# COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-024589-145
(500-11-041305-117)

---

MINUTES OF THE HEARING

---

DATE: January 16, 2015

CORAM: THE HONOURABLES YVES-MARIE MORISSETTE, J.A.
JULIE DUTIL, J.A.
NICHOLAS KASIRER, J.A.

| APPELLANTS | ATTORNEY / COUNSEL |
|---|---|
| **TABERNA PREFERRED FUNDING VI, LTD**<br>**TABERNA PREFERRED FUNDING VIII, LTD**<br>**TABERNA EUROPE CDO I P.L.C.**<br>**TABERNA EUROPE CDO II P.L.C.** | Mtre SYLVAIN RIGAUD<br>Mtre CHRYSTAL ASHBY<br>(*NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L.,S.R.L.*) |
| RESPONDENTS | ATTORNEY / COUNSEL |
| **STICHTING HOMBURG BONDS** | Mtre GUY PAUL MARTEL<br>Mtre DANNY DUY VU<br>(*STIKEMAN ELLIOTT S.E.N.C.R.L., S.R.L.*) |
| **SAMSON BÉLAIR/DELOITTE & TOUCHE INC.** | Mtre MASON POPLAW<br>Mtre NICOLAS DESLANDRES<br>Mtre JOCELYN PERREAULT<br>(*MCCARTHY TÉTRAULT S.E.N.C.R.L., S.R.L.*) |
| **1810040 ALBERTA LTD. (FORMERLY KNOWN AS HOMBURG INVEST INC. AND HOMBURG SHARECO INC.) ET AL.** | Mtre MARTIN DESROSIERS<br>(*OSLER, HOSKIN & HARCOURT, S.E.N.C.R.L./S.R.L.*) |

| IMPLEADED PARTY | ATTORNEY / COUNSEL |
|---|---|
| **HOMCO REALTY FUND (52) LIMITED PARTNERSHIP ET AL.** | |

In appeal from a judgment rendered on June 30, 2014 by the Honourable Justice Mark Schrager, of the Superior Court, (Commercial Division), district of Montreal

NATURE OF THE APPEAL: **Interlocutory judgment - Companies' Creditors Arrangement Act.**

| | |
|---|---|
| Clerk: Marcelle Desmarais | Courtroom: Antonio-Lamer |

## HEARING

| | |
|---|---|
| 9 h 30 | Submissions by Mtre Sylvain Rigaud. |
| 11 h 00 | Suspension. |
| 11 h 17 | Resumption. |
| 11 h 17 | Continuation of submissions by Mtre Rigaud. |
| 11 h 21 | Submissions by Mtre Martin Desrosiers. |
| 11 h 32 | Submissions by Mtre Guy Paul Martel. |
| 11 h 56 | Submissions by Mtre Mason Poplaw. |
| 12 h 31 | Reply by Mtre Sylvain Rigaud. |
| 12 h 42 | Comments by Mtre Mason Poplaw. |
| 12 h 43 | Comments by Mtre Rigaud. |
| 12 h 44 | End of arguments. |
| 12 h 44 | Suspension. |
| 13 h 04 | Resumption. |
| | BY THE COURT: |
| | Unanimous judgment see page 3. |

Marielle Bernard

Clerk

**BY THE COURT**

---

JUDGMENT

---

[1] With leave of a judge of this Court, the appellants have appealed a judgment of the Superior Court, District of Montreal (the Honourable Mark Schrager), rendered on June 30, 2014, which granted the respondents' re-amended motion for directions pursuant to the *Companies' Creditors Arrangement Act*.[1] The judge declared, *inter alia*, that the payment of amounts due to the appellants under certain indentures and notes collectively referred to by the judge as the 2011 Taberna Indentures be subordinated to the full and complete payment of the Senior Debt of Homburg Invest Inc. (HII), including claims by the respondent Stichting Homburg Bonds (Stichting).[2]

***

[2] For the most part, the facts are not in dispute. All parties refer to the account given by the motion judge, in particular in paragraphs [1] to [20] of his reasons.

[3] The key issue before the Superior Court was the meaning to be given to the 2011 Taberna Indentures, specifically to the sections of those agreements that provided that payment of the Taberna notes held by the appellants be subordinate to Senior Debt holders, including Stichting.

