COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-022386-122
(500-11-041305-117)

DATE: APRIL 12, 2012

PRESIDING: THE HONOURABLE ALLAN R. HILTON, J.A.

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

ROMSPEN INVESTMENT CORPORATION
PETITIONER – Petitioner
v.

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD.
INVERNESS ESTATES DEVELOPMENT LTD.
CP DEVELOPMENT LTD.
RESPONDENTS – 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
IMPLEADED THIRD PARTIES – Impleaded parties
and

SAMSON BELAIR/DELOITTE & TOUCHE INC.
IMPLEADED PARTY – Monitor

JUDGMENT

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[1] The Debtor Homberg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,[1] and an initial order was issued on September 9, 2011. Romspen Investment Corporation, a private company, seeks leave to appeal a judgment of the Superior Court rendered by the Honourable Mr. Justice Louis J Gouin, acting in his capacity as the supervising judge under the *CCAA*, that dismissed its application to lift the stay of proceedings that prevents it from enforcing its first ranking mortgage and related security on condominium developments owned by two subsidiaries of Homburg in Calgary, Churchill Estates Development Ltd. and Inverness Estates Development Ltd.

[2] Romspen has conveniently set out the sequence of events leading to the present application in the motion with which the supervising judge was seized.

[3] As mentioned, the initial order containing the stay of proceedings was issued on September 9, 2011 until October 7. It has been continuously renewed since then and was in force as of December 1, the date of Romspen's application for the stay to be lifted.

[4] On December 8, 2009, Romspen lent $10,500,000 and $8,900,000 respectively to Churchill and Inverness. In addition to the first ranking security, on December 19, 2009, Romspen, Churchill and Inverness executed a cross collateralization and cross default agreement. The essence of this agreement was twofold: to provide that a default by either debtor would be considered a default of both debtors, and the respective security instruments would secure all amounts owing by both Churchill and Inverness.

[5] Churchill and Inverness both began to default under the security instruments on September 1, 2011, that is to say prior to the initial *CCAA* order on September 9 containing the stay of proceedings that remains in place.

[6] In support of its motion soliciting the lifting of the stay, Romspen alleged that:

- Romspen is the only secured creditor of its two debtors, there is no plan of compromise or arrangement that could be proposed to it that it would accept

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[1] R.S.C. c.-36.

other than immediate payment of the entirety of the secured debt in principal, interest and costs;

- In proceeding with the enforcement of its real security as it proposes, its two debtors would suffer no prejudice since any sale of condominium units would result in a reduction of their indebtedness to Romspen;

- The properties secured in favour of Romspen do not form part of the Debtors[2] core assets and are not integral to any proposed restructuring or business operations;

- The Alberta foreclosure proceedings would be conducted under court supervision and thus the Debtors interest and those of others having an interest in the properties on which Romspen holds its security will be protected.

[7] Romspen summed up its position by alleging that lifting the stay as requested would not: jeopardize the Debtors efforts at reorganization; endanger their survival; or, negatively impact the viability of nor cause any hardship to the Debtors, their restructuring proceedings or any eventual plan or compromise.

[8] The supervising judge began by noting, correctly, that the granting of the order Romspen sought was discretionary.

[9] In a nutshell, he held that Romspen's application was premature since the stay was not prejudicing its position with respect to the secured properties. As the first ranking mortgagee, it had to approve any condominium sales, and it was being paid the proceeds of any such sales, which had the effect of reducing Churchill and Inverness' secured indebtedness. Interest on the debts was still running at the contracted rates of 9.75% and 12.5 %, which still represented a good return on investment. There was no showing that the sale prices of the condominium units were being affected by the stay, indeed, the units were not being sold at so-called liquidation prices.

[10] All Romspen really wanted, the supervising judge found, was direct control of condominium unit sales in order to expedite receipt of proceeds with which to make investments that are more financially advantageous. Doing so would work a prejudice on any eventual restructuring. To the extent the situation changed and a prejudice to it could be shown, Romspen was free to apply anew for the lifting of the stay.

[11] In a judgment being released concurrently with this judgment,[3] I conclude that I should follow the consistent practice of judges in chambers of this Court that the four recognized criteria to consider on a *CCAA* leave application are cumulative, with the

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2 The Debtors are those as they have been so identified in the style of cause.

3 Case number 500-09-022267-116.

result that a failure to establish any one of them will result in the dismissal of the application. Those criteria are:

- whether the point on appeal is significant to the practice;
- whether the point raised is significant to the action itself;
- whether the appeal is *prima facie* meritorious, or, on the other hand, whether it is frivolous, and;
- whether the appeal will unduly hinder the progress of the action.

