

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 IN ANNEX I

Mis-en-cause

- and -

SAMSON BELAIR/DELOITTE & TOUCHE INC.

Monitor

- and -

STICHTING HOMBURG BONDS

- and -

STICHTING HOMBURG CAPITAL SECURITIES

Petitioners

AMENDED MOTION FOR AMENDMENTS TO THE INITIAL ORDER
(Sections 11, 11.02, 11.51 and 36 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 granted to a number of partnerships¹ related to the CCAA Debtors certain protections and authorizations contained in the Initial Order, including the Stay of Proceedings.
4. The petitioners in the context of the present motion are two foundations incorporated under the laws of the Netherlands, namely, Stichting Homburg Bonds, in its capacity as Trustee under a Trust Indenture made as of May 31, 2006, as supplemented by a number of supplemental indentures, and in its capacity as Trustee under a Trust Indenture made as of December 15, 2002, as supplemented by a number of supplemental indentures, as well as Stichting Homburg Capital Securities, in its capacity as Trustee under a Trust Indenture made as of February 28, 2009 (collectively, the "**Petitioners**").
5. Together, the debt represented by the Petitioners represents at least two-thirds of the Debtors' funded debt [...] (excluding the indebtedness of the various limited partnerships).
6. Unless otherwise indicated, any undefined capitalized term used herein shall have the meaning attributed to such term in the Initial Order.

II. ORDERS SOUGHT

7. The Petitioners, relying on the come back clause found at paragraph [56] of the Initial Order, hereby seek the following amendments to the Initial Order:

¹ These entities are [...] the "**Applicant Partnerships**" listed on Annex I hereto.

- (i) the addition of an order which provides that the Debtors shall file with this Court, on or before October 7, 2011, a preliminary plan of compromise or arrangement between the Debtors and one or more classes of their creditors, or a precise description containing the key elements of such a plan;
- (ii) the deletion of [...] any and all references to the "Applicant Partnerships" in the Initial Order, in Annex I thereto and in the style of cause of the present Court proceedings;
- (iii) [...];
- (iv) the deletion of the paragraphs which grant the Directors' Charge (paragraphs [26] and [27] of the Initial Order) and which attribute a rank to this charge or otherwise deal with it (paragraphs [43] and following of the Initial Order);
- (v) [...];

The whole as appears from the conclusions to this motion.

III. BACKGROUND

8. A copy of the Debtor's *Motion for an Initial Order* (as amended, the "**CCAA Petition**") was sent by counsel for the Debtors, Osler Hoskin & Harcourt LLP, to counsel for the Petitioners, Stikeman Elliott LLP, at 10:25 a.m. on September 9, 2011, as appears from a copy of an email communicated (without attachments) as **Exhibit P-1**.
9. The CCAA Petition was presentable at 2:15 p.m. that same day, as appears from Exhibit P-1.
10. Counsel for the Petitioners contacted their clients and received instructions to contest the issuance of the Initial Order. However, in light of the short delays involved, counsel for the Petitioners disposed of very little time to review the contents of the CCAA Petition and to prepare their submissions.
11. The hearing, which began in the afternoon of September 9, 2011, lasted well into the evening and led to the issuance of the Initial Order over the objections of the Petitioners.
12. On September 9, 2011, the Debtors informed the Court of the intention to proceed with the sale of 3,000,000 Bought Deal Units in Homburg Canada Real Estate Investment Trust for gross proceeds of \$34.5 million (the "**Bought Deal**"), as appears from paragraphs 71 and following of the CCAA Petition. The Bought

Deal Units belonged to Partnership (199), one of the Applicant Partnerships which is not included in the Initial Order's definition of "Petitioners".