[4] As the judge noted at para. [13] of his reasons, the 2011 Taberna Indentures replaced the 2006 Taberna Indentures following a period of negotiation. Significantly, sections 12.2(b) and 12.2(c) of the 2006 Taberna Indentures were deleted and do not appear in the 2011 Indentures. Section 12.2(b) had provided for full payment of the Senior Debt (including the Stichting bonds) in priority to the Junior Debt (including the Taberna notes) in the event of bankruptcy or insolvency of HII. Section 12.2(c) was a "turnover clause": it provided that, in the event of a payment received by the trustee under the 2006 Taberna Indentures in contravention with the terms of the Indentures, such proceeds would be remitted or turned over to the Senior bondholders.

[5] According to Taberna, the effect of these deletions on the meaning to be given to the 2011 Taberna Indentures is that the claim of the Taberna noteholders is no longer subordinate to the claim of the Stichting bondholders in connection with the HII plan. This is the case, they say, notwithstanding the terms of Article XII of the 2011 Taberna Indentures which continue to refer to the subordination of securities issued thereunder to Senior Debt. The Taberna noteholders asked the Superior Court to declare that under the 2011 Taberna Indentures, they should be paid *pari passu* with the Stichting bondholders pursuant to the CCAA plan of arrangement.

---

1 R.S.C., 1985, c. C-36.

2 2014 QCCS 3135. The terms used to describe the various bonds, notes and indentures herein are defined in the reasons of the motions judge and, as the parties have done, we shall refer to those defined terms for ease of reference.

[6] The judge disagreed. He decided that, notwithstanding the deletions and other evidence adduced as to the parties' intentions, the claim of the Taberna noteholders under the 2011 Taberna Indentures remained subordinate to the Senior Debt, including the Stichting debt. He agreed with the expert evidence that, under governing New York law, the terms of a contract should be enforced as the definitive expression of the parties' intent where they are clear and unambiguous. The subordination language in the 2011 Taberna Indentures was clear and unambiguous expression of the parties' intention that the Taberna notes be subordinate to the Stichting bonds. The deletion of the turnover provisions from the 2006 Indentures did not change the subordinated status of the Taberna notes. Moreover, held the judge, the rights of the creditors *inter se* were not altered by the approval and homologation of the CCAA plan of arrangement. The subordination clause was held to be this fully enforceable even if the Taberna noteholders and the Stichting bondholders are in the same class of creditors.

***

[7] The appellants argue that the judge made three errors, each of which justifies setting aside the judgment *a quo*: he purportedly misinterpreted Article XII of the 2011 Taberna Indentures; he allegedly erred in his appreciation of the impact of the CCAA proceedings on the rights of the creditors *inter se* pursuant to the subordination provisions of the Indentures; and he is said to have been mistaken in his view of the enforceability of the Indentures against the Stichting bondholders as third parties.

[8] The appellants are mistaken on the first two grounds of appeal. For the reasons that follow, we are of the view that the appellants have failed to show that the judge committed a reviewable error. It is not necessary to decide the third point. In the result, the appeal should be dismissed.

***

## I Alleged Error in the Interpretation of the 2011 Taberna Indentures

[9] Did the judge err in his interpretation of the subordination provisions of the 2011 Taberna Indentures leading him to conclude, mistakenly, that the claims held by the Taberna noteholders are still subordinated to the claims of the Stichting boldholders?

[10] The appellants present three sub-arguments under this heading. They are treated here in turn.

[11] First, the appellants argue that the judge wrongly resolved the subordination dispute on the basis of general insolvency law principles rather than on the contractual wording in the 2011 Taberna Indentures, including the choice of law clause designating New York law as applicable to the contract's interpretation. In support of this position, they point to language used in para. [51] of the judge's reasons where he stated the following : "[a]ccordingly, applying principles of Canadian insolvency law to the subordination in the present [case], Taberna remains subordinate in the insolvency and this absent the specific bankruptcy language and a turnover clause".

[12] The appellants are mistaken on this point.

