

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-041305-117

DATE : February 17, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD
INVERNESS ESTATES DEVELOPMENT LTD
CP DEVELOPMENT LTD

Debtors / Petitioners

And

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
HOMCO REALTY FUND (94) LIMITED PARTNERSHIP
HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mis en cause

And

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

And

**STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES**

Trustees

And

**TABERNA EUROPE CDO I PLC
TABERNA EUROPE CDO II PLC
TABERNA PREFERRED FUNDING VIII, LTD
TABERNA PREFERRED FUNDING VI, LTD**

Contesting Parties

REASONS FOR JUDGMENT

JS 1319

INTRODUCTION

[1] The amended motion of Stichting Homburg Bonds and Stichting Homburg Capital Securities (collectively « Stichting ») for the payment of fees of professional advisors was heard on February 13, 2012 at which time the Court indicated that the motion would be granted in part with an order and reasons to follow. These are the reasons for the order which issued on February 15, 2012 a copy of which is annexed hereto.

[2] On September 9, 2011, the Debtor filed and obtained an initial stay order (« Initial Order ») pursuant to sections 4, 5 and 11 of the Companies' Creditors Arrangement Act (« CCAA »)¹.

[3] The stay granted under the Initial Order has been extended several times and the most recent order of this Court extends the protection under the CCAA to March 16, 2012. The Honourable Mr. Justice Louis J. Gouin, j.s.c. is charged with the management of the case but due to a conflict of interest with the attorneys representing the Contesting Parties, the undersigned presided over the hearing of the motion referred to above.

[4] Stichting seeks an order of this Court providing for the advance by the Debtor of the reasonable fees of the trustees of Stichting as well as the attorneys and financial advisors engaged by them to represent Stichting in the matter of the present CCAA filing. The request is limited to fees incurred since December 3,

¹ R.S.C., (1985), c. C-36.

2011. The advances of these fees will be set-off against payments to be made to Stichting under an eventual plan of arrangement.

[5] One creditor or group of creditors, Taberna Europe CDO 1 PLC and related entities (« Contesting Parties ») contested the motion although one of the main thrusts of such contestation was settled by the parties before the hearing and reflected in the drafting of the proposed order, as will be set forth in more detail herein below.

[6] Both the Debtor and the Monitor consented to the motion.

[7] The matter was heard on the basis of the affidavit supporting the motion and the documentary evidence filed by Stichting. The representative of the Monitor, Mr. Pierre Laporte, C.A., testified briefly before the undersigned.

FACTS

[8] Petitioners are two entities created under the laws of the Netherlands who act as trustees under three trust indentures which govern the issuance of three series of bonds : (i) corporate bonds, (ii) mortgage bonds and, (iii) capital securities.

[9] The indentures constitute Stichting as the trustee thereunder as the duly authorized representatives of the holders of the debt or bonds with the power to declare default, claim payment and agree to extensions of periods of payment, amongst other things.

[10] Most significantly for present purposes, the trustees also have the right to engage advisors including lawyers and accountants.

[11] The trustees have engaged Canadian litigation and corporate counsel, Dutch attorneys and a Canadian financial advisor.

[12] The trust indentures provide that the trustees' remuneration and that of its professional advisers, including legal fees, are payable by the Debtors.

POSITION OF THE CONTESTING PARTY

[13] The crux of the contestation by the Contesting Parties is that the holders of the corporate securities have « equity claims » and as such rank subordinate

to all other creditors² such that it is extremely unlikely that they will receive the payment of any dividend on their claims. This is significant since the motion is predicated on seeking an advance for purposes of paying professional fees, which advance will ultimately be reimbursed from the proceeds of a distribution by the Debtor.

[14] The Contesting Parties also took the position before the undersigned that notwithstanding the wording of the trust indentures, as a matter of Quebec law, the payment of professional or at least legal fees could not form part of the claims of any of the bondholders in the CCAA proceedings. No claims process has as yet been put in place and in the opinion of this Court, it would be at best, premature to deal with this issue at the present time.

DISCUSSION

[15] The Monitor indicated and it is common ground that there is presently or will be shortly, cash available to pay professional fees. The Debtor has or will shortly receive substantial funds following the purchase of its holdings in the Canmarc REIT. In any event, with the consent of all parties the order issued reflects that fees can only be paid out of available cash. If the Debtor was put in the position to borrow in order to advance fees to the bondholders, the Court would have been reticent to grant the Motion.

[16] There are approximately 9500 bondholders under the three indentures. They are mainly individuals (as opposed to corporations), resident in Holland. Each of the bonds is in a relatively small amount. The largest is 2,340,000 Euros; the average is 31,999 Euros.