[12] In support of its application before me, Romspen argues forcefully that there was no evidence to support the supervising judge's conclusion that lifting the stay would be very prejudicial to the interests of Churchill and Inverness' restructuring. This is so, it says, especially in light of the fact that there is no plan of compromise or arrangement in sight to approve, nor have Churchill and Inverness set forth a timeframe within which to pay out Romspen in full. It is also concerned, to quote from the motion before me, that "the continued delay in the ability of Romspen to enforce its security will expose Romspen to a potential shortfall in the recovery of its indebtedness."

[13] If it is correct to say that the supervising judge lacked a factual underpinning to conclude that lifting the stay would be prejudicial to the two debtors' restructuring, as Romspen alleges, it is equally true that its concern about a potential shortfall in the recovery of its indebtedness is based on nothing more than speculation.

[14] Finally of interest is Romspen's assertion that the judgment fails to take account of case-law emanating primarily from Alberta and British Columbia that questions stays in the case of companies such as Churchill and Inverness that are real estate holding companies not having a real, on going business concern.[4] In such circumstances, it is argued, there is no need in this case to take account of factors that are present with a going concern, such as the preservation of employment for the debtor's employees.

[15] In opposing the application for leave to appeal, counsel for the respondents contends for the most part that the supervising judge exercised his discretion properly, and that since the matter before him was discretionary, there is no basis on which the Court could intervene on the merits if leave were to be granted. He notes as well that it is generally perceived to be preferable for condominium units such as those owned by

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[4] See *Re Marine Drive Properties Ltd.*, 52 C.B.R. (5th) 47, 2009 BCSC 145, at paras. 39–41, per Butler, J. In that case it should be noted that the judge had granted the initial CCAA order *ex parte*, and observed, at para. 32, that it was improbable, given the history of the matter, that any arrangement the debtor proposed "is doomed to fail". See also *Re Octagon Properties Group Ltd.*, 58 C.B.R. (5th) 276, 2009 ABQB 500, in which Kent, J. dismissed a contested application for *CCAA* relief by a debtor, also on the basis that secured creditors were unlikely to agree on a compromise or arrangement.

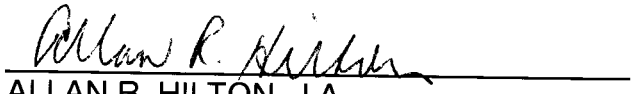
Churchill and Inverness to be sold by the owner rather than a mortgagee. In this respect, as of the date of hearing before me, Churchill had only 17 unsold units, while Inverness had 40 such units.

[16] He also notes, as the supervising judge mentioned, that the principal has been reduced and the interest paid on the secured debts Churchill and Inverness owe Romspen following each condominium sale.

[17] Although I have no difficulty in concluding that Romspen has satisfied the fourth criteria to the effect that an appeal would not unduly hinder the *CCAA* action, I cannot reach the same conclusion with respect to the other three criteria. The point at issue does not appear to be significant to the practice or to the action itself – what the supervising judge did by refusing to lift the stay was well within the ambit of his authority as the proverbial "captain of the ship". Moreover, the Alberta and British Columbia trial judgments relied on as showing the existence of a controversy requiring resolution by this Court occurred in a completely different context – the refusal to grant a *CCAA* order on the one hand and the setting aside of a *CCAA* order obtained *ex parte*. Here, the *CCAA* order is in place and no one is suggesting seriously that the stay issued initially was somehow defective.

[18] Finally, given the discretionary nature of the relief Romspen claimed, it is improbable, as counsel for Churchill and Inverness argued, that the Court would intervene if I were to grant leave. I could not say therefore that the proposed appeal is *prima facie* meritorious, although I readily concede counsel for Romspen ably presented an arguable case to the supervising judge and to me. At the appellate level, however, a party trying to reverse a discretionary order has a considerable hill to climb. In any event, Romspen is free to return to the supervising judge should there be a change of circumstances warranting his review.

[19] Romspen's motion is accordingly dismissed with costs.



ALLAN R. HILTON, J.A.

Mr. David P. Preger
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For the respondents

Mtre Jocelyn Perreault
McCARTHY TÉTRAULT
For the impleaded party SAMSON BELAIR/DELOITTE & TOUCHE INC.

Unrepresented
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

Date of hearing: March 1, 2012