ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

Estate Number: **33-2618511**
Court File No.: **33-2618511**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: **33-2618512**
Court File No.: **33-2618512**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: **33-2618510**
Court File No.: **33-2618510**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ARTIVA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number: **33-2618513**
Court File No.: **33-2618513**

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

SUPPLEMENTAL BRIEF OF AUTHORITIES

2 March 2020

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TAB 1

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775

Date: 20111107
Docket: S117098
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Pacific Shores Resort & Spa Ltd., Westerlea Sales Consulting Ltd., Aviawest Resorts Inc., Ocean Place Holdings Ltd., Fairfield Ventures Inc. and Parkside Project Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	D.K. Fitzpatrick
Appearing on behalf of the Monitor:	S. Dvorak
Counsel for Fisgard Capital Corporation:	A.A. Frydenlund S. Stephens
Counsel for Unsecured Loan Holders:	D. Toigo
Counsel for Water's Edge Rental Pool Creditors:	K.S. Campbell
Counsel for bcIMC Construction Fund Corp.:	C.D. Brousson
Place and Date of Hearing:	Vancouver, B.C. November 2 and 4, 2011
Place and Date of Judgment:	Vancouver, B.C. November 7, 2011

[1] **THE COURT:** This proceeding was commenced on October 21, 2011. On October 24, 2011, I granted an initial order pursuant to s. 11.02(1) of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("*CCAA*") which included an interim stay of proceedings and a nominal administration charge. At that time, two of the secured creditors, bcIMC Construction Fund Corporation and bcIMC Specialty Fund Corporation (collectively "bcIMC") and Fisgard Capital Corporation opposed the granting of the order. There was, however, insufficient time to fully hear the arguments against the granting of the order, notwithstanding that the statutory requirements of the *CCAA* had been met by the petitioners.

[2] This hearing was intended to stand as a comeback hearing under s. 11.02(2) of the *CCAA*, when the arguments of those secured creditors could be fully heard. At this time, the petitioners seek to extend the stay to December 11, 2011, and to increase the administration charge from $100,000 to $300,000.

[3] Further, the petitioners seek an order authorizing debtor in possession, or DIP, financing in the amount of $600,000 and the imposition of a director's charge in the amount of $700,000.

[4] bcIMC and Fisgard oppose the granting of the order sought, contending that it is not appropriate in the circumstances and that the petitioners are not acting in good faith and with due diligence; in other words, that the petitioners have not satisfied the test in respect of the granting of this further order as that test is formulated under s. 11.02(3) of the *CCAA*. Fisgard also applies to appoint a receiver over the security held by it relating to one of the developments.

[5] As at the time of the application for the initial order, the onus remains on the petitioners at this hearing to satisfy the requirements under s. 11.02(3) of the *CCAA*.

Background Facts

[6] The corporate group, or, as it is known, the Aviawest Group, began its operations in 1990 with the development of the Pacific Shores Resort near

Parksville, British Columbia. Over the last 21 years, the business has grown substantially and includes other resort properties around B.C. Generally speaking, the business of the Group includes sales of vacation ownership products, sales of deeded ownership products and management of those interests.

[7] At the peak of its business, the Group employed over 400 people on Vancouver Island. I am advised that over 8,000 families are vacation owners or fractional owners in its property portfolio.

[8] The corporate structure is fairly complex, but for the purposes of this application I will summarize it as follows:

a) the Pacific Shores resort is owned by the petitioner Ocean Place Holdings Ltd.;

b) the units of Pacific Shores Resort, along with the resort amenities, are managed by the petitioner Pacific Shores Resort & Spa Ltd. ("PSRS"). PSRS also operates a rental pool for the owners. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PSOE, PSFRA and PS Strata, who were represented at this hearing;

c) the Parkside Resort in Victoria was developed in 2009. It is owned by the petitioner Parkside Project Inc. in trust for a limited partnership, the general partner of which is the petitioner Fairfield Ventures Inc. There are other interested parties relating to this resort, including various owner associations and strata corporations, known as PV1, PV2 and PV Strata, who were also represented at this hearing;

d) the petitioner Aviawest Resorts Inc. ("Aviawest") operates a business that manages the Parkside Resort and also other resorts in Victoria, Sun Peaks, Ucluelet (known as the Water's Edge Resort) and Vancouver. It also sells vacation interests in the Parkside Resort and the other resorts listed. In addition, Aviawest operates rentals of

certain vacation units in Parkside Resort and Water's Edge Resort. Aviawest sells memberships and points packages to purchasers in the Aviawest Resort Club, which is an independent company which is not part of this proceeding but who was represented at the application. Aviawest also provides management services to the Club. The points program is integrated with the various vacation properties which it manages.

[9] The Aviawest Group employs approximately 250 people at this time in respect of its various operations, with 115 employed at the Pacific Shores Resort and 80 at Parkside Resort.

[10] The causes of the Group's insolvency can be laid principally at the feet of the development of the Parkside Resort. There were significant delays and cost overruns relating to that project. In addition, the global economic downturn in 2008 has led to decreased sales, which has exacerbated the lack of working capital due to a loss of credit facilities with one of their lenders.

[11] There is a substantial amount of evidence detailing the assets of the Group and the outstanding debt against those assets. In respect of Parkside Resort, bcIMC has a first mortgage of $28.1 million, BCC Mortgage Investment Corporation has a second mortgage of $8.5 million, and bcIMC has a third mortgage of $20 million. There is also a fourth mortgage of $1.7 million. Finally, there are various priority claims, such as property taxes, and a substantial amount of unsecured debt totalling $6.6 million. The total of the priority claims and secured debt alone is $58 million.

[12] In respect of Pacific Shores Resort, Fisgard has a first mortgage of $8.7 million, and the bcIMC and BCC debt on the Parkside Resort is collaterally secured against this property as well. There are also priority claims and unsecured debt relating to this property. The total secured debt against this property is $82 million, although that includes the debt collaterally secured relating to the Parkside Resort.

[13] Aviawest also has assets, such as its points portfolio and receivables, and also has substantial debt totalling $13.3 million. That debt includes $7.6 million owed to unsecured noteholders who were represented at the hearing.

Arguments of the Secured Creditors

[14] bcIMC and Fisgard contend that the *CCAA* order should not be granted for a number of reasons, as follows:

1. there is no equity in the assets;
2. they have no faith in current management;
3. there is no plan, in that no lender will provide sufficient financing to pay off the secured creditors since there is no equity; and
4. they will not vote for any plan that requires them to accept less than what they are owed.

I will deal with each of these arguments in turn.

No equity in the assets

[15] The total value of the assets, accepting the appraisals of the petitioners, is $88.2 million, which does not include the going-concern value of the Group. The total debt is estimated by the petitioners at $90.2 million, although I note that the monitor puts that figure at $99.4 million.

[16] Much of the argument regarding the equity situation concerned the valuations relating to the Parkside Resort, which has secured debt of $58 million. The petitioners value the Parkside Resort at $63.7 million based on appraisals obtained by them in November 2010, which would indicate some value beyond the secured debt on that asset. There are also potential tax losses in Parkside Resort of $19 million.

[17] bcIMC says that the appraisals are suspect because the appraiser in fact had an interest in the Parkside Resort at the time. In response, Mr. Sweett, the appraiser, has filed a certificate attesting that he did not value his unit in the Resort and that he did the remainder of the appraisal given his familiarity with and expertise relating to the project before his purchase of that unit.

[18] bcIMC has introduced an appraisal of the Parkside Resort well below this first appraisal. In accordance with my order dated November 2, 2011, this appraisal was sealed given bcIMC's submission that it was highly confidential and that there could be potential detrimental effects if it was disclosed publicly.

