

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

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, (199) GP, 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, and in its capacity as Trustee under a Trust Indenture made as of December 15, 2002, and 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 obligations.
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 Homburg Realty Fund (92) Limited Partnership ("**Partnership (92)**"), Homburg Realty Fund (199) Limited Partnership ("**Partnership (199)**"), Homburg Realty Fund (52) Limited Partnership ("**Partnership (52)**"), Homburg Realty Fund (53) Limited Partnership ("**Partnership (53)**"), Homburg Realty Fund (88) ("**Partnership (88)**"), Homburg Realty Fund (89) Limited Partnership ("**Partnership (89)**"), Homburg Realty Fund (105) Limited Partnership ("**Partnership (105)**"), Homburg Realty Fund (121) Limited Partnership ("**Partnership (121)**"), Homburg Realty Fund (122) Limited Partnership ("**Partnership (122)**") and Homburg Realty Fund (142) ("**Partnership (142)**") and together with Partnership (92), Partnership (199), Partnership (52), Partnership (53), Partnership (88), Partnership (89), Partnership (105), Partnership (121) and Partnership (122), the "**Applicant Partnerships**") (para. [9] of the Initial Order).

- (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 certain paragraphs of the Initial Order which grant the Debtors specific powers to restructure their business and financial affairs and their replacement with an order which provides that until further order of this Court, none of the Homburg Parties:
 - (a) shall, other than in accordance with existing agreements and in the ordinary course of business, sell, dispose of, convey, transfer, release, discharge, assign, hypothec, pledge or grant security on any of their property, assets and undertakings involving an amount of consideration (in any one transaction or series of related transactions) without prior leave of this Court; and
 - (b) enter into any new material transaction or incur any new debt or other obligation except in the ordinary course of business or as otherwise provided for in this Order or any subsequent order;
- (iii) subsidiarily, if the order sought in (ii) is not granted, an order which ensures that the disposition of any assets directly or indirectly owned or controlled by the Applicant Partnerships, or the grant of any encumbrances on such assets, shall be subject to the same restrictions and limitations as those which apply to assets owned or controlled by the Debtors, and to the same effect, that the reference to "the Petitioners" in paragraphs [28] to [34] and in paragraph [45] of the Initial Order shall be replaced with "the Homburg Parties";
- (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 addition of the name "Homburg Realty Fund (142)" in the list of entities in ANNEX I of the Initial Order;

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 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. Paragraph [56] of the Initial Order provides that "[...] *any interested Person may apply to this Court to vary or rescind the Order or seek other relief upon seven (7) days notice to the Homburg Parties, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.*"
19. The Petitioners seek several amendments to the Initial Order. These amendments are aimed at ensuring that the Debtors are prevented from disposing of any further assets of the Homburg Parties without Court approval, at protecting the rights of all stakeholders involved in this restructuring, and at 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. 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 such information on or before the date of expiration of the Stay Period.
23. Moreover, although the Debtors have failed to provide the slightest hint as to the contents of the roadmap which they propose to follow, the Initial Order extends to them the Stay of Proceedings as well as full powers to restructure their businesses as they see fit. This includes the power to downsize their operations (para. [28](a)), dispose of property outside the ordinary course of business (para. [28](c)) and disclaim or resiliate agreements to which they are parties (para. [28](e)).

24. The Petitioners respectfully submit that the conclusions granted in paragraphs [28] to [30] of the Initial Order are too broad in light of the complete absence of any indication as to what the restructuring of Debtors may entail.
25. 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. In light of the Petitioners' current opposition to the course of action chosen by the Debtors and the fact that the Petitioners' cooperation will be required in order to negotiate a successful plan of reorganization and compromise, the vast restructuring powers conferred unto the Debtors in the Initial Order ought to be curtailed, at least until further order of this Court.

2. Disposition of Assets of the Applicant Partnerships

26. Subsidiarily, should this Court reach the conclusion that the Debtors are entitled to retain the restructuring powers conferred upon them by paragraphs [28] to [30] of the Initial Order, the Petitioners submit that at the very least, the Initial Order should be amended to clearly provide that property of the Applicant Partnerships cannot be disposed of or encumbered without obtaining prior leave of this Court.
27. The Debtor's recent actions in respect of the Bought Deal illustrate the importance of this matter. The sale of the Bought Deal Units indirectly held by HII without court approval was in breach of paragraphs [14] of the Initial Order, which applies to all Homburg Parties, including the Applicant Partnerships.
28. The Bought Deal was also in breach of paragraph [28](c) of the Initial Order, although the drafting of this paragraph is far from clear. While the introductory portion of paragraph [28](c) refers to Monitor and Court approval in respect of actions taken by the "Petitioners" (a term that excludes the Applicant Partnerships), section (c) itself prevents the conveyance of any "Property" outside of the ordinary course of business. Since the term "Property" is defined at paragraph [14] of the Initial Order as including the property of the Homburg Parties, the Petitioners submit that property of the Applicant Partnerships is covered by this provision.
29. In any event, the statutory safeguards provided by the CCAA must apply to the property of all parties who benefit from the protection of the Stay of Proceedings, including the Applicant Partnerships. One cannot purport to derive protection and powers from the CCAA's application while circumventing the statutory requirements which impose limits and court supervision over the very exercise of these powers.
30. To deny the relief sought herein would run counter to the very objectives of the CCAA and could lead to a serious erosion of the rights of the Debtor's stakeholders, particularly in a case such as this, where the Stay of Proceedings is extended to partnerships which hold valuable assets.

