Indentures (the "**Corporate Bonds Indenture**"), as well as under (b) a Trust Indenture made as of December 15, 2002 between ShareCo and Stichting Homburg Mortgage Bond, as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture**"); and
- (ii) Stichting Homburg Capital Securities, in its capacity as Trustee, is the duly authorized representative of the debentureholders under a Trust Indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities (the "**Capital Securities Indenture**").

[3] **ORDER** that the Initial Order issued by this Court on September 9, 2011 in the present matter shall be amended as follows:

- (i) the underlined language shall be added to paragraph [41] of the Initial Order:

[41] **ORDERS** that the Petitioners shall pay, on the same payment terms, the fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisors, as well as the fees and disbursements of the director(s), special advisor, legal counsel and financial advisors of the Stichting Homburg Bonds and the Stichting Homburg Capital Securities, in their capacity as trustees under the relevant trust indentures (the "**Trustees' Advisors**"), incurred in connection with or with respect to the Restructuring, whether incurred before or after the Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

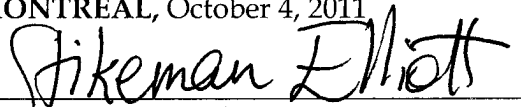
- (ii) the underlined language shall be added to paragraph [42] if the Initial Order:

[42] *DECLARES that the Monitor, the Monitor's legal counsel, if any, the Petitioners' legal counsel and the Monitor and the Petitioners' respective advisors, as well as the Trustees' Advisors, as security for the professional fees and disbursements incurred both before and after the making of the Order in respect of these proceedings, the Plan and the Restructuring, be entitled to the benefit of and are hereby granted a charge and security in the Property to the extent of the aggregate amount of \$3,000,000 (the "**Administration Charge**"), having the priority established by paragraphs [43] and [44] hereof.*

- [4] **ORDER** the provisional execution of this Order be rendered herein notwithstanding any appeal;

WITHOUT COSTS, save and except in the event of contestation.

MONTREAL, October 4, 2011



~~STIKEMAN ELLIOTT LLP~~

Attorneys for the Petitioners
Stichting Homburg Bonds and Stichting
Homburg Capital Securities

ANNEX I

APPLICANT PARTNERSHIPS

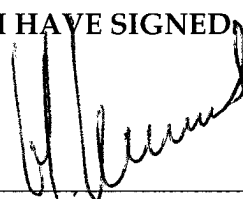
1. HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
2. HOMCO REALTY FUND (53) LIMITED PARTNERSHIP
3. HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
4. HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
5. HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
6. HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
7. HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
8. HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
9. HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
10. HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

AFFIDAVIT

I, the undersigned, Henricus Clemens Gertrudis Franciscus Knuvers, businessman, having my principal place of business at Paasheuvelweg 16, 1105 BH, Amsterdam, The Netherlands, solemnly declare the following:

1. I am a director of Stichting Homburg Bonds and Stichting Homburg Capital Securities.
2. All the facts alleged in the *Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* are true.

AND I HAVE SIGNED



**HENRICUS CLEMENS GERTRUDIS
FRANCISCUS KNUVERS**

**Solemnly declared before me in Montreal
on the 4th day of October, 2011**






NOTICE OF PRESENTATION

To: Service List

TAKE NOTICE that the *Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* will be presented before the Honourable Louis Gouin J.S.C. or one of the Honorable Judges of the Superior Court, sitting in the District of Montréal, at the Montréal Court House, 1 Notre-Dame Street West, Montréal, Québec, on Thursday, **October 6th, 2011**, at **9:15 a.m.** in a Room to be determined and communicated to the Service List.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, October 4, 2011



STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners
Stichting Homburg Bonds and Stichting
Homburg Capital Securities

SUPERIOR COURT

N° 500-11-041305-117

CANADA
PROVINCE OF QUEBEC
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IN THE MATTER OF THE PLAN OF
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BS0350 **Our File:** 131425-1001

*Motion for the Payment of Fees, Disbursements
and Expenses of the Indenture Trustees and the
Indenture Trustees' Advisors and Related Relief*

ORIGINAL

Me. Guy P. Martel (514) 397-3163
Fax: (514) 397-3493

STIKEMAN ELLIOTT
Stikeman Elliott LLP BARRISTERS & SOLICITORS
40th Floor
1155 René-Lévesque Blvd. West
Montréal, Canada H3B 3V2