[19] There are difficulties relating to this appraisal also. It is clear that it does not purport to provide a market value of the property, but rather an investment value to a specific investor, namely Delta Hotels, a subsidiary of bcIMC. In addition, the value indicated in this appraisal is contradicted in any event by bcIMC's own evidence in that they indicate that they have received an offer to assume their first mortgage on the Parkside Resort for the sum of $20 million.

[20] The petitioners point to other evidence of value which confirms to some extent the values in their appraisals, including assessment values and their relationship to sale prices, historical prices of the ownership interests and negotiated listing prices determined with lender input.

[21] The Monitor has also conducted a limited review of the sales of Parkside Resort units and has concluded that the values in the appraisal of the petitioners are generally supported, with the proviso that the time within which those units could be sold and the cost that would be incurred during that time would erode the overall values as at this time.

[22] For the purposes of this application and with that proviso, I accept that the value of the Parkside Resort interests as advanced by the petitioners is as set out in their appraisals.

[23] With respect to Fisgard, it is apparent that they are well secured given the value of the Pacific Shores Resort, which is estimated by the petitioners to be $16.5 million. The $5.5 million liquidation value that was referred to by Aviawest was a liquidation value and not a going-concern value, which is particularly relevant given Fisgard's own stated intention to continue the operations of the Resort even within a receivership.

[24] There is no doubt that the petitioners are insolvent and that they face substantial challenges ahead in terms of any restructuring. However, for the purpose of this application, it is evident to me that there are substantial assets that will be a potential source of refinancing or sale with respect to both Parkside Resort and Pacific Shores Resort.

No faith in management

[25] In this respect, bcIMC says that management has shown no record of success and that there has been financial mismanagement and cash flow and financial recordkeeping irregularities. Fisgard adopts these same contentions.

[26] bcIMC says that it has not received any interest payments since 2009, although it appears that they have been receiving 100% of payments from sales and applying those proceeds to principal, which has resulted in their debt being reduced by $35 million over the last two years. I have been advised that just prior to the filing, bcIMC received approximately $1 million toward its loan, although I understand that Fisgard disputes that payment, saying that the payment was improperly diverted to bcIMC.

[27] It is clear to me that there have been substantial dealings between bcIMC and the petitioners since the loans were initially advanced and also throughout the ensuing period when financial difficulties became apparent to all concerned. I have been advised that there were a substantial number of meetings to discuss matters and also the appraisals now presented by the petitioners were provided to bcIMC some time ago.

[28] Both parties seem to have been working together to resolve the problems, and I have not been advised that bcIMC raised any issues relating to management's abilities until now. To that extent, the lack of success on the part of the petitioners has come as no surprise to bcIMC at this time.

[29] In fact, even as early as some months ago when the appraisal evidence was known, bcIMC took no action. bcIMC's opposition and the demands for payment in relation to this proceeding only arose after the petitioners indicated their intention to seek protection under the *CCAA* in mid-October. This opposition relates to bcIMC's position that they do not object to the petitioners seeking protection provided that it is done on their terms, all in accordance with a "with prejudice" offer that they sent some days ago which gives them full control over how long these proceedings would extend and on what terms (including that no DIP financing would be sought or obtained).

[30] There are some issues concerning rental monies from Water's Edge Resort. It appears that rental monies were previously used by Aviawest contrary to an agreement, which required that those monies be held in a segregated trust account. I am advised that this has been rectified and that the segregated accounts are now in place. There may be consequences arising from this situation, although that will be sorted out in the fullness of time. In any event, counsel for Water's Edge Resort did not submit that the order should be refused for this reason.

[31] I also would note that in *Muscletech Research and Development Inc. (Re)* (2006), 19 C.B.R. (5th) 57 (Ont. Sup. Ct. J.) at para. 4, Justice Farley stated that the good faith requirement relates to conduct within the proceedings, not that relating to past activities.

[32] The Monitor has been working diligently with the petitioners during the short time of its engagement since October 24. Accordingly, its review of the matters has been limited. Nevertheless, the Monitor has concluded that the petitioners are acting in good faith and with due diligence. I also accept that the current

management team has a great deal of expertise in this business that would be fundamental to any restructuring that may occur.

[33] In conclusion, I do not accept the submissions of bcIMC and Fisgard that there is any justification for their lack of faith in management.

There is no plan

[34] bcIMC says that there is no plan or any credible outline of a plan that makes any sense. To a large extent, this argument is that any plan is "doomed to failure" and accordingly, these proceedings should be terminated.

[35] This contention is addressed in the affidavit of James Pearson, who is the chief executive officer of the petitioners. Key elements of the plan at this time include:

a) the sale of some redundant assets, which would reduce cash flow requirements;

b) the sale and lease back of certain assets to increase working capital;

c) restructuring the income stream from the PSOE and the Club;

d) the refinance of the debt with bcIMC regarding Parkside Resort, which would in part allow some proceeds of sale to provide working capital;

e) restructuring the secured debt with Fisgard;

f) continuing sales of fractional interests and commercial units;

g) renegotiating arrangements with existing interest groups regarding the management and operation of the vacation interests;

h) resuming the points business; and

i) making a proposal to unsecured creditors regarding a share in the future income stream.

[36] In addition, I am advised by counsel for the petitioners that they have now talked to six potential investors who are either hotel entrepreneurs or financiers.

[37] Both the petitioners and bcIMC have referred me to *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577. In that case, the Court disapproved of the granting of an initial order where there was no stated intention by the debtor to propose an arrangement or compromise to its creditors. I note, however, that this situation is markedly different than the situation addressed in that case. As Tysoe J.A. stated at para. 31, it is not a prerequisite that a draft plan be filed at the time of the stay. What is required, however, is that the creditor have a *bona fide* intention to do so while having the protections of the stay under the *CCAA*.

[38] Given the evidence of the petitioners, I am satisfied that the Group has a *bona fide* intention to present a plan. I am not convinced that, as bcIMC states, it is simply a "hope and a prayer".

[39] I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The *CCAA* proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

Secured creditors will not vote in favour of any plan

[40] This argument is also part of the "doomed to failure" argument of bcIMC and Fisgard. I have been referred by bcIMC and Fisgard to *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952, 5 C.B.R. (5th) 64, as authority for the proposition that unless there is equity in the assets beyond that owed to secured creditors, a *CCAA* order is only appropriate if the secured creditors are supportive of it.

[41] To the contrary, at para. 19 of that case, the Court states quite clearly that a recalcitrant creditor should not necessarily prevent the granting of an order under the *CCAA*. This approach is consistent with the comments of Madam Justice Newbury

in *Forest & Marine* who stated, in the face of a major secured creditor's insistence that it would vote against any plan:

> [27] ... I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner.

[42] Further, bcIMC's insistence that it will not cooperate in terms of a refinancing simply does not make sense in light of what has already occurred in relation to bcIMC's debt and the positions and actions they have taken in relation to their debt. Firstly, they have already made the "with prejudice" offer to accept an amount under their first mortgage position only, which would give rise to a loss of approximately $20 million. Secondly, they have investigated the potential sale of their debt, which gave rise to an offer of $20 million.

[43] Both of these circumstances indicate to me that they are open to negotiations with the petitioners and that those negotiations may possibly result in a refinance of their debt that would allow the Group to go forward on some restructured basis.

[44] bcIMC and Fisgard are well known and sophisticated lenders doing business in this jurisdiction. As was stated by the court in *Rio Nevada Energy Inc. (Re)* (2000), 283 A.R. 146 (Q.B.) at para. 25, this is some evidence that bcIMC and Fisgard will not act against their commercial interests and that they will reasonably consider proposals. This distinguishes the case of *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178 at para. 12, 244 A.R. 93, where there was evidence that the lender had valid commercial reasons to vote against the proposal.

DIP Financing

[45] The petitioners seek DIP financing in the amount of $600,000, which is just shy of the $620,000 which the cash flow indicates will be required to see them through to December 11.

