

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: 500-11-041305-117

DATE: January 23, 2012

PRESIDING: THE HONOURABLE LOUIS J. GOUIN, 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

- 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

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor

- and -

ROMSPEN INVESTMENT CORPORATION

Petitioner

JG2270

JUDGMENT

[1] Romspen Investment Corporation ("**Romspen**") presents a *Motion for an Order Lifting the Stay of Proceedings against Churchill Estates Development Ltd. and Inverness Estates Development Ltd. for the Purpose of Commencing Mortgage Foreclosure Proceedings against Real Property in the Province of Alberta* (the

"**Motion**") pursuant to Section 11.02 et seq. of the *Companies' Creditors Arrangement Act*¹ (the "**CCAA**").

1. **FACTS**

[2] Churchill Estates Development Ltd. ("**Churchill**") and Inverness Estates Development Ltd. ("**Inverness**") are single-purpose companies which own an inventory of unsold condominium units (the "**Units**", or a "**Unit**") located in Alberta.

[3] Romspen is a commercial mortgage lender and the only secured creditor of Churchill and Inverness.

[4] Romspen's security² affects the Units, and it includes a "cross collateralization and cross default agreement"³ among Romspen, Churchill and Inverness.

[5] On September 9, 2011, an order (the "**Initial Order**") was rendered granting court protection pursuant to the CCAA to the Debtors and Mis-en-cause, including Churchill and Inverness.

[6] The stay of proceedings (the "**Stay**") provided under the Initial Order was extended on two occasions, and is scheduled to expire on March 16, 2012.

[7] At the time of the Initial Order, Churchill owed approximately \$7,500,000 to Romspen, with interest at the rate of 9.75% *per annum*, and Inverness owed approximately \$3,100,000 to Romspen, with interest at the rate of 12.50% *per annum* (collectively, the "**Loans**").

[8] The Loans are in default and have matured.

[9] As permitted under the Initial Order, Churchill and Inverness continue carrying on their business of selling Units; they remit the net proceeds thereof to Romspen (the "**Proceeds**").

[10] The Proceeds are used to pay or reduce, firstly, any outstanding interest under the Loans and, secondly, the principal of the Loans.

[11] At the time of the Motion hearing, the balance of the Loans, including pre-filing condominium fees, was approximately \$6,500,000 for Churchill, and approximately \$2,060,000 for Inverness (collectively, the "**Outstanding Loans**").

[12] The appraised "liquidation value" of the Units is well in excess of the Outstanding Loans, and the "market value" thereof exceeds substantially the Outstanding Loans. The relevant confidential appraisal reports were filed under seal⁴ by Romspen.

¹ R.S.C. 1985 c. C-36.

² Exhibits R-1, R-2, R-3, R-4, R-5 and R-6.

³ Exhibit R-7.

⁴ Exhibits R-10 and R-11.

2. ROMSPEN'S MOTION

[13] Romspen submits that the Court should not maintain the Stay without each of Churchill and Inverness proposing a plan of compromise or arrangement.

[14] Furthermore, Romspen confirms that there is no plan which Churchill and Inverness could propose which would be acceptable to it other than immediate payment of 100% of the then outstanding Loans.

[15] According to Romspen, the Units do not form part of the Debtors' core assets and, notwithstanding that the Units' appraised value is higher than the Outstanding Loans, the Alberta real estate market is volatile, and Romspen is therefore at risk.

[16] In any event, mortgage foreclosure proceedings in Alberta are conducted under the supervision of the court, and the Debtors and other persons having an interest in the Units will be protected in those proceedings.

[17] Furthermore, Romspen alleges that the requested lifting of the Stay will not : (i) jeopardize the Debtors' reorganization efforts, (ii) endanger their survival, (iii) negatively impact the viability of any restructuring plan, or (iv) cause any hardship to the Debtors' restructuring proceedings.

[18] Finally, Romspen stresses that it is unacceptable and prejudicial to it that Churchill and Inverness be liquidating the Units themselves, and not Romspen, as the only secured creditor.

3. ISSUE TO BE CONSIDERED

[19] The only issue to be considered is whether or not the Stay should be lifted to allow Romspen to enforce its secured rights on the Units.

4. DISCUSSION

4.1 The law

[20] The lifting of a stay is discretionary, with no statutory guidelines contained in the CCAA.

[21] On the other hand, the lifting of a stay was granted in the following situations, as reported in the case law :

"1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditor's financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so."⁵

4.2 Analysis

[22] None of the above situations apply to the present matter.

[23] The Court is of the opinion that the Motion is premature : Romspen is far from being prejudiced, at the present time, by the Stay.