[17] Despite the small individual amounts of the bonds, in the aggregate, this group constitutes the largest single creditor body in the present CCAA filing and may even have sufficient claims in dollars to carry an eventual vote on an arrangement.

[18] In the circumstances described above there is a combination of geographic, linguistic and financial barriers impeding the bondholders from proper representation by the appropriate professionals in this CCAA file. Though nothing might stop individual bondholders from engaging their own counsel, this is clearly unrealistic for the most part, in the circumstances. Without funding this important group of creditors will be denied appropriate representation.

[19] Most significantly, the uncontradicted proof in the record before the undersigned is that there will in all probability be a significant distribution to the

² ss. 19 and 2 CCAA and s. 140.1 Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

bondholders. The possible exception of course being the holders of the corporate securities who in the submission of the Contesting Parties hold equity claims which would be subordinated to all other claims.

[20] As stated above the request for the advance of fees is premised on a reimbursement. The hesitation of the Court and the preoccupation of the Contesting Parties was that in the event there is no distribution to the holders of the corporate securities then there would be no practical means to seek reimbursement of the advance made to them for fees. This concern has been addressed by the drafting of the order which provides that reimbursement of any fees advanced is to be made by way of set-off (or compensation) against the aggregate payment to the three classes of bondholders. Accordingly should the holders of corporate securities not receive a distribution their share of the advance for fees would be reimbursed to the Debtor by the holders of the other two classes of debt.

[21] The foregoing should not be misinterpreted. The Court makes no determination or finding at this time as to whether the rights under the corporate securities are equity claims. The Contesting Parties or any other party may seek to make such argument at the appropriate time.

[22] The advance of fees sought herein is not strictly provided on a literal reading of the CCAA. Section 11.52(1)(c) provides for the possibility of granting a security or charge over the assets of the Debtor to secure the payment of fees. The rationale is to allow the effective participation of a class of creditors that might otherwise be denied the possibility of representation when such class of creditors is a significant stakeholder³.

[23] It appears to the Court that the rationale for the payment here is the same as the underpinning of Section 11.52(1)(c). If the Court has the power to grant a charge to secure payment by the Debtor, surely the general jurisdiction under Section 11 allows for an order of payment of such amounts. This is *a fortiori* when the payments to be made will be advances subject to reimbursement.

[24] As stated, the circumstances described above justify the making of such an advance. The group of creditors is significant, if not the most significant group of creditors. Because of the factors enumerated above the group requires professional representation and it is impractical to canvass 9,500 members to contribute to a fund for the payment of the professional fees.

[25] The jurisdiction to order the payment of fees in such circumstances has been recognized by the courts. In *Nortel*⁴, the Court ordered the CCAA Debtor to pay the fees of the lawyer of three thousand five hundred employees. In the

³ Bill C-55 : Industry Canada, clause by clause briefing book.

⁴ *Re Nortel Networks Corp.*, (2009) 53 C.B.R. (5th) 196 (Ont. S.C.J.).

ABCP Commercial Paper case⁵, the CCAA Debtor was ordered to pay the fees of counsel to retail purchasers of asset-backed commercial paper. Equally, in *Edgeworth*⁶, the Debtor was ordered to pay counsel representing four thousand Asian investors.

[26] The undersigned is aware of the decision of the Hon. Mr. Justice Clément Gascon, j.s.c. in the matter of *Mecachrome*⁷ where he refused to allow security for the payment of the legal fees of the board of directors, the banking syndicate and certain other groups of creditors. Mr. Justice Gascon felt that no adequate explanation had been given to justify such treatment and most significantly nothing was demonstrated to him that would indicate that the participation of these groups in the CCAA process would be jeopardized by the failure to grant them the benefit of a charge for the payment of legal fees⁸. In the present case, it has been demonstrated to the undersigned that because of the large number of relatively small denomination of bonds held by foreign individuals, the advances for the fees of professionals appointed to represent such bondholders is essential to their effective participation in the present CCAA process.

CONCLUSION

[27] For all of the foregoing reasons the motion was granted and the attached order was issued.

[28] Costs were not sought and the nature of the contestation by way more of intervention does not merit the awarding of costs against the Contesting Parties.



MARK SCHRAGER, j.s.c.

⁵ *Re Metcalfe & Mansfield*, n° 08-CL-7440, Order, Re Appointment of Representative Counsel in ABCP, (Ont. S.C.J.), 15 avril 2008, j. Campbell.

