

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Commercial Division)

NO.: 500-11-045750-136
Estate No.: 41-1821345

IN THE MATTER OF THE RECEIVERSHIP OF:

HOMCO REALTY FUND (98) LIMITED
PARTNERSHIP

Debtor

- and -

TITAN EUROPE 2006-5 P.L.C.

- and -

CREDIT SUISSE INTERNATIONAL

Secured Creditors

- and -

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Receiver/Petitioner

- and -

HATFIELD PHILIPS INTERNATIONAL
LIMITED

Mise-en-cause

MOTION FOR THE ISSUANCE OF AN ORDER AUTHORIZING THE SALE OF A REAL
PROPERTY AND FOR THE ISSUANCE OF A VESTING ORDER
(Section 243 of the *Bankruptcy and Insolvency Act* (the "BIA"))

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN
COMMERCIAL DIVISION IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, OR TO
THE REGISTRAR THEREOF, THE RECEIVER/PETITIONER RESPECTFULLY SUBMITS AS
FOLLOWS:

I. PURPOSE OF THE MOTION

1. Samson Bélair/Deloitte & Touche Inc. ("**Deloitte**"), in its capacity as receiver (the "**Receiver**") to Homco Realty Fund (98) Limited Partnership (the "**Debtor**"), is seeking from this Court the issuance of an order authorizing it to sell to Erste Fahrenkamp & Gärtner Grundbesitz GmbH & Co. KG (the "**Purchaser**"), an entity designated by Porta Möbel GmbH & Co. ("**Porta**"), the Carat Park Shopping Centre located at Teucheler Weg 16, in the city of Wittenberg (06886), Germany (the "**Property**");

II. PROCEDURAL BACKGROUND

2. On December 18, 2013, the Debtor, a sole purpose entity that was established to acquire and operate the Property, filed an assignment in bankruptcy under the BIA, and Deloitte was appointed trustee (the "**Trustee**") of the Debtor's estate;
3. On January 16, 2014, Deloitte was also appointed as Receiver to the Property and was authorized to petition this court for further authorization to sell the Property (the "**Receivership Order**"), as appears from the Court record;
4. On or about the same day, in conformity with the Trustee's representation during the first creditors' meeting held on January 8, 2014 and the Receivership Order, the Trustee renounced to and transferred to the Receiver all of its rights, possessions and powers in and over the Property and other assets of the Debtor (excluding the Debtor's intercompany receivable and taxes receivable);

III. INTERESTED PARTIES

5. As further described in the *Motion for the Issuance of an Order Appointing a Receiver* dated January 15, 2014 and its accompanying Exhibits filed in the Court record (the "**Receivership Motion**"), the entities relevant to the Receivership proceedings include Credit Suisse International and Titan Europe 2006-5 p.l.c., Hatfield Philips International Limited and Garigal Asset Management GmbH, and their role as described in the Receivership Motion are summarized hereunder;

A. Credit Suisse International and Titan Europe 2006-5 p.l.c.

6. On March 28, 2006, Credit Suisse International, a financial services company, entered into, as original lender and security agent, a facility agreement (as amended from time to time) with the Debtor, acting through its general partner, Homburg L.P. Management Inc., whereby Credit Suisse International agreed to provide a term loan to the Debtor in the amount of €23,205,000 (the "**Loan**");
7. On December 21, 2006, Credit Suisse International entered into a Loan Transfer Agreement with Titan Europe 2006-5 p.l.c. ("**Titan**"), pursuant to which it transferred its entire interest in the Loan to Titan;
8. However, as security agent, Credit Suisse International has the independent right to demand and receive payment of any amount owing to Titan, by the Debtor;
9. Titan is a public company incorporated with limited liability under the laws of Ireland;

10. Titan and Credit Suisse International are the only secured creditors (the "**Secured Creditors**") of the Debtor, and maintain security over substantially all of the Debtor's movable and immovable property, comprised namely of the Property;

B. *Hatfield Philips International Limited*

11. The Secured Creditors are represented by Hatfield Philips International Limited ("**Hatfield**"), a limited partnership incorporated in England and Wales, who acts as the special servicer of the Loan and related security on behalf of the Secured Creditors;