13. Although the sale was disclosed in the CCAA Petition, no specific Court order approving the transaction was sought nor obtained, nor were any documents in support of this transaction filed in the Court record.
14. On September 12, 2011 at 10:33 a.m., the first business day following the CCAA Order, counsel for the Petitioners wrote to counsel for the Debtors, requesting them to advise when the Debtors would seek this Court's approval for the Bought Deal or whether HII had decided to disclaim or resiliate the underwriting agreement relating to such transactions, as appears from said letter and cover email, **Exhibit P-2**.
15. On September 13, 2011 at 8:30 a.m., a press release entitled "*Homburg Invest Inc. Closes \$34.5 Million Secondary Offering of Units of Homburg Canada Real Estate Investment Trust*" was issued by CNW Telbec on behalf of the Debtor HII, in which it was announced that "[...] HII completed the sale of 3,000,000 units of the REIT [...]" as appears from a copy of said press release, **Exhibit P-3**.
16. The prospectus issued in connection with the Bought Deal, **Exhibit P-4**, defines the "Selling Unitholder" as being "*Homburg Invest Inc., directly or through a wholly-owned subsidiary*" and it is stated, at page 10, that the REIT and the Selling Unitholder "*have agreed to sell*" the units and that "[t]he offering price of the units was determined by negotiation between the REIT, the Selling Unitholder and the Underwriters", leaving no doubt as to HII's implication in the sale.
17. After the closing of the Bought Deal, counsel for the Debtors wrote an email to counsel for the Petitioners, in which they stated that the Bought Deal did not need to be approved by the Court since "[...] *neither HII nor the other parties described as Petitioners in the Initial Order [...] are the sellers of the units*" and furthermore, that paragraph [14] of the Initial Order "*has no bearing on the Bought Deal*", as appears from a copy of said email, **Exhibit P-5**.

IV. GROUNDS FOR THIS MOTION

18. [...]
19. The Petitioners seek several amendments to the Initial Order. These amendments are aimed at [...] removing the Applicant Partnerships from the group of entities which have been placed under this Court's protection, protecting the rights of all stakeholders involved in this restructuring [...] and meeting the requirements of the CCAA in a number of respects.

1. "Esquisse" or "avant-goût" of a CCAA Plan

20. The first paragraph of the CCAA Petition states that the Debtors made their application under the CCAA "[...] *to facilitate the reorganization of their business and operations including the restructuring of their capital structure*". The remainder of the CCAA Petition is silent however, as to how the Debtors intend to reach the objective of reorganizing and restructuring their operations and capital structure.
21. A restructuring of the Debtors under the CCAA will undeniably constitute a costly, lengthy and complex undertaking.
22. Together the Petitioners represent claims of approximately €440,000,000 against the Debtors and are the holders of more than two-thirds of the Debtors' funded debt obligations (excluding the debt at the limited partnerships level). In light of the absence of any information concerning the type of restructuring to be implemented or the steps to be taken in connection therewith, the Petitioners submit that it is not only appropriate but also necessary for this Court to order the Debtors to provide [...], on or before October 15, 2011, a preliminary plan of compromise or arrangement between the Petitioners and one or more classes of their creditors, or at the very least, a precise description containing the key elements of such a plan.
23. [...]
24. [...]
25. [...]

1.a) Unlawful Extension of the Stay to the Applicant Partnerships

- 25.1 The Initial Order currently extends the Stay of Proceedings and other benefits to the "Homburg Parties", a defined term which includes ten (10) limited partnerships known as the "Applicant Partnerships" listed on Annex I hereto.
- 25.2 According to the Debtors at paragraphs 25 and 30 of their Amended Motion for an Initial Order dated September 9, 2011:
- (i) HII GP Inc. ("(199) GP") acts as general partner of Homco Realty Fund (199) Limited Partnership ("Partnership (199)");
 - (ii) Homburg L.P. Management Inc. ("Homburg Management") acts as general partner of all other Applicant Partnerships; and
 - (iii) HII is the sole limited partner of all the Applicant Partnerships.