[46] The petitioners have in hand a term sheet from Fisgard which allows for funding to a maximum of $2.5 million. If the DIP financing is ordered, the parties are generally agreed that it will be restructured so as to separate the funding to Parkside Resort and Pacific Shores Resort given the different debt structures on those properties. There would also have to be some general funding for head office expenses.

[47] There also appears to be the possibility that PSOE and the Club will recommence paying the amounts that would normally have been billed to them by the petitioners but for the prepayments that were made in anticipation of services continuing. If so, that will provide an additional $323,000 by December 11.

[48] The granting of DIP financing is to be considered in accordance with s. 11.2 of the *CCAA*, which are relatively new provisions that came into force in September 2009:

> Interim Financing
>
> **11.2** (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> Priority – secured creditors
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> Priority – other orders
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> Factors to be considered
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> > (*a*) the period during which the company is expected to be subject to proceedings under this Act;

> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[49] I will address each of the factors listed in s. 11.2(4):

a) at this time the petitioners are seeking to continue the stay for a further five weeks until December 11, 2011, which is not an inordinate amount of time given the ambitious task ahead of them. Nevertheless, in my view it is essential that they be given this breathing room to explore restructuring options. The parties and the Monitor can assess their progress by that time to determine whether a continuation from that time forward is appropriate.

b) regarding management, as I have stated above, in my view the current management of the business is acting in good faith and with due diligence. They appear to be in the best position to potentially come to a solution given their expertise and the complexities involved. They have taken immediate steps to address cash flow difficulties in terms of the operational costs. I would also add that no party has submitted that the present management team be replaced by, for example, a Chief Restructuring Officer or that the Monitor should be granted further powers to address any deficiencies in that respect.

c) it goes without saying that bcIMC does not support current management. However, a substantial number of other stakeholders do support the management team, including BCC, who has a significant financial stake in the matter given its second mortgage on Parkside Resort. Fisgard does

not support management either. However, I am of the view that this position should be discounted substantially given that it is fully secured on Pacific Shores Resort.

d) the DIP financing is necessary in the circumstances to allow the Group's operations to continue. Without it, this proceeding cannot go forward. In that respect, it will enhance the prospects of a viable compromise or arrangement.

e) I have already discussed the nature and value of the Group's assets. Allowing the Group to continue can only serve to maintain the existing goodwill in the Group's business. It is well acknowledged that a receivership would have disastrous consequences in relation to the ability to market the units.

f) material prejudice is the most substantial argument of bcIMC and Fisgard in opposition to the DIP financing. I accept that the imposition of the charge may prejudice them in the event that the assets are not sufficient to pay their first mortgages, although that seems more unlikely in respect of Fisgard. Nevertheless, the materiality of the charge is questionable, particularly since the secured lenders have expressed an intention to continue the operations of Pacific Shores and Parkside Resorts respectively – which would in turn result in any receiver obtaining priority borrowings and which would erode the security in the same manner as DIP financing. The DIP financing will allow operations to continue, which will maintain the goodwill and enhance values in the meantime. In these circumstances, I am satisfied that the benefits of DIP financing outweigh any potential prejudice to the secured creditors, particularly bcIMC: see *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. at para. 28.

I would note that material prejudice to secured creditors is only one factor and is to be considered in equal measure with the others listed in

s. 11.2(4). It is not, as submitted by Fisgard, the case that as a matter of law the court cannot impose DIP financing over the objections of a secured creditor if there is prejudice to that secured creditor, particularly in light of the statutory test.

g) I would note that the Monitor in its first report, dated October 31, 2011, agrees that the current offer of Fisgard is the most favourable to the petitioners and the Monitor supports the granting of an Order approving DIP financing and the imposition of a DIP charge for that purpose.

Conclusions

[50] I wish at this time to address the argument of Fisgard that a *CCAA* proceeding is not appropriate in respect of these Resorts since they are real estate developments.

[51] There are numerous cases which have considered this issue including *Cliffs Over Maple Bay*; *Encore Developments Ltd. (Re)*, 2009 BCSC 13, 52 C.B.R. (5th) 30; and *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, 52 C.B.R. (5th) 47, to name a few. Yet those cases are clearly distinguishable from the present circumstances. In those cases, there were undeveloped or partially completed real estate projects and the courts found that it was more appropriate for the secured creditors to realize on those assets in the usual manner.

[52] In *Forest & Marine*, at para. 26, the Court of Appeal clearly drew the distinction between that situation and one where there is an active business being carried on within a complicated corporate group. The latter situation is exactly what we are dealing with here.

[53] Despite the setbacks in their business, the petitioners wish to continue their operations within the *CCAA* for the purpose of developing and presenting a plan to their creditors. This is consistent with the fundamental purpose of the *CCAA* as has been expressed in many cases of this court and our Court of Appeal: see, for

example, *Sharp-Rite Technologies Ltd. (Re)*, 2000 BCSC 122 at para. 23; and *Cliffs Over Maple Bay* at paras. 27-29.

[54] The petitioners say they have a proven track record in terms of sales and that they remain in the best position to maintain operations while they seek a more permanent solution to their financial troubles. They say that this will be advantageous for a number of reasons: the business is complex; the businesses are linked together such that each depends on each other, such that the whole will be weakened by a receivership; the buying of fractional interests is driven by the relationship with Aviawest; a stay will protect other stakeholders beyond the first secured creditors; and management has the skills to continue the sales of fractional interests.

[55] These points concerning the complexity and interconnectedness of the petitioner parties, which I accept, meet the suggestion by bcIMC and Fisgard that somehow the proceeding should be bifurcated – although this argument is, for the most part, made by each of them against the other in that each says that their main security should be released from the proceedings and that the other businesses and properties can remain within the *CCAA* proceedings. There was also a suggestion by bcIMC that Aviawest should be released from the *CCAA* proceedings, although it is not clear to me what benefit might be gained in that respect.

[56] In my view, this is a highly integrated group and the protections under the *CCAA* must be for the entire group in order that they can seek a solution to their financial problems as a whole. It may be that individual solutions will be found for particular assets or debts, but that can be accommodated within the *CCAA* proceedings as currently sought by the petitioners for that integrated group.

[57] I do not wish to end without noting the obvious. There are a substantial number of stakeholders involved: the petitioners themselves and the related corporate entities, the secured creditors, the unsecured creditors, the owner groups and strata corporations, the thousands of homeowners, and the hundreds of employees. Many of the hundreds of parties holding unsecured debt in Aviawest are

retirees who have invested their life savings into the enterprise, although it is also apparent that many pensioners have also invested through bcIMC.

[58] There can be no doubt that a receivership will result in a complete obliteration of every financial interest save for the first and possibly second secured lenders. On this point there is no disagreement, save for Fisgard's somewhat inexplicable argument that a receivership of Pacific Shores Resort would prejudice no one. The prejudice to the other stakeholders in relation to that resort is palpable in the event of a receivership.

[59] In conclusion, it is my opinion that the petitioners have satisfied the onus upon them to establish that they are acting in good faith and with due diligence and that the making of a further order extending the stay is appropriate. The order will go as sought, including that the administration charge is increased to $300,000 and that a director's charge is imposed to a maximum of $700,000 in respect of potential obligations that might be incurred post-filing.

[60] In addition, I am satisfied that the requested DIP financing order is appropriate in the circumstances and that it can be structured as has already been discussed between the parties.

[61] Fisgard's application to appoint a receiver is dismissed.