C. *Garigal Asset Management GmbH*

12. On November 13, 2013, Garigal Asset Management GmbH ("**Garigal**") was hired as asset manager to the Property pursuant to the Asset and Property Management Agreement (the "**Management Agreement**") dated November 1, 2013, entered into between the Debtor, Hatfield and Garigal. As per the terms of the Management Agreement, Garigal has provided comprehensive managing services to the Debtor (and to the Receiver since the beginning of the Receivership proceedings), including, *inter alia*, developing a business plan setting forth (i) strategies for entering into new occupational leases and (ii) steps for the eventual sale of the Property;

D. *Other Creditors*

13. As indicated in the Receivership Motion, in the course of the bankruptcy proceedings, the Secured Creditors filed a proof of claim in the amount of \$29,516,085, representing the balance of the loan, which amount exceeds the estimated realization value of the Property.
14. Other than the unsecured portion of the Secured Creditors' claim, the Debtor had no other known unsecured creditor at the time of its assignment in bankruptcy.
15. The Trustee received only two other proofs of claim in the course of the bankruptcy proceedings (both unsecured), one of which was thereafter withdrawn by the claimant and the other one was disallowed by the Trustee with no appeal filed by the claimant.

IV. THE PROPERTY

16. The Property is a single storey shopping centre of 18,152 sqm that was built in 1994;
17. It is situated in the northern part of the City of Wittenberg, in the former East Germany, with a population of approximately 135,000 inhabitants;
18. The anchor tenant is an Edeka supermarket which occupies 60% of the surface area and the vacancy rate has climbed to 28%, following the departure of a large hardware store in October 2012;

V. FACTUAL BACKGROUND

19. The Debtor is a limited partnership whose sole limited partner is Homburg Invest Inc. ("HII"). On September 9, 2011, HII had filed for and obtained an initial order pursuant to *Companies' Creditors Arrangement Act* (the "CCAA") by the Superior Court of Quebec;
20. HII, through various entities (the "**HII Group**"), owned a diversified portfolio of real estate assets in Europe (the Netherlands, Germany and the Baltic states), Canada and the United States, a number of which had been operating with a negative cash flow and/or had a fair market value less than the outstanding capital balance of a loan secured by a mortgage over the same property;
21. In the context of the CCAA proceedings, the HII Group engaged in a thorough analysis of its real estate portfolio, identifying certain "non-core" properties, which included the Property;
22. As a result of such review, the Property was identified as "non-core" property and was removed from the HII Group's structure and balance sheet;
23. As indicated in the Receivership Motion, the previous asset manager, Hinvest Rems B.V. ("**Hinvest**"), an entity related to HII, faced several challenges in renting the Property, due, *inter alia*, to the necessity to proceed with certain renovations and capital improvements. As a result, vacancy rate has remained high and the Debtor's revenues were insufficient, resulting in a negative cash flow from operations;
24. On December 4, 2012, in light of these financial difficulties, Hatfield, acting on behalf of the Secured Creditors, had sent a letter to the Debtor, advising the Debtor that it was in default, having failed to comply with its obligations;
25. On November 13, 2013, the property management agreement between Hinvest and the Debtor was terminated and the Management Agreement between the Debtor, Hatfield and Garigal became effective.
26. As mentioned above, on December 18, 2013, the financial difficulties of the Debtor culminated to the filing of an assignment in bankruptcy and, on January 16, 2014, the Receivership Order was rendered;

VI. REASONS FOR THE APPOINTMENT OF THE RECEIVER

27. As stated above, at the time of the Receivership Order, the estimated realizable value of the Property was lower than the amount of the Loan;
28. In these circumstances, the Trustee would normally have ceased operating and surrendered the Property to the Secured Creditors;
29. The Secured Creditors opted to request the appointment of Deloitte as Receiver with the necessary powers to take all appropriate measures in respect of the Property, including overseeing Garigal's continued administration and maintenance of the Property pursuant to the Management Agreement, hoping that the value of the Property would ultimately be maximized, which would allow the Receiver, in cooperation with Garigal and Hatfield, to eventually proceed with the sale of the Property for the benefit of the Secured Creditors;