⁶ *Re Edgeworth*, n° CV-11-9409-00CL, Initial Order, (Ont. S.C.J.), 10 novembre 2011, j. Campbell.

⁷ *Re Mecachrome International Inc.*, C.S. Montréal, n° 500-11-035041-082, 13 janvier 2009, j. Gascon.

⁸ *Re Mecachrome, id.*, par. 79 à 81.

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SUPERIOR COURT

(Commercial Division)

**C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

NO: 500-11-041305-117

DATE: February 15, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

**HOMBURG INVEST INC.
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**STICHTING HOMBURG BONDS
STICHTING HOMBURG CAPITAL SECURITIES**

Trustees

**ORDER ON THE TRUSTEES' AMENDED MOTION FOR THE PAYMENT OF FEES,
DISBURSEMENTS AND EXPENSES**

FURTHER to the court hearing held on February 13, 2012 and the representations of counsel to Stichting Homburg Bonds and Stichting Homburg Capital Securities (the "**Trustees**") as well as counsel to other interested parties;

CONSIDERING the Trustees' *Amended Motion for the Payment of Fees, Disbursements and Expenses of the Indenture Trustees and the Indenture Trustees' Advisors and Related Relief* (the "**Motion**");

CONSIDERING the Initial Order issued by the Court on September 9, 2011 (the "**Initial Order**"), as extended and amended by the First Extension Order issued on October 7, 2011 and the Second Extension Order issued on December 8, 2011;

CONSIDERING the:

- a. Trust Indenture made as of May 31, 2006, between Homburg Invest Inc. ("**HII**") and Stichting Homburg Bonds, as supplemented by several Supplemental Indentures (the "**Corporate Bonds Indenture R-1**"), pursuant to which four series of corporate bonds were issued (the "**Corporate Bonds**");
- b. Trust Indenture made as of December 15, 2002, between Homburg ShareCo Inc. and Homburg Stichting Homburg Mortgage Bond, as supplemented by several Supplemental Indentures (the "**Mortgage Bonds Indenture R-2**"), pursuant to which four series of mortgage bonds were issued (the "**Mortgage Bonds**");
- c. Trust Indenture made as of February 28, 2009, between HII and Stichting Homburg Capital Securities (the "**Capital Securities Indenture R-3**"), pursuant to which capital debt securities were issued (the "**Capital Securities**");

(the Corporate Bonds, Mortgage Bonds and the Capital Securities, collectively the "**Securities**");

CONSIDERING that the Trustees have retained the services of:

- a. Mr. Henk Knuffers, Ms. Marian Hogeslag, Mr. Wouter de Jong, Mr. Hendrik Stadman Robaard and Mr. Karel de Vries, to act as directors of each Trustee;
- b. Stikeman Elliott LLP ("**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;

(collectively, and together with any other director, legal, financial, or other advisors of the Trustees, the "**Trustees' Advisors**");

CONSIDERING the 5th Report to the Court submitted by Samson Bélair/Deloitte & Touche Inc., in its capacity as Monitor; and

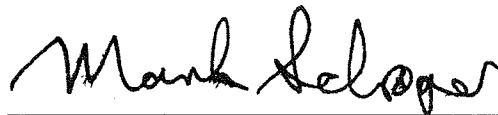
CONSIDERING the powers granted to this Court under the *Companies' Creditors Arrangement Act* and more specifically section 11 thereof.

FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Trustees' Motion, in part;

[2] **ORDERS** that the Petitioners shall advance from the available cash of the Debtors, on the same payment terms as the fees and disbursements payable by the Petitioners pursuant to paragraph [41] of the Initial Order dated September 9, 2011 as amended and/or restated, amounts equivalent to the reasonable fees and expenses incurred as and from December 3rd, 2011 in connection with the CCAA proceedings and the Restructuring by the Trustees' Advisors, the aggregate of which advances (the "**Stichting Advances**") up to the maximum amount to be distributed or paid (i) shall become due and payable to the Debtors immediately prior to any distribution or payment, including pursuant to a sale of assets, liquidation or realization of security or otherwise (each a "**Distribution Event**"), to be made to or for the benefit of the holders of the Securities, as the case may be, (ii) shall be set-off/compensated against the aggregate of any distribution to be made to or for the benefit of the holders of Securities pursuant to any such Distribution Event and (iii) shall be allocated, as between the holders of Securities, on a pro-rata basis, based on the amount, if any, to be distributed or paid in respect of each of the Corporate Bonds, Mortgage Bonds and Capital Securities as a percentage of the total amount to be distributed in respect of all Securities.

THE WHOLE WITHOUT COSTS.



MARK SCHRAGER, J.S.C.