"The Honourable Madam Justice S.C. Fitzpatrick"

TAB 2

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *League Assets Corp. (Re)*, 2013 BCSC 2043

Date: 20131108
Docket: S137743
Registry: Vancouver

In The Matter of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended

And

In The Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, As Amended

And

In The Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, As Amended

And

In The Matter of A Plan of Compromise and Arrangement of League Assets Corp. and Those Parties Listed on Schedule "A"

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D.E. Gruber T.M. Tomchak R. Morse T.C. Louman-Gardiner
Counsel for PricewaterhouseCoopers Inc. as Monitor:	J.R. Sandrelli T.R.M. Jeffries
Counsel for Quest Mortgage Corp., Quest Capital Management Corp.	C.D. Brousson
Counsel for BCMP Mortgage Investment Corporation and Interior Savings Credit Union	K.E. Siddall

Counsel for TCC Mortgage Holdings Inc. FCC Mortgage Associates Inc.; Citizens Bank of Canada; First Calgary Financial Credit Union Limited, Firm Capital Mortgage Fund Inc.	Geoffrey Thompson R.B. Dawkins
Counsel for Canadian Western Bank	A. Frydenlund
Counsel for Romspen Investment Corporation	S.H. Stephens
Counsel for Business Development Bank of Canada	D.B. Hyndman
Counsel for Timbercreek Mortgage Investment Corporation	William C. Kaplan, Q.C. H. Sevenoaks
Counsel for Ad Hoc Committee of Convertible Promissory Noteholders of League Opportunity Fund Ltd.	W.E.J. Skelly
Counsel for Export Development Canada, Bank of Montreal and Churchill Real Estate Inc.	H. Ferris
Counsel for Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (Proposed DIP Lenders)	G.J. Gehlen
Counsel for Maxium Financial Services	P.J. Reardon
Counsel for Roynat Inc.	D.K. Fitzpatrick
Counsel for Proposed Representative Counsel for Investors	J. Grieve
Place and Date Of Hearing:	Vancouver, B.C. October 25, 2013
Place and Date of Judgment:	Vancouver, B.C. November 8, 2013

Introduction

[1] This proceeding was recently commenced, on October 17, 2013, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). On October 18, 2013, an Initial Order (the "Initial Order") was granted by Madam Justice Brown of this court. That Initial Order included an Administration Charge of $750,000 and a Directors' Charge of $500,000. PricewaterhouseCoopers Inc. was appointed as Monitor (the "Monitor").

[2] The organization of the petitioner group of companies (the "League Group") is exceedingly complex, as I will describe in more detail below. In broad terms, there is a complicated corporate structure comprised of real estate investment trusts, limited partnerships and corporations involved in the development and/or management of various real estate projects in British Columbia, Alberta, Ontario and Quebec. The assets of the League Group include certain securities and income producing and development properties which have been said to have an "implied" equity of over $210 million. Liabilities of the League Group are in excess of $410 million, including claims from approximately 3,200 investors who paid approximately $352 million for various interests.

[3] The comeback hearing has been scheduled for November 18, 2013. Following the granting of the Initial Order, various secured creditors on individual projects have consolidated their opposition to these proceedings. It is expected that they will raise substantial issues at the comeback hearing.

[4] In the meantime, the League Group has brought this application for debtor in possession or "DIP" financing, given its contention that it urgently needs interim funding until the comeback hearing. The Monitor has also brought an application to appoint representative counsel for the investor group.

[5] On October 25, 2013, I heard both applications and granted both orders, although on somewhat different terms than those sought. I indicated at that time that my reasons would follow. These are those reasons.

Background

[6] Emanuel Arruda and Adam Gant started the League Group in 2005 with two projects. Further properties were acquired on the same basis as before, namely using traditional bank financing and individual investor contributions.

[7] At present, the majority of the League Group entities are owned by IGW Assets Limited Partnership ("LALP"). The general partner of this limited partnership is owned by two numbered companies, which are owned or controlled by Mr. Arruda and Mr. Gant's family trusts respectively.

[8] The League Group, which has sought and obtained protection under the *CCAA* and related entities, and their general business activities can be generally summarized as follows:

a) IGW Real Estate Investment Trust ("IGW REIT"): IGW REIT does business mainly through the IGW REIT Limited Partnership ("IGW LP") which undertakes certain project development directly or through separate limited partnerships located in B.C., Alberta, Quebec and Ontario. IGW REIT has issued various notes totalling approximately $10 million. In addition, there are numerous unsecured loans outstanding and outstanding mortgages in respect of various projects;

b) LALP project specific limited partnerships: LALP also operates another set of such limited partnerships designed for short term investments, located in B.C., Alberta and Ontario. Each project general partner is owned by LALP with investors buying units in the limited partnership. Some of the project entities are said to be solvent and not financially tied to the filing petitioners (such as through guarantees) and are therefore not filing parties themselves;

c) League Assets Corp. ("LAC"): LAC owns various general partners of a number of limited partnerships which are involved in various projects, the main ones being Redux Duncan, Colwood Development and Fort St.

John, all located in B.C. There are other entities owned by LAC with diverse, but it seems mostly inactive, operations. As with LALP, a number of LAC related entities (and hence projects) are said to be solvent and not financially tied to the filing petitioners. They are therefore not filing parties themselves;

d) "Other" project limited partnerships: these have a similar structure to that of LAC and LALP, save that Mr. Gant and Mr. Arruda own the general partners for the project specific limited partnerships in B.C., Quebec and Ontario. This is said to be an oversight and in any event, these "other" limited partnerships are managed within the League Group, with LAC providing management services for these projects;

e) League Opportunity Fund ("LOF"): LOF is wholly owned by LALP. It is a vehicle for investors and it has issued promissory notes of approximately $13.5 million. The money was loaned by LOF to other members of the League Group. IGW LP (majority owned by IGW REIT) and LAC have guaranteed these notes;

f) investment and wealth management: there are a number of entities within the League Group's investment division which relate to investment and wealth management, including the Harris Fraser Group Limited which was recently acquired in July 2013; and

g) asset management: LAC is retained by IGW REIT, IGW LP and various project limited partnerships to provide asset management, for which it charges fees.

[9] The causes of the League Group's financial difficulties have been attributed to a number of factors. Firstly, the 2008 worldwide financial crisis caused a number of delays to certain projects; reduced demand resulted in increased borrowing costs in the long term. Secondly, the recovery from the financial downturn has resulted in many investors seeking to redeem their investments with the League Group to look

for higher risk/higher return investments. Thirdly, financing difficulties have been experienced on some projects, such as Redux Duncan and Colwood Development. Generally speaking, Mr. Gant states that the League Group has outgrown both its current corporate structure, which is too complex, and also its project by project funding model.

[10] The League Group currently has approximately 105 employees in various roles in Victoria, Vancouver, Toronto and Calgary. The fairly recent acquisition of the Harris Group is adding a further 20 employees in Hong Kong.

[11] There has been substantial evidence introduced in Mr. Gant's affidavits regarding the value of the various assets and projects and the secured debt against them. Aside from some Marketable Securities, there are 17 income producing properties and four development properties, for a total of 21 properties.

[12] There are 34 mortgage lenders and some have charges on multiple properties. Exhibit "E" to Mr. Gant's affidavit #2 sets out a summary of the various properties or projects, including the appraised values ($395.6 million), the outstanding mortgage debt ($184.6 million) and the "implied equity" in those properties or projects. I will revisit the reliability of this document in further detail below, but it will suffice at this stage to refer to the indicated "implied equity" in the Marketable Securities ($5.8 million), Income Producing Properties ($76.2 million) and Development Properties ($128.9), for a total of approximately $211 million.

[13] Unsecured creditors include the note holders in the various project limited partnerships and IGW REIT, inter-corporate debt primarily between IGW LP and other members of the League Group, trade creditors (mostly relating to Colwood Development) and professional service firms (although some of them recently obtained security for their debts just before the filing).

[14] Mr. Gant indicates that government remittances are substantially up to date, including those owed to Canada Revenue Agency and the British Columbia government. Income taxes are paid in full for 2012. All of these amounts continue to

be paid in the ordinary course of business. However, property taxes are substantially in arrears.

[15] Finally, the investor group is comprised mostly of individuals and Mr. Gant believes that some of them have invested a significant portion of their net worth in the League Group. There are also some institutional investors. As of September 2013, IGW REIT ceased making distributions to its investors.