[13] The motion judge correctly identified New York law as providing the rules of interpretation applicable to the 2011 Taberna Indentures and determined the content of these rules based on expert evidence presented before him: see paras. [14], [32] and [40] of his reasons. Once he decided that the determination of the substantive rights of the parties under the contract was governed by New York law, the judge also correctly held that the procedural treatment of such rights, for affected creditors under the plan of arrangement, was subject to Canadian insolvency law: paras [31], [32] and [40]. The judge's comment in para. [51], when read in the context of his analysis as a whole, is not inconsistent with this approach and evinces no reviewable error.

[14] Second, the appellants submit that the judge erred "in law" when he concluded that the deletion of the existing turnover provision in the 2011 Taberna Indentures by HII and the Taberna noteholders did not constitute evidence that the parties no longer intended the Taberna notes to be subordinated to the Stichting bonds.

[15] Writing on the terms of the 2011 Taberna Indentures at paragraph [40] of his reasons, the judge observed that "[t]he subordination clause clearly establishes the princip[le]. The extrinsic evidence adduced by Taberna is not convincing of any intention to change the princip[le] of subordination that existed under the 2006 Taberna Indentures". After reviewing expert evidence on the rules for the interpretation of contracts in New York law, the judge decided that there was "no meeting of the minds" regarding the legal consequences of not reproducing the turnover provisions in the 2011 Taberna Indentures (para. [54]). On his view of the evidence, while the parties did delete the turnover provisions, they did not agree to change the basic subordination concept expressed in the 2006 agreements and carried forward by the clear and unambiguous wording of the 2011 Taberna Indentures. Even without the turnover clause, the subordination provisions are fully enforceable in a bankruptcy or insolvency context. The judge considered that the subordination language in Article XII of the 2011 Taberna Indentures was "sufficient" notwithstanding the deletion of the turnover provisions (para. [47]).

[16] The interpretation of the intention of the parties as expressed in the 2011 Taberna Indentures is a finding of fact. Courts have been emphatic in deciding that whether or not a judge correctly interpreted a contract is a question of fact or, at best, a mixed question of fact and law.[3] The appellants bear the burden of showing that the judge committed a palpable and overriding error in order to have the judgment reversed.[4]

[17] They have failed to meet that burden.

[18] The judge found that, according to the clear meaning of the 2011 Taberna Indentures, the Taberna notes are subordinated to the Stichting bonds. In so doing, he applied the rule of interpretation in New York law that a clear and unambiguous wording is considered to be the definitive expression of the parties' intention.

---

3 *Sattva Capital Corp.* v. *Creston Moly Corp.*, 2014 SCC 53, paras. 42 to 55. See also *René Corriveau & Fils inc.* v. *9201-0958 Québec inc.*, 2014 QCCA 1765, para. 10 and *Compagnie de chemin de fer du littoral nord de Québec et du Labrador inc.* v. *Sodexho Québec ltée*, 2010 QCCA 2408, para. 211.

4 *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[19] The judge added that the evidence that Taberna brought did not convince him that the parties had agreed to set aside the subordination "principle" or "concept" by deleting the turnover provisions. In paragraphs [37] to [40], he specifically considered the appellants' argument, founded upon the testimony of their expert, that the deletion of the turnover provision was not parole evidence and that, instead, it was significant as an indication of the parties' intention to end subordination. The judge rejected that view of the evidence and preferred to discern the parties' intention from the clear terms of the contract.

[20] Contrary to the appellants' submission, the judge did not decide that there was no meeting of minds on the basis of the "subjective" motivations of the parties but he relied, above all, on the clear terms of the 2011 agreements. The appellants have failed to show that this was a palpable and overriding error.

[21] Thirdly, the appellants contend that the judge wrongly imposed an obligation to turnover payment upon the Taberna noteholders notwithstanding the fact that the turnover provisions had been deleted from the 2011 Indentures.

[22] This argument is without merit.

[23] Once again, the judge simply applied the clear terms of the 2011 Indentures, in particular, section 12.2(a) which provides that no payment shall be made to the Taberna noteholders so long as a payment default of the Senior Debt exists. Sections 12.2(b) and 12.5 impose on the Taberna noteholders and the trustee an obligation to take reasonable action to ensure the effectiveness of subordination. Section 5.6 of the 2011 Indentures provides that payment of all the Senior Debt shall be made in priority to amounts due under the Taberna notes. Moreover, contrary to the argument of the appellants, the judge did not order the Taberna noteholders to "turn over" the amounts recovered under the plan of arrangement to Stichting since, pursuant in particular to section 9.6b) of the Plan, those funds have been reserved pending the outcome of the subordination dispute. In this respect, having received no distribution under the plan, the noteholders have nothing to "turn over".