[24] On the contrary, the Court retains from the proof, *inter alia*, the following :

- a. Romspen is fully secured; even the appraised "liquidation value" of the Units is well in excess of the Outstanding Loans;
- b. Churchill and Inverness keep selling Units, their core assets, in their normal course of business; they have always been in the business of selling condominium units; they are acting in good faith and with due diligence in the sale process of the Units;
- c. Churchill and Inverness are not "liquidating" the Units; the sales of condominium units, that took place between the Initial Order and the Motion hearing, were done for a price equal to the average "market value" thereof;
- d. any sale of a Unit is subject to Romspen agreeing to release its security thereon, and the net proceeds of such sale is remitted to Romspen;

⁵ *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1, at paragr. 20 (Alta Q.B.); *Groupe Blanchette Inc. (Arrangement relatif à)*, [2005] J.Q. no 9809, J.E. 2005-1553, at paragr. 25 (C.S.); *Canwest Global Communications Corp., Re* (2009) CarswellOnt 7882, 61 C.B.R. (5th) 200, paragr.32-33 (Ont. S.C.J.); *AbitibiBowater Inc., Re* (2009) QCCS 6463, at paragr. 21-28; R.H. McLaren, Canadian Commercial Reorganization: Preventing Bankruptcy, Aurora: Canada Law Book, paragr. 3.3400.

- e. Romspen continues to charge interest at the rates of 9.75% and 12.50% *per annum* to Churchill and Inverness respectively; and
- f. as confirmed by Churchill and Inverness during the Motion hearing, they intend to table a plan of compromise or arrangement which will offer Romspen 100% of its then outstanding Loans.

[25] In fact, Romspen's sole objective is to control the sale process of the Units. Romspen is impatient to get immediate payment of the Outstanding Loans in order to reinvest its funds with high returns, although investments at 9.75% and 12.50% *per annum* seem to be very good investments.

[26] In the present circumstances, and at the present time, lifting the Stay to allow Romspen to control the sale of the Units would be very prejudicial to Churchill's and Inverness' restructuring. In any event, and as mentioned above, no sale of a Unit can take place without Romspen agreeing to release its security thereon.

[27] The Debtors and Mis-en-cause have been working hard over the last months to solve many issues, including the "control issues" referred to by Justice Mark Schragger, J.S.C., in his January 19, 2012 reasons for his January 12, 2012 order on Homburg Invest Inc.'s "*Motion for Approval of a Purchase Agreement and for Ancillary Orders*".

[28] This restructuring file is complex, kind of a legal "quilt", and one should never lose sight of the global picture, at least, certainly not this supervising Court.

[29] While Romspen may only be interested in being paid immediately and advocates for a Debtor by Debtor analysis, the reality is quite different.

[30] The Debtors and Mis-en-cause were successful in obtaining the issuance of the Initial Order, including the Stay, and Romspen did not object to it.

[31] At the present time, Churchill and Inverness are trying to maximize, as much as possible, the available net equity on their assets after payment of the Romspen Outstanding Loans, so as to obtain more leverage and options for their up-coming plan of compromise and arrangement.

[32] Failing proof of material prejudice suffered by Romspen, the Court will not permit that Churchill and Inverness lose control of the Units for the sole benefit of Romspen.

[33] Churchill and Inverness have been successful, up to now, in selling condominium units for their "market value". No matter how a foreclosure process is conducted, the chances of attracting offers above the Units' "market value" are rather illusory, if not utopian.

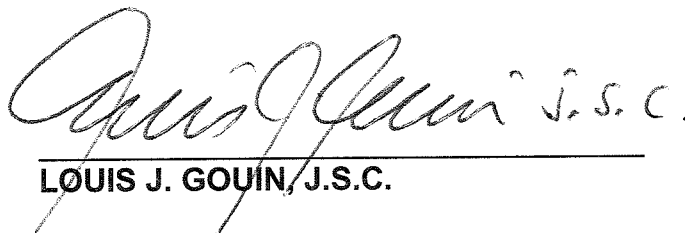
[34] On the other hand, if in a few weeks or months from now, Romspen can prove to the Court that Churchill and Inverness are not acting in good faith and with due

diligence in the sale process, or that the sales of the Units are concluded at a price close to their "liquidation value", thereby affecting Romspen security coverage to a point that it is likely to be materially prejudiced by the Stay, the Court will then consider lifting the Stay to allow Romspen to commence mortgage foreclosure proceedings against the Units.

FOR THESE REASONS, THE COURT:

[35] **DISMISSES** the "*Motion by Romspen Investment Corporation for an Order Lifting the Stay of Proceedings against Churchill Estates Development Ltd. and Inverness Estates Development Ltd. for the Purpose of Commencing Mortgage Foreclosure Proceedings against Real Property in the Province of Alberta*";

[36] **WITHOUT COSTS.**



LOUIS J. GOUIN, J.S.C.

Me Annie Lefebvre
DE GRANDPRÉ JOLI-COEUR LLP
Me David P. Preger
DICKINSON WRIGHT LLP
Counsel to the Petitioner

Me Martin Desrosiers
Me Julien Morissette
OSLER, HOSKIN & HARCOURT LLP
Counsel to the Debtors and Mis-en-cause

Me Jocelyn T. Perreault
MCCARTHY TÉTRAULT LLP
Counsel to the Monitor

Hearing date : January 20, 2012