[16] Mr. Gant states that the League Group has already taken steps to attempt a restructuring but has been hampered by the lack of funds. He states that any restructuring would likely involve: simplifying the corporate structure, divesting underperforming projects, seeking a stable and comprehensive funding for the various projects, changing the IGW loan process and finally, a potential public offering to increase equity and reduce credit requirements.

Secured Creditor's Objections

[17] It quickly became apparent during this hearing that a substantial number of the secured creditors were opposed to these proceedings generally and also specifically opposed to the relief sought on these applications. The secured creditors appearing on these applications included BCMP Mortgage Investment Corporation, Interior Savings Credit Union, Firm Capital Mortgage Fund Inc., Citizens Bank of Canada, First Calgary Financial Credit Union Limited, Canadian Western Bank, Romspen Investment Corporation, Business Development Bank of Canada, Timbercreek Mortgage Investment Corporation, Export Development Canada, Bank of Montreal, Churchill Real Estate Inc., Maxium Financial Services and Roynat Inc.

[18] I will not address the complaints or arguments of each individual secured creditor. Many of the arguments are interrelated. Those arguments can be generally summarized in the broad categories as follows:

a) Service/notice: despite the preamble to the Initial Order stating that the court was advised "that the secured creditors and others who are likely to be affected by the charges created herein were given notice", many of the

secured creditors state that they did not receive any notice of that hearing or that notice was sent directly to the general offices of the secured creditors which inevitably meant that it was not addressed by them after the hearing had taken place.

No evidence was before me concerning service/notice to the secured creditors. It is apparent that many of the secured creditors intend to argue at the comeback hearing that the Initial Order was granted on an *ex parte* basis and is therefore subject to being set aside for material non-disclosure, including that there was no true urgency in hearing the matter on an *ex parte* basis. It is now generally agreed that the comeback hearing will be heard on a *de novo* basis with the League Group having the onus of justifying to the court the continuation of the provisions in the Initial Order in accordance with the *CCAA*, s. 11.02(3).

b) Statutory Prerequisites: it is argued that individual entities within the League Group do not meet the definition of "debtor company" in s. 2 of the *CCAA* (i.e. they are not "insolvent") and therefore, those entities do not qualify to file for protection under s. 3. I note, however, that this particular issue was addressed before Brown J. prior to the granting of the Initial Order.

In addition, at least one secured creditor intends to argue that the Initial Order should be set aside because the plan of arrangement was doomed to fail (see for example, *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.));

c) The Enforcing Mortgagees: The secured creditors argue that there was no justification for two of the secured creditors, being TCC Mortgage Holdings Inc. ("TCC") and Quest Mortgage Corp. ("Quest"), being exempted from the stay under the Initial Order (para. 18).

TCC had commenced foreclosure proceedings in May 2013 in respect of the Redux Duncan property. An Order Nisi of foreclosure was granted in August 2013 with the redemption period due to expire in January 2014. Apparently, TCC had brought an application for the appointment of a receiver about the time that the Initial Order was granted. In addition, Quest's mortgages over the Colwood Development property were in default and demands for payment were served in early October 2013. The time for enforcement of those demands would have expired just before the granting of the Initial Order. It is my understanding that Quest has now also commenced a foreclosure proceeding against the Colwood Development.

Unfortunately, the exclusion of these "Enforcing Mortgagees" has engendered a response by the other secured creditors who, not surprisingly, wish to be treated in the same fashion. The fact that they are being treated differently has given rise to the other secured creditors taking the position that these proceedings are, unfairly, affecting only them in terms of their ability to enforce their security. In addition, it is only their security which is being primed by the various charges granted in these proceedings, since the security of the Enforcing Mortgagees has been exempted from the Administration Charge and the Directors' Charge and it is also proposed to be exempted from any DIP Lender's Charge or Representative Counsel Charge.

In many *CCAA* proceedings, foreclosing mortgagees are stayed in a variety of circumstances including when they have already begun enforcement proceedings. Although it was described as an "Enforcing Mortgagee" in the Initial Order, Quest had not yet commenced any foreclosure proceeding or at best, had only recently filed the action. Reasons for the exclusion of these parties were said to be not only that there were monetary defaults under their security, but also to avoid arguments by them as to the appropriateness of this *CCAA* proceeding,

based on well-known British Columbia authorities such as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327. Accordingly, while the League Group may have avoided that argument from the Enforcing Mortgagees, the decision to exempt them has resulted in the other secured creditors now being resolved to make those same arguments, in addition to arguing that the League Group was not acting in good faith by agreeing to that exemption.

My only preliminary comment on the issue at this point is that while the court strives to achieve fairness in the proceedings, the task of the court in imposing the stay is in part to ensure that it is "appropriate": *CCAA*, s. 11.02(3)(a). As Deschamps J. stated in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, appropriateness in part extends to treating stakeholders "as advantageously and fairly as the circumstances permit": para. 70. Often there are good reasons to depart from a blanket stay affecting various stakeholders, as is evidenced from the provisions of the model order. Typical examples would include payment of employees and critical suppliers. However, in respect of stakeholders having what seems to be a commonality of interest (and commonality of potential prejudice), I would expect that there would be cogent and compelling evidence to support an order that treated them differently.

d) The "White Boxes" Entities: The secured creditors also make certain arguments in respect of certain members of the League Group who are *not* part of the petitioning group. I have already referred to the extremely complex structure of the League Group. The organizational chart includes various entities marked in yellow which are part of the League Group and who are also petitioning debtors. Many other entities are identified in what have been called the "white boxes" on the organization chart which include those entities that were not part of the petitioning debtor group. I have already referred to some of these "white box" entities above, but it is

said by Mr. Gant that they also generally include firstly, shell companies where there are no assets and secondly, entities where the sole liability is to investors and as such, they are not insolvent.

The secured creditors argue that the exclusion of these "white box" entities is suspicious in that there has been inadequate disclosure of the financial circumstances relating to them. In particular, the suggestion has been made that there may be sufficient income or assets in those other entities to support the operations of the League Group in these proceedings without the necessity of priming charges which prejudice their security. If these entities are indeed solvent, then this argument would appear to be diametrically opposed to the other argument of some secured creditors (discussed above) that only *insolvent* entities should be petitioning debtors.

Despite these objections, and for the purposes of these applications, I am satisfied that the materials generally disclose the circumstances relating to these "white box" entities and why these entities have not been included in the *CCAA* filing. I do, however, appreciate that the stakeholders, including the secured creditors, may require further information about these "white box" entities beyond what is contained in Mr. Gant's affidavits. I expect that the League Group, possibly with the assistance of the Monitor, can provide reasonable and relevant material to them so that they might explore this matter. At present, I simply acknowledge that this may be the basis for arguments to be advanced by the secured creditors at the comeback hearing in respect of whether the League Group is operating in a *bona fide* manner.

e) Conflicts: Last, but not least, the secured creditors have raised a number of conflicts on the part of counsel involved in these proceedings. It is clear to me that these conflicts have significantly coloured the perceived fairness of these proceedings from the outset. The original counsel for the

League Group (who has since withdrawn) disclosed, after the Initial Order was granted, that she has also acted in the past for Quest. Some of the secured creditors intend to argue at the comeback hearing that there was material nondisclosure of this conflict to Brown J. and that this relationship between the law firm and Quest may have affected the League Group's decision to exclude Quest from the stay.

In addition, in the days following the granting of the Initial Order and in the face of the League Group's application for DIP financing, it was disclosed that the law firm acting for the Monitor (who ceased to act at the end of this hearing) had also undertaken to act for the DIP Lenders in respect of the preparation of financing documents. The explanation is that the DIP Lenders urgently required counsel to address the League Group's pressing need for this DIP financing. Although screens were put in place between the individual lawyers at the law firm, it has unfortunately resulted in the perception that the Monitor's support of the DIP financing, or at least the legal advice relating to the Monitor's support, has been influenced by that relationship. This turn of events was extremely unfortunate, particularly in light of the unquestioned duties of the Monitor as an officer of this court and its overriding duty to act fairly in respect of all stakeholders, whether they are in support of or opposed to the DIP financing.