- 25.3 Neither (199) GP nor Homburg Management were included as filing entities in these CCAA proceedings. A limited partnership cannot purport to benefit from CCAA protection when its general partner is not a filing entity.
- 25.4 In fact, the Debtors have not submitted any evidence to the effect that (199) GP and Homburg Management even authorized the making of an order in respect of the Applicant Partnerships.
- 25.5 HII is not the registered owner of the assets of the Applicant Partnerships which, as in most limited partnerships, are registered in the name of the general partner. These assets are not those of the limited partner, HII, to dispose of as it sees fit. The consent of the general partner of each Applicant Partnership was a prerequisite to any lawful attempt at placing the Applicant Partnerships under CCAA protection.
- 25.6 In light of the foregoing, the Initial Order cannot extend to the Applicant Partnerships and all references to these entities in the Initial Order, in Annex I thereto as well as in the style of cause must be deleted.
- 25.7 In addition, on September 30, 2011, Trustees' counsel was copied on a letter (the "**Blake's Letter**") sent to Debtors' counsel by the attorneys for Homburg Canada Inc. and Homburg Management, Blake, Cassels & Graydon LLP ("**Blakes**"), itself in reply to a letter from Debtor's counsel to Blakes, as appears from a copy of the Blakes Letter communicated as **Exhibit P-6**.
- 25.8 Despite the fact that these exchanges directly implicated the interests of the Trustees under the Heads of Agreement, Exhibits P-8 to the *De Bene Esse Motion to Lift the Stay*, Trustees' counsel was not copied on the original letter from counsel to the Debtors to counsel for Homburg Management.
- 25.9 The Blakes Letter highlights several issues, at least two of which are of particular concern to the Trustees:
- (i) there is a dispute between the Debtors and Homburg Management with respect to the amendment of the *Amended and Restated Agreement of Limited Partnership* in respect of Partnership (199), pursuant to which Homburg Management was purported to be removed as general partner of Partnership (199) and replaced by (199) GP. The representations of the Debtors and the Monitor before this Court were silent on the very existence of this dispute, which is all the more suprising in light of the fact that Partnership (199) was the entity involved in the Bought Deal for the REIT units which proceeded without appropriate disclosure or Court authorization;
 - (ii) it appears that HII seeks to involve itself in the management and control of the business of the limited partnerships in respect of which HII is a limited partner. In addition to raising that these attempts are unlawful,

the Blakes Letter also mentions that the contravention of the limited partnership agreements could give rise, under the applicable legislation, to "material tax and other consequences". This Court and HII's stakeholders are entitled to be fully informed of these risks without delay - it is in fact the duty of the Monitor to raise these issues before this Court.

25.10 In light of the foregoing, the Petitioners also contest all amendments formulated in connection with the Applicant Partnerships in the Debtors' Motion to Extend the Stay Period and to Amend the Initial Order and for Other Orders dated October 4, 2011, including the "replacement" of Partnership (53) with Partnership (94) sought therein (again, because Homburg Management is not a Petitioner in these proceedings and there is no evidence that Homburg Management, as general partner of Partnership (94), has in fact consented to the relief requested by the Petitioners in such motion).

2. [...]

26. [...]

27. [...]

28. [...]

29. [...]

30. [...]

3. D&O Charge

31. The Initial Order grants to the Directors of the Petitioners the benefit of a \$2,000,000 Directors' Charge, as appears from paragraphs [26] and [27] of the Initial Order. Paragraphs [43] and following of the Initial Order provide that the Directors' Charge and the Administrative Charge shall rank after the existing security on the Debtors' Property, but before unsecured claims.

32. As holders of the largest portion of unsecured claims against the Debtors, the Petitioners are directly affected by the creation and rank of the Directors' Charge.

33. It is submitted that the Debtors do not meet the statutory requirements for the creation of the Directors' Charge and that the Initial Order ought to be amended to remove the paragraphs which created it and which deal with its rank, the whole in accordance with the conclusions to this Motion.

34. The CCAA Petition, at paragraphs 129 and following, states that the Debtors' current directors' and officers' liability insurance provides \$10,000,000 in aggregate coverage and expires in June 2012. The directors and officers

concerned therefore enjoy the benefit of significant coverage for at least another nine (9) months.