## II Impact of the CCAA Proceedings on the Subordination Provisions

[24] Did the motions judge err in concluding that the debtors' CCAA plan of arrangement did not alter the rights of the Stichting bondholders and the Taberna noteholders in relation to each other?

[25] The appellants contend that by voting in favour of the plan of arrangement under the CCAA, Stichting waived its right to be considered senior to the Taberna noteholders pursuant to the subordination provisions.

[26] The judge rejected this argument. He wrote, at para. [42] that "[...] the rights of the debtor vis-à-vis its creditors [are] altered under the proposal but not the rights of the creditors *inter se*". Later in his reasons, he explicitly relied on the judgment of the Court of Appeal for Ontario in *Re Stelco*[5] to reject the Taberna noteholders' submission that the implementation plan changed the substantive rights of the Stichting and Taberna creditors as between themselves.

---

[5] 2007 ONCA 483, confirming [2006] CanLII 27117 (Sup. Ct J.).

[27] The appellants have not convinced us that the judge erred in this regard.

[28] The respondents have correctly noted, as the judge himself observed, that the motion for directions was filed before the plan of arrangement was adopted. All ordinary creditors, including holders of the Stichting bonds and the Taberna notes, were grouped in the same class. But the plan provided that nothing would be paid to the Taberna noteholders before the outcome of the "Taberna Order" – *i.e.* the motion for directions before Schrager, J. – dealing with the subordination provisions pursuant to section 9.6b) of the Plan, as noted above.

[29] In para. [46] of his reasons, the judge correctly relied on *Re Stelco*[6] which held that junior and senior debt may be grouped within the same class. To this end, the judge also correctly relied on the judgment of this Court in *Mérisel*[7].

[30] In the circumstances, the appellants are wrong to suggest that the HII plan has an impact on this dispute between competing creditors as to their rank *inter se*. While it is true that the approval, sanction and implementation of a CCAA plan of arrangement can extinguish indebtedness of a creditor, it has no necessary impact on the rights between the creditors themselves.

## III *Ultra petita*

[31] The appellants argue that the judge ventured beyond the arguments made by the respondents in first instance by deciding that it is "in itself fatal to Taberna's position [...] that Stichting was not a party to the negotiations leading up to the 2011 Taberna Indentures nor to the documents themselves" (para. [56]). They say the judge was wrong to do so and that his finding on this point is insufficient to sustain the judgment.

[32] It is not necessary to decide this point to dispose of the appeal.

[33] As a practical matter, the reasons given by the judge concerning the fact that Stichting was not a party to the 2011 Taberna Indentures were not strictly speaking necessary to his conclusion. As the judge explained, the meaning to be given to the clear and unambiguous terms of the 2011 Taberna Indentures, despite the absence of a turnover clause, was the basis in law for his decision to rank the Taberna notes subordinate to the Stichting bonds. The judge's discussion of Stichting's rights under the law on stipulation for the benefit of a third party was not decisive for the outcome of the case in first instance.

[34] All parties before this Court agree that this was a subsidiary argument made by the respondents in first instance. Given our conclusion that the judge made no reviewable error in his interpretation of the 2011 Indentures, the Court refrains from deciding the point.

[35] In dismissing the appeal, the Court will not disturb the order for costs made by the motion judge in first instance.

---

6 (2005) 15 C.B.R. (5th) 307 (Ont. C.A.), confirming 2005 CanLII 41379 (Sup. Ct J.).

7 *2862565 Canada Inc.* v. *Mérisel Canada Inc.*, [2002] R.J.Q. 671 (QC CA).

[36] **FOR THE AFOREMENTIONED REASONS**, the Court:

[37] **DISMISSES** the appeal, with costs.

YVES-MARIE MORISSETTE, J.A.

JULIE DUTIL, J.A.

NICHOLAS KASIRER, J.A.