Finally, current counsel for the League Group has disclosed that his law firm is an unsecured creditor. I am not aware of any objections arising from this fact. However, it does appear that the law firm was giving legal advice to the DIP Lenders at one point.

[19] I am advised that all of the issues above may be raised at the comeback hearing. In addition, the secured creditors raised these issues on this application arguing that, in these circumstances, the court should be extremely reluctant to authorize DIP financing and grant a DIP charge or any other charge based on the

substantial attacks that will be made on the Initial Order and on the continuation of this proceeding. It is no doubt the strategy of the secured creditors at this time to attempt to inject sufficient uncertainty into these proceedings such that any DIP lender will be reluctant to advance monies to the League Group.

[20] It not my intention or role at this time to revisit the basis upon which the Initial Order was granted. Presumably, the Initial Order was granted having regard to the statutory requirements under the *CCAA* and based on well-known principles applicable on such applications, including those set out in *Century Services Inc.* at paras.15-18, 57-71. I appreciate that the issues raised by the secured creditors are significant and if substantiated, may have serious consequences. Nevertheless, I am not convinced that these arguments are sufficient to dissuade the court from granting interim relief at this time, simply to see the League Group through to the comeback hearing, some 24 days away at the time of this hearing.

[21] Accordingly, it is my intention to proceed to hear and decide these applications before me based on the Initial Order being extant and based on the updated and current circumstances of the League Group. I have specifically rejected the suggestion of one of the secured creditors to grant these orders on a "without prejudice" basis.

DIP Financing

[22] In its application materials, the League Group sought approval of a DIP facility in the amount of $31.5 million from Whil Concepts Inc., NWM Private Equity LP and NWM Balanced Mortgage Fund (whom I will collectively call the "DIP Lenders"). This proposed facility was not only for what was said to be operating funding for the next 13 weeks ($5 million), but for other purposes such as payment of tax arrears ($3.5 million), mortgage payments for 13 weeks ($5 million) and to payout one of the existing mortgage lenders, TCC ($18 million).

[23] Despite this, the League Group only sought a DIP Lender's Charge of $1.6 million which was said to be the amount of emergency funding that was urgently needed to get to the comeback hearing on November 18. The DIP Lenders

supported this restricted charge, based on their submissions that they had no intention of funding, save and except with a DIP Lender's Charge. I understand that given the urgency, and despite the objections of the secured creditors, the DIP Lenders are prepared to immediately fund this amount and in doing so, waive the following conditions: that advances would only be made after expiry of the appeal period and that certain administrative matters, such as insurance, be in place.

[24] The test for DIP funding is now mandated by the *CCAA*, s. 11.2:

> **Interim financing**
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> **Priority — secured creditors**
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Priority — other orders**
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> **Factors to be considered**
>
> (4) In deciding whether to make an order, the court is to consider, among other things,
>
> (*a*) the period during which the company is expected to be subject to proceedings under this Act;
>
> (*b*) how the company's business and financial affairs are to be managed during the proceedings;
>
> (*c*) whether the company's management has the confidence of its major creditors;
>
> (*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (*e*) the nature and value of the company's property;
>
> (*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[25] In accordance with the *CCAA*, s. 11.2(1), the League Group has filed a cash flow forecast to the date of the comeback hearing.

[26] As a preliminary matter, no one has challenged the adequacy of the efforts by the League Group to obtain satisfactory interim financing. Nor is there any challenge to the appropriateness of the business terms arranged with the DIP Lenders, including the term, interest rate and level of various fees for monitoring the commitment itself and professionals. The Monitor comments favourably on the process by which the DIP financing was sought by the League Group and the reasonableness of the terms proposed by the DIP Lenders.

[27] It is proposed that the DIP Lender's Charge would rank after the Administration Charge but before the Directors' Charge and any Representative Counsel Charge.

[28] Notice of this application for DIP financing has been given to secured creditors likely to be affected, as required by the *CCAA*, s. 11.2(1). The secured creditors attending on this application object to the financing for a variety of reasons (as discussed above), and also on the basis that this funding is not urgent, there is an insufficient evidentiary basis for the relief sought and that they will be prejudiced by the DIP Lender's Charge ranking ahead of their security.

[29] I will address each of the factors identified in *CCAA*, s.11.2(4).

(a) The period during which the League Group is expected to be subject to proceedings under the CCAA

[30] The DIP financing that is sought today is simply to allow the League Group to continue its operations until the comeback hearing on November 18 by allowing it to make certain core payments.

(b) How the League Group's business and financial affairs are to be managed during the proceedings

[31] Mr. Gant states in his affidavit that the League Group has been working closely with the Monitor regarding its financial affairs, including reviewing all payments made by the League Group. The Monitor similarly says that it has been working cooperatively with the League Group in terms of preparing the cash flow forecast and other financial documentation.

[32] In addition, the League Group had already made certain efforts to reduce operating expenses in anticipation of the *CCAA* filing.

(c) Whether the League Group's management has the confidence of its major creditors

[33] Not surprisingly, most of the counsel for the secured creditors appearing on this application voiced their clients' lack of confidence in the League Group's management. However, these types of bald assertions, without more, and without evidence, do little to provide the court with a satisfactory basis upon which to assess this factor. In addition, the position of the secured creditors must be considered in the context of other evidence that suggests that they are fully secured and that payments owed to them by the League Group are current: *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49(c).

[34] Counsel for certain note holders of LOF raised the matter of governance of the League Group during his submissions. While supporting the application for DIP financing, it appears that those stakeholders are considering whether an application for a chief restructuring officer (CRO) might be appropriate in the circumstances. I do not wish or need to predict what might happen at the comeback hearing or any later court application but presumably, if an application for such relief is brought, it will be based on evidence as to the willingness and/or ability of the current management of the League Group to proceed with its restructuring efforts.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made by the League Group

[35] Substantial arguments were advanced, by a number of the secured creditors, that the DIP funding was not necessary or urgent. With respect, I disagree.

[36] The cash flow forecast indicates that in the period leading up to November 18, approximately $1.6 million will be required in respect of corporate operating expenses. A large portion of that amount, $1.1 million, will be required for payroll, with the first payroll of approximately $550,000 due the very date of the hearing and the second payroll being due on November 8, 2013. The cash flow forecast indicates proposed payments of $339,000 for "project funding" which I am advised relates to supporting certain income producing properties which are operating on a negative cash flow basis. Notwithstanding that the evidence on the project operating expenditures is somewhat thin, in my view, it is reasonable to expect that the League Group has some ongoing operations in the specific projects that require support in this interim period. Again, I would emphasize that it is the overarching intention of the League Group to conduct business in the ordinary course, at least in the initial period of the restructuring until a longer term strategy can be formulated.

[37] The anticipated cash receipts of approximately $1.9 million over this time frame are clearly not sufficient to fund the anticipated costs of approximately $3.5 million. Nor is the timing of some of those receipts during the week of October 28 certain in terms of making the payroll as soon as possible after it was due on October 25.

[38] Finally, the cash flow forecast anticipates restructuring and financing costs of $1.45 million until the comeback hearing. There are strenuous objections to payment of these amounts; however, it cannot be argued that professionals who are assisting in the restructuring of these proceedings should be denied payment of their reasonable remuneration on an ongoing basis, if such payments are possible: *Timminco Ltd. (Re)*, 2012 ONSC 506 at para. 66. The amounts are large but not unusual given the complexity of these proceedings and the issues raised. These

professionals should not be required to simply rely on a court ordered charge to protect their outstanding fees. The Administration Charge in any event would not have been sufficient to cover the amounts expected to be incurred to the date of the comeback hearing.