30. Garigal was requested to develop a business plan to promote the Property, namely through capital expenditures, identifying new tenants and reducing the vacancy rate with a view to increase the realizable value of the Property;

VII. EFFORTS TO MAXIMIZE VALUE

31. According to Garigal, it has been increasingly difficult to attract new tenants for the Property for the following reasons:

- i) A high level of competition in the immediate area resulting from a Kaufland-anchored centre located less than two kilometers away and the opening of a brand new shopping centre in the city centre, in October 2012;
- ii) In Wittenberg, the unemployment rate of 12% and is far worse than the German average of 6.3%. The population of Wittenberg is forecasted to decrease by 18% before 2025;
- iii) The Property is considered old and outdated, with an unattractive internal/external layout as well as poor signage and lighting;
- iv) The existing building/zoning legislation restricts or prevents certain modifications to the Property and commercial usage;

32. In December 2013, Garigal started to explore leasing options and had preliminary discussions with the City of Wittenberg to expand the usage of the vacant area;

33. At the time, as indicated in the Receivership Motion, the Debtor estimated the realization value of the Property at approximately \$24.5M (or approximately €17M). Garigal was of the opinion that the estimated value of the Property, if fully leased, would indeed be in that range, but that such estimated value was significantly lower when considering the existing vacancy;

34. Garigal's initial business plan included the following:

- i) Secure a tenant within the vacant area;
- ii) Review the technical situation of the building and put in place a repair plan prior to a sale;
- iii) Make repairs and improvements to the Property;
- iv) Market the Property for sale;

35. Concurrently with Garigal leasing efforts, Hatfield and the Receiver requested an appraisal of the Property from Jones Lang LaSalle GmbH ("JLL"), a real estate valuation firm;

36. Garigal approached over 25 potential tenants, including furniture stores, kitchen retailers and bike stores. The Property was presented for both leasing and purchase to Porta, Höffner Möbelgesellschaft, Roller and Poco. Garigal also had discussions with Brack Capital and Kintyre regarding the acquisition of the Property;

37. The only party which expressed an interest in leasing the Property was Porta, one of the largest players in German furniture businesses;
38. Porta was first interested in leasing the vacant area and being granted a purchase option to be exercised before the end of 2014, subject to certain conditions, such as: free rent, taking-up the space currently occupied by another tenant, obtaining a building permit for its contemplated use and capital expenditures by the Receiver;
39. In July 2014, JLL submitted its appraisal report, filed herewith under seal as **Exhibit R-1**, providing for estimated market values of the Property under the assumption that new leases would intervene with Porta and another lessee and under the assumption of the current vacancy rate of 28%. The latter value is obviously significantly lower than the former one;
40. In September 2014, Porta withdrew its offer to lease, but remained interested in purchasing the Property;
41. On September 17, 2014, Porta confirmed its interest in acquiring the Property, under different scenarios (namely a closing by December 31, 2014, by March 31, 2015 and by December 31, 2015), as appears from Porta's letter (with translation) dated September 17, 2014 filed herewith under seal as **Exhibit R-2**. The proposed purchase price in the different scenarios is lower if the date of closing is later;
42. All of the contemplated purchasing scenarios were subject to Porta taking-over rent-free the vacant area and an adjacent space presently occupied by another tenant, by December 31, 2014;

VIII. ANALYSIS

43. The Receiver is informed by Garigal that all reasonable endeavors to secure one or more tenants for the vacant areas were taken, that such initiatives have not been successful, and that it appears unlikely that another tenant would be found in the near future;
44. According to Garigal and Hatfield, the reasons of the difficulty in leasing the vacant areas include the following:
 - i) The real estate market of Wittenberg is almost inactive with a very limited number of commercial transactions occurring recently;
 - ii) The existing restrictive building/zoning legislation restricts the assortment of businesses allowed in the area and requires a time-consuming and complex permit application process for any work relating to the Property, thus limiting the number of potential tenants; and
 - iii) Capital expenditures have been identified and requested by both the anchor tenant Edeka and Porta, and most likely the same requirements would be made by any other interested lessee;