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. ANNEX I to the Initial Order

38. Paragraph [9] of the Initial Order extends the protection of the CCAA to the Applicant Partnerships, one of which is listed as Homburg Realty Fund 142 (defined as "Partnership 142").
39. ANNEX I to the Initial Order lists the names of those entities which are *mis-en-cause* in the present proceedings and includes all Applicant Partnerships except for one, Homburg Realty Fund 142.

40. The Petitioners submit that ANNEX I must be amended to correct this situation, failing which the protection of the CCAA would extend, pursuant to paragraph [9] of the Initial Order, to an entity which is not a party to these proceedings.

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 short delay between the presentation of this Motion and the expiry of the Stay Period on October 7, 2011, by which time the parties are likely to re-appear before this Court, 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:

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

[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 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 7, 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) paragraphs [28] to [30] of the Initial Order shall be deleted and replaced with the following paragraph [30.1]:

[30.1] ORDERS that until further order of this Court, none of the Homburg Parties:

- (a) *shall, other than in accordance with existing agreements and in the ordinary course of business, sell, dispose of, convey, transfer, release, discharge, assign, hypothec, pledge or grant security on any of their property, assets and undertakings involving an amount of consideration (in any one transaction or series of related transactions) without prior leave of this Court; and*

(b) *enter into any new material transaction or incur any new debt or other obligation except in the ordinary course of business or as otherwise provided for in this Order or any subsequent order.*

(iii) subsidiarily, if the Order sought in (ii) is not granted and paragraphs [28] to [30] of the Initial Order are not deleted, all references to "the Petitioners" in paragraphs [28] to [34] and in paragraph [45] of the Initial Order shall be replaced with "the Homburg Parties" and the following paragraph [28.1] shall be added after paragraph [28]:

[28.1] DECLARES, for greater certainty, that the disposition of any assets directly or indirectly owned or controlled by the Applicant Partnerships, or the grant of any encumbrances on such assets, shall be subject to the same restrictions and limitations as those which apply to assets owned or controlled by the Petitioners.

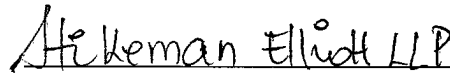
(iv) paragraphs [26], [27] and [43] of the Initial Order shall be deleted and the references to "the CCAA Charges" in the Initial Order shall be replaced with "the Administration Charge";

(v) the name "Homburg Realty Fund (142)" shall be added to the list of entities in ANNEX I to the Initial Order;

[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, September 16, 2011

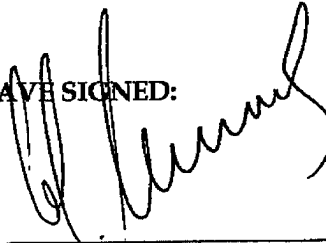

STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners
Stichting Homburg Bonds and Stichting
Homburg Capital Securities

AFFIDAVIT

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

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

AND I HAVE SIGNED:



Henricus Clemens Gertrudis Franciscus
Knuvers

Solemnly declared before me at Amsterdam, The Netherlands,
on the 16th day of September, 2011



Elmar Dijkstra, a candidate civil-law notary, acting as a deputy of Mr. Daan ter Braak,
civil-law notary, practising in Amsterdam, The Netherlands



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

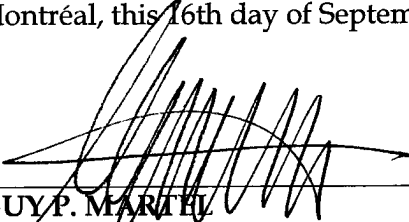
Petitioners

ATTESTATION OF AUTHENTICITY
ART. 82.1 C.C.P.

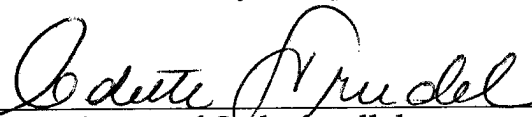
I, the undersigned, Guy P. Martel, lawyer, practicing at 1155, boulevard René-Lévesque West, Suite 4000, in Montréal, District of Montréal, Province of Quebec, H3B 3V2, solemnly affirm as follows:

1. On September 16, 2011, at 11:25 A.M., I received an affidavit signed by Mr. Henricus Clemens Gertrudis Franciscus Knuvers, sole director of Stichting Homburg Bonds and Stichting Homburg Capital Securities (the "Foundations"), in support of the Petitioner's *Motion for Amendments to the Initial Order and Related Relief*.
2. The above-mentioned affidavit was sent to me from Amsterdam, The Netherlands, via email (Kolkman@vandoorne.com) by Mtre Joost Kolkman, external counsel for the Foundations practicing at the law office of Van Doorne N.V.
3. The copy of this affidavit joined to the present attestation is a true copy of the Affidavit in PDF format received on September 16, 2011 from Mtre Kolkman.

Montréal, this 16th day of September, 2011


GUY P. MARTEL
STIKEMAN ELLIOTT LLP
Attorneys for the Petitioners

SOLEMNLY AFFIRMED before me in
Montréal, this 16th day of September 2011


Commissionner of Oaths for all the
judicial districts of Quebec

27644

NOTICE OF PRESENTATION

To: Service List

TAKE NOTICE that the *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, at a date and time to be determined by the Court and communicated to the Service List.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, September 16, 2011

Stikeman Elliott LLP

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
DISTRICT OF MONTRÉAL

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

HOMBURG INVEST INC. & *al.*
Debtors

- and -
HOMBURG REALTY FUND (199) LTD.
PARTNERSHIP & *al.*

Mis-en-Cause
- and -
SAMSON BÉLAIR/DELOITTE & TOUCHE INC.
Monitor

-and-
STICHTING HOMBURG BONDS & *al.*
Petitioners

BS0350 Our File: 131425-1001

MOTION FOR AMENDMENTS TO
THE INITIAL ORDER

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