[39] Further, if they wish, the stakeholders will have the opportunity to review all professional fees at the end of this matter. In particular, paragraph 34 of the Initial Order provides that the Monitor and its legal counsel will pass their accounts before this court. Paragraphs 6 and 7 of the Initial Order provide for the payment of *reasonable* fees and disbursements to the League Group's counsel.

[40] Without the proposed DIP funding, the League Group readily admits that it will be unable to continue. The Monitor states:

> ... If the financing is not approved, the current liquidity situation is such that League will not be able to fund payroll on Friday, October 25th, which will require an immediate cessation of operations and the accompanying liquidation of its assets in a forced and distressed manner.

[41] I am satisfied that the DIP financing sought on this application is urgently needed in order to fund operations within these proceedings until the comeback hearing. Accordingly, I agree that such funding will enhance the prospects of an arrangement by the League Group to its creditors.

(e) The nature and value of the League Group's property

[42] As I have stated numerous times, many of the secured creditors oppose the continuation of this proceeding and wish to take steps to realize on their security.

[43] Most of the assets owned by the League Group are complex real estate holdings including income producing properties and development properties, some of which are not yet completed.

[44] The Monitor points out what might be said to be fairly obvious; namely, that such a realization scenario is not in the interests of the creditors, including even these secured creditors, or the numerous other stakeholders in these proceedings:

> A forced and distressed liquidation is clearly not in the interests of the creditors or Investors, nor is it in the interests of many of the mortgage lenders who do not enjoy first mortgage security and whose security is spread across multiple properties and assets. Such lenders will then be compelled to deal with complicated scenarios where their recovery on one property will determine the extent to which they must rely on another property for the recovery of their loans. If a liquidation of League's assets is to occur, it is imperative that such a liquidation should occur on an orderly and controlled basis.

[45] In addition, as pointed out by counsel for the League Group, the nature of the assets is such that even if the secured creditors were to take steps to realize on their security, they would inevitably be incurring some of the same types of expenses, including professional fees, as are currently being proposed to be paid in accordance with the cash flow forecast: *Pacific Shores Resort & Spa Ltd.* at para. 49(f).

(f) Whether any creditor would be materially prejudiced as a result of the DIP Lender's Charge

[46] The issue of material prejudice to the secured creditors was largely focused on the evidence as to the value of the secured assets and the "implied equity" which was calculated based on certain mortgage amounts stated to be outstanding.

[47] Again, I do not intend to focus on each individual secured creditor. Many of the secured creditors take issue with what has been described as the appraised value of the various projects over which they hold security and also with what is calculated to be the mortgage debt outstanding on those projects.

[48] The League Group and the Monitor do not dispute that this calculation of $210.9 million of "implied equity" is not a certain calculation. In particular, the Monitor emphasizes that it has only, to this time, performed a "high level review" of the calculation of equity in the various projects. The Monitor notes:

a) Marketable Securities: those amounts are based on recent trading prices of units in the Partners REIT, which are publicly traded;

b) The Income Producing Properties: the ascribed values of these properties are supported by appraisals, although it is apparent that some of those appraisals are dated. In addition, the Monitor notes that most of the appraisals have been prepared for financing purposes which in their experience, tend to be higher than values recoverable in the market. Nevertheless, the Monitor concludes that there appears to be "significant positive equity available in these properties"; and

c) The Development Properties: the values ascribed are based on book values which represent the monies the League Group has spent to date to develop the properties. Again, based on the Monitor's experience, if the development is not completed, the recovery for these projects will be substantially less than the costs incurred to date. With respect to the Colwood Development specifically, the Monitor is of the view that even if the League Group completes the project, it is unlikely that the project costs will be fully recovered. Accordingly, the Monitor states that the $129.9 million "implied" equity in the development properties is overstated, although it is unclear at this time to what degree.

[49] I agree that the exact financial position of the League Group in the income producing and development properties is unknown to some extent. These proceedings have only begun and the Monitor is no doubt continuing its investigation and analysis of the various projects. I anticipate that the equity position in these properties will be further clarified in the near future and that this further information can be communicated to the stakeholders. The Monitor points to the fact that after the granting of the Initial Order, the mortgage lenders needed "time and a better understanding of League's complexity and possible restructuring plan to consider supporting this refinancing".

[50] In the meantime, despite the shortcomings in the financial calculations, there appears to be substantial equity in those properties. Most of the secured creditors appearing on the application did not have any more reliable information towards a

calculation of the equity in the projects. When asked about their own specific secured positions, most were not able to state convincingly or conclusively that their loans were in jeopardy, although some submissions were made that certain loan positions were "on the bubble". Even if any of the secured creditors are in or close to a deficit position, the intention of the League Group is to continue funding the mortgage payments, subject to obtaining further DIP financing to do so. In that event, any further prejudice will be lessened. None of the secured creditors were able to say that their loans were subject to any financial defaults, although I am assuming that given the *CCAA* filing, there are likely to be many non-financial defaults in accordance with the usual security documentation.

[51] As I noted in *Pacific Shores Resort & Spa Ltd.* at para. 49(f), material prejudice to secured creditors is only one factor to be considered in equal measure with the others listed in the *CCAA*, s. 11.2(4).

[52] On the basis of the evidence presented, I am satisfied that at the very least, the secured creditors will suffer some prejudice in terms of delays in realization of their security in the event of a failure to restructure by the League Group. Beyond that, I am not satisfied that there is *material* prejudice to the secured creditors given the asset/debt levels disclosed to date. Further prejudice may arise in the event that the "implied equity" amounts are reduced or perhaps eliminated.

[53] Based on the current values disclosed, it is, as Mr. Gant suggests, really the unsecured creditors and the investor group who are facing the material prejudice at this time and any prejudice to the secured creditors must also be considered in light of that material prejudice. As I have noted above, there are also a substantial number of employees.

[54] In light of the concerns expressed by the secured creditors, the League Group, with the support of the Monitor, has proposed certain allocation provisions in the order authorizing DIP financing, should an allocation issue arise in the future. In accordance with these provisions, costs that may be specifically attributed to a certain asset shall be allocated to that asset. Costs that are not attributable to any

asset are to be allocated as follows: firstly, to unencumbered or not fully encumbered assets and secondly, to assets generally based on a *pro rata* allocation based on the actual value of an asset.

[55] I agree that this allocation provision should alleviate many of the secured creditors concerns as to how the DIP Lender's Charge may be borne. It remains to be seen, of course, whether any allocation issues will in fact arise as that will be dependent on the success of the restructuring.

(g) The Monitor's report

[56] The Monitor's first report to the court is dated October 23, 2013. The Monitor supports the proposed DIP financing and the granting of a DIP Lender's Charge, having reviewed the financial terms of the DIP Lenders and being satisfied that those are reasonable terms and the best available in the marketplace.

[57] The Monitor is also satisfied that the restriction of the DIP Lender's Charge to $1.6 million will allow for the minimum cash requirements for the League Group to meet its operating and restructuring obligations until the time of the comeback hearing.

[58] Finally, the Monitor has expressed the view that it supports both the DIP Lender's Charge and the Representative Counsel Charge referred to below to a total of $1.85 million notwithstanding that those charges would prime the existing secured creditors, other than the Enforcing Mortgagees. The Monitor states that it is sensitive to concerns being raised by the mortgage lenders as a result of the priming but that it supports the priming on the basis that there appears to be equity in the properties such that it is unlikely the mortgage lenders will ultimately be impacted by these priority charges.