45. Virtually all potential owners-occupiers have been approached and, aside from Porta, showed no interest. For other types of investors, a 28% vacancy rate will inevitably result in a significant discount to the Porta's purchase offer;
46. Porta is an ideal candidate as it is well informed about the condition of the Property, it will occupy the vacant space, it has a good relationship with Edeka (the most important tenant) and it has already applied for a construction permit;
47. The Receiver is advised by Hatfield that the latter carried out a net present value analysis for all three of Porta's scenarios and for a fourth scenario consisting of a lease-up period of 18 months (with certain assumptions) and subsequent sale of the Property.
48. Based on such analysis, Hatfield was supportive of both scenarios 1 and 2, i.e. a sale to Porta by December 31, 2014 or alternatively March 31, 2015, as such scenarios would suggest higher recoveries to the Secured Creditors on a net present value basis;
49. At this stage, Hatfield's analysis suggests that the third scenario proposed by Porta (i.e. a closing with Porta by December 31, 2015) and the fourth scenario of a lease up and sale strategy over eighteen more months would not, at least on a net present value basis, necessarily be in the best interest of the Secured Creditors;
50. The proposed sale price under scenarios 1 and 2 is in the range of the estimated value of the Property according to the Debtor and Garigal, and is higher than JLL's estimated value of the Property with the existing vacancy rate;
51. It is expected that a sale to Porta will provide certainty of execution as Porta does not require any external financing or retainers;

IX. THE SALE AND PURCHASE AGREEMENT

52. In these circumstances, in the fall of 2014, Garigal, with the consent of Hatfield and the Receiver, entered into discussions with Porta (and eventually the Purchaser) in order to complete a transaction under the scenarios 1 or 2 proposed by Porta and the Purchaser, namely either a sale by December 31, 2014 or by March 31, 2015;
53. All parties involved, namely Garigal, Hatfield, the Receiver, the Purchaser and Porta, participated to discussions and negotiations and multiple versions of a draft Sale and Purchase Agreement were exchanged between the parties;
54. On December 17, 2014, the parties agreed to the terms and conditions of a Sale and Purchase Agreement (the "**SPA**") providing for a sale to the Purchaser, the whole subject to Court approval. The SPA is filed herewith under seal as **Exhibit R-3**;
55. It is anticipated that the SPA be signed in front of a German notary on December 19, 2014; the SPA provides that a "down-payment" (deposit) representing 10% of the purchase price must be paid to the notary within five (5) banking days thereafter;
56. However, given the current timing, the need for several Canadian documents (including the order sought by the current motion) to be "legalized" for German purposes for the SPA to become binding upon the Receiver as seller, the German requirements for a transfer of real estate property to become effective and the provisions of the SPA, the

transfer of property is expected to only become effective on March 31, 2015, subject to certain conditions;

57. The SPA is governed by German law and the Receiver is advised that the provisions pertaining to the distribution of the purchase price provided by the SPA, as it will be further described in the Receiver's report to be filed under seal as **Exhibit R-4** (the "**Receiver's Report**"), is in accordance with German practice in the context of a sale by an insolvency administrator;
58. The SPA provides that the Purchaser is aware of the fact that the sale is made by Deloitte in its capacity as Receiver and accepts the broad exclusion of rights and claims contained in the SPA;
59. The SPA provides for limited representations that are limited to the Receiver's actual knowledge and Garigal confirmed to the Receiver that all relevant information in its possession was remitted to the Purchaser; in addition, the Receiver received a confirmation from Garigal that, at its knowledge, the statements or representations made in relation to the Property in the SPA, including the annexes, were not wrongful, misleading or incomplete;

X. RECOMMENDATION

60. As it will be further described in the Receiver's Report, the Receiver is of the opinion that the contemplated sale under the terms of the SPA is fair, reasonable and the best transaction possible under the circumstances further described above, including the location and age of the Property, the vacancy rate, the building/zoning issues and the required capital expenditures to secure a new tenant;
61. Garigal and Hatfield confirmed to the Receiver that they are supportive of a sale of the Property to the Purchaser as per the terms of the SPA, and Hatfield further represented to the Receiver that the Secured Creditors have confirmed to Hatfield their approval of the sale to the Purchaser;

XI. SEAL ORDER

62. Given the confidential nature of the information contained in Exhibits R-1, R-2, R-3 and R-4 and the fact that the signature of the SPA is expected to occur on December 19, 2014 and the effective transfer of the Property on March 31, 2015, the Receiver respectfully submits that such Exhibits should be kept confidential and under seal;

XII. URGENCY

63. Given the expected signature of the SPA in front of the German notary on December 19, 2014, the Receiver respectfully submits that it is urgent that the order sought by the present motion, in the form of the draft order filed herewith as **Exhibit R-5**, be rendered.