35. The CCAA Petition also alleges at paragraph 131 that the Debtors are "*not in a position to secure adequate additional directors and officers liability insurance, notably in light of their financial situation.*" However, the Debtors have not provided any evidence to support these allegations, nor have they provided any details regarding the inquiries made with potential insurers in order to secure additional insurance.
36. The creation of the Directors' Charge requires, by statute, that the Court reach the conclusion that the Debtors cannot obtain adequate indemnification insurance for the officers and directors concerned at a reasonable cost. The Debtors did not meet the burden of proof in this respect.
37. The CCAA Petition also failed to provide the evidence required to justify the Directors' Charge itself, or its quantum. The fact that HII currently only has 46 employees according to paragraph 21 of the CCAA Petition does not appear to support a theory whereby the directors and officers of the Debtors could face significant liability for unpaid employee wages, which is typically one of the primary sources of potential liability for directors and officers.

4. [...]

38. [...]

39. [...]

40. [...]

V. CONCLUSIONS

41. The amendments to the Initial Order sought herein are fair and reasonable and in the interest of the Debtors and their stakeholders.
42. Considering the [...] urgency of the situation, the Petitioners request the provisional execution of the orders sought herein to be rendered notwithstanding any appeal.
43. 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.
44. The present motion is well founded in fact and in law.

WHEREFORE, MAY THIS COURT:

[1] **GRANT** the Petitioner's *Amended Motion for Amendments to the Initial Order and Related Relief* (the "**Motion**");

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

(i) the following paragraph [11.1] shall be added to the Initial Order after paragraph [11]:

[11.1] ORDERS the Petitioners to file with this Court, on or before October 15, 2011, a preliminary plan of compromise or arrangement between the Petitioners and one or more classes of their creditors, or a precise description containing the key elements of such a plan;

(ii) [...] the deletion of any and all references to the "Applicant Partnerships" in the Initial Order, in Annex I thereto and in the style of cause of the present Court proceedings;

(iii) [...]

(iv) paragraphs [26], [27] and [43] of the Initial Order shall be deleted and the references to "the CCAA Charges" in the Initial Order shall be replaced with "the Administration Charge";

(v) [...];

[3] **ORDER** that from the date of this Order until the Stay Termination Date, Homburg Invest Inc. shall cease and desist from any and all steps and actions taken or to be taken in connection with the running of the business of any limited partnership in which Homburg L.P. Management Inc. is the general partner, or in respect of the care, custody and maintenance of the property, assets and undertaking of such limited partnership(s), and shall refrain from getting involved in the control of the business of such limited partnership(s).

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

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

MONTRÉAL, October 4, 2011

Stikeman Elliott

STIKEMAN ELLIOTT LLP

Attorneys for the Petitioners

Stichting Homburg Bonds and Stichting

Homburg Capital Securities

ANNEX I
APPLICANT PARTNERSHIPS

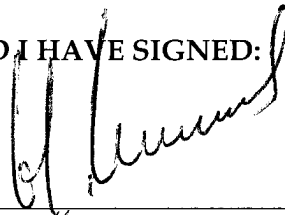
1. HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
2. HOMCO REALTY FUND (53) LIMITED PARTNERSHIP
3. HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
4. HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
5. HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
6. HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
7. HOMCO REALTY FUND (121) 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:

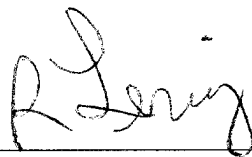
1. I am a director of Stichting Homburg Bonds and Stichting Homburg Capital Securities.
2. All the facts alleged in the Amended Motion for Amendments to the Initial Order are true.

AND I HAVE SIGNED:



HENRICUS CLEMENS GERTRUDIS
FRANCISCUS KNUVERS

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





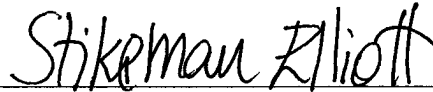
NOTICE OF PRESENTATION

To: Service List

TAKE NOTICE that the *Amended Motion for Amendments to the Initial Order* 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.** and 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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BS0350 Our File: 131425-1001

AMENDED MOTION FOR AMENDMENTS
TO THE INITIAL ORDER

ORIGINAL

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