FOR THESE REASONS, MAY IT PLEASE THIS COURT TO:

GRANT the present *Motion for the issuance of an order authorizing the sale of a real property and for the issuance of a vesting order*,

ISSUE an order authorizing the sale of the Property as per the terms of the SPA filed herewith as **Exhibit R-3**, the whole through an approval and vesting order in the form of the draft order filed herewith as **Exhibit R-5**;

ORDER that Exhibits R-1, R-2, R-3 and R-4 be kept confidential and under seal until further order of this Court;

THE WHOLE without costs, save in case of contestation.

MONTRÉAL, December 17, 2014



McCARTHY TÉTRAULT LLP
Attorneys for the Receiver

AFFIDAVIT

I the undersigned, Jean-Christophe Hamel, CPA, CA, CIRP, senior manager of Samson Bélair/Deloitte & Touche Inc., domiciled and residing for the purpose hereof at 1 Place Ville Marie, suite 3000, Montréal, Québec, H3B 4T9, solemnly declare the following:

1. I am a duly authorized representative of Samson Bélair/Deloitte & Touche Inc. in its capacity of Receiver of Homco Realty Fund (98) Limited Partnership.;
2. All the facts alleged in the *Motion for the Issuance of an Order Authorizing the Sale of a Real Property and for the Issuance of a Vesting Order* are true.

AND I HAVE SIGNED



Jean-Christophe Hamel

SOLEMNLY DECLARED BEFORE ME
ON THE 17th DAY OF DECEMBER 2014



COMMISSIONER OF OATHS
FOR THE PROVINCE OF QUÉBEC



NOTICE OF PRESENTATION

TO: Me Jean Fontaine
Stikeman Elliott
1155 boulevard René-Lévesque Ouest
Bureau 4000
Montréal QC H3B 3V2

Attorneys for the Mise-en-cause,
Hatfield Philips International Limited,
acting as special servicer on behalf of
the Secured Creditors

TO: **GARIGAL Asset Management GmbH**
Gutleutstr. 82
D - 60329 Frankfurt am Main

*Attention to: Uwe Keßler, Senior Asset
Manager*

TO: Ilja Keller
Porta Service & Beratungs GmbH & Co.
KG Bakenweg 16-20
32457 Porta Westfalica

acting for
Erste Fahrenkamp & Gärtner
Grundbesitz GmbH & Co. KG

TAKE NOTICE that the *Motion for the Issuance of an Order Authorizing the Sale of a Real Property and for the Issuance of a Vesting Order* will be presented for hearing and allowance in the Superior Court, Commercial Division, at the Montréal Courthouse, 1 Notre-Dame Street East, Montréal, on **December 18, 2014, at 9:00 a.m.**, or so soon thereafter as counsel may be heard, and in **room 16.10**.

PLEASE ACT ACCORDINGLY.

MONTRÉAL, December 17, 2014


McCARTHY TÉTRAULT LLP
Attorneys for the Receiver

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT
(Commercial Division)

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LIST OF EXHIBITS
(MOTION FOR THE ISSUANCE OF AN ORDER AUTHORIZING THE SALE OF A REAL PROPERTY
AND FOR THE ISSUANCE OF A VESTING ORDER)

Exhibit R-1: under seal	Appraisal report from JLL dated July 2014.
Exhibit R-2: under seal	Porta's letter (with translation) dated September 17, 2014.
Exhibit R-3: under seal	Sale and Purchase Agreement subject to Court approval.
Exhibit R-4: under seal	Receiver's report [to be filed at the hearing].

Exhibit R-5: Draft order.

MONTREAL, December 17, 2014

A handwritten signature in cursive script that reads "McCarthy Tétrault LLP". The signature is written in dark ink and is positioned above a horizontal line.

McCARTHY TÉTRAULT LLP
Attorneys for the Receiver