[59] As the Monitor notes, it is usual in these types of cases that a DIP Lender will advance monies into those proceedings only where the loans are supported by a court ordered priority charge over existing charge holders. All of the parties who submitted offers to the League Group to provide DIP financing required such a

priority charge. In *Timminco Ltd. (Re)*, 2012 ONSC 948, aff'd 2012 ONCA 552, Mr. Justice Morawetz stated:

> [49] In the absence of the court granting the requested super priority, the objectives of the CCAA would be frustrated. It is neither reasonable nor realistic to expect a commercially motivated DIP lender to advance funds in a DIP facility without super priority. The outcome of a failure to grant super priority would, in all likelihood, result in the Timminco Entities having to cease operations, which would likely result in the CCAA proceedings coming to an abrupt halt, followed by bankruptcy proceedings. Such an outcome would be prejudicial to all stakeholders ...

[60] The same considerations discussed in *Timminco Ltd.* are at play here. It is unreasonable to expect that any DIP lender would advance the required DIP financing, save and except with a charge having priority over existing creditors. As stated by the League Group and as confirmed by the Monitor, this DIP financing is necessary and urgently required to continue the operations of the League Group for a very short period of time until the comeback hearing. Failure to obtain that financing will result in a liquidation scenario - one which, given the different stakeholder groups and the complexity of the assets, will no doubt result in a multiplicity of realization proceedings at great cost. In that liquidation scenario, there will likely be prejudice to those who are said, at this time, to be the stakeholders who have significant equity in the assets.

[61] It is a fundamental objective of the *CCAA* to avoid such an outcome if at all possible.

[62] In conclusion, the DIP financing is urgently required by the League Group and is necessary to fund the operations for a very short period of time to the comeback hearing. The order approving the DIP facility is granted. However, in my view, there is no need to approve any DIP facility beyond the $1.6 million financing needed to the time of the comeback hearing. The League Group is at liberty to bring a further application in respect of any further DIP financing.

Representative Counsel

[63] The Monitor applies for the appointment of Fasken Martineau DuMoulin LLP ("Faskens") as representative counsel for the investor group. In addition, the Monitor seeks an order that Faskens be granted a charge in the amount of $250,000 in respect of its fees and disbursements. The proposed ranking of that charge is that it will stand in priority to all of the security and charges (including the Director's Charge) but be subordinate to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

[64] As noted above, the investor group has been identified as comprising approximately 3,200 individuals and some institutional investors who have supplied approximately $352 million to the League Group to fund its real estate properties and business operations. Generally speaking, these investors have contributed funds in the form of secured notes, unsecured notes and equity to IGW REIT, LOF and to individual project limited partnerships, either directly or through an RRSP eligible investment vehicle. I understand that the various investment vehicles have different conversion, redemption or retraction features.

[65] The Monitor advises that while there are certain common attributes amongst the investor group, there are other circumstances relating to the various investments that would suggest that some individuals or sub-groups may have positions that may differ from others within the overall group. For example, it may be such that different project specific investments have equity, while others do not.

[66] The Monitor has already fielded over 100 enquiries from various investors. On October 23, 2013, the Monitor scheduled and held a conference call for the purpose of informing investors of the *CCAA* proceedings and the anticipated process and also to answer any questions. I am advised that over 460 investors participated in that call. At that time, the investors were introduced to counsel from Faskens and the concept of a representative counsel was discussed.

[67] If representative counsel is to be appointed, there is no opposition to the appointment of Faskens given their extensive experience in insolvency matters and

in particular, matters involving large and disparate stakeholder groups where representative counsel were appointed, such as in the Eron Mortgage Corporation proceedings.

[68] The Monitor states that it is unlikely that many of the individual investors will either have the financial wherewithal or means to engage legal counsel to provide for their meaningful participation in these insolvency proceedings. In addition, if a number of separate law firms are retained by investors, a multiplicity of representation by those having a commonality of interest will add to the cost and therefore the complexity of the proceedings. Finally, the Monitor notes that these investors are the stakeholders to be "most keenly affected by this restructuring" and representation of their interests may be beneficial so as to ensure that all stakeholders have adequate input into the course of these proceedings.

[69] I am satisfied that the Monitor is not in a position to assist any further in alerting the investors to these proceedings, organizing the investor group and advising them of issues that may affect them either as a group or individually.

[70] The statutory jurisdiction upon which such representative charges are considered is found in the *CCAA*, s. 11, which provides that the court may make any order that it considers "appropriate" in the circumstances:

> **General power of court**
>
> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[71] The appropriateness of such orders has been considered numerous times by the Ontario Superior Court of Justice (Commercial List): see *Nortel Networks Corp. (Re)* (2009), 53 C.B.R. (5th) 196, 2009 CarswellOnt 3028, *Fraser Papers Inc. (Re)*, 2009 CarswellOnt 6169, *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 9398, and *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 and by this court: *Catalyst Paper Corp. (Re)*, 2012 BCSC 451.

[72] In *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328, Pepall J. (as she then was) summarized many of the factors that have been considered in granting these types of order:

> [21] Factors that have been considered by courts in granting these orders include:
>
> - the vulnerability and resources of the group sought to be represented;
> - any benefit to the companies under CCAA protection;
> - any social benefit to be derived from representation of the group;
> - the facilitation of the administration of the proceedings and efficiency;
> - the avoidance of a multiplicity of legal retainers;
> - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
> - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
> - the position of other stakeholders and the Monitor.

[73] The stakeholder groups for which representative counsel were appointed in *Nortel Networks Corp.*, *Fraser Papers Inc.*, *Canwest Global Communications Corp.* and *Canwest Publishing Inc.* were current and former employees of the debtors. In those cases, the Ontario court noted the particular vulnerability of certain of those stakeholders. The vulnerability of the investor group here has not yet been fully investigated, but the Monitor and Mr. Gant certainly suggest that similar concerns arise in relation to the individuals who have invested a significant portion of their net worth in the League Group. In addition, the indications of equity in the League Group's assets would also suggest that their interests in these proceedings are real and not merely illusory.

[74] In *First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, Mr. Justice D.M. Brown appointed representative counsel in those *CCAA* proceedings for some 1,200 clients who were investors in one of the debtor companies (para. 38). Representative counsel were also appointed in the Eron Mortgage Corporation

proceedings for certain investor groups: see *Eron Mortgage Corp. (Trustee of) v. Eron Mortgage Corp.* (1998), [1999] 4 W.W.R. 375 (S.C.) at para. 3.

[75] I am satisfied that the appointment of representative counsel in this case is appropriate for the reasons stated by the Monitor. As matters stand, the investor group is a significant one and it is important that they be properly represented so that they can take appropriate positions in these insolvency proceedings. From a timing perspective, it is somewhat imperative that the investors obtain some legal representation in respect of the comeback hearing which, as I have alluded to, is expected to be highly contentious principally from the perspective of the secured creditors.

[76] At this point in time, the investor group has a sufficient "commonality of interest" that can be best served by one counsel: *Nortel Networks Corp.* at paras. 62-63, *Fraser Papers Inc.* at paras. 11-12. The appointment of representative counsel will allow their positions to be advanced in an efficient manner, to the benefit of all stakeholders. Separate representation may be required at a later time once Faskens has had an opportunity to investigate the claims of the investors and determine what positions might be advanced in these proceedings. That matter can be addressed if and when it arises.

[77] The statutory jurisdiction to order that the fees and disbursements of any representative counsel be secured by a charge is found in the *CCAA*, s. 11.52(1)(c):

> **Court may order security or charge to cover certain costs**
>
> **11.52** (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> ....
>
> (*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> **Priority**

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[78] Having forecast to the secured creditors my conclusions with respect to the DIP financing, I encouraged the parties to discuss what interim accommodations could be agreed upon in order that representative counsel could be retained for the investors in the short period of time leading up to the comeback hearing.

[79] As a result of those discussions, it was generally agreed and subsequently ordered that Faskens would be appointed as representative counsel with authorized fees of $125,000. The League Group was authorized to pay a retainer of $75,000. It was also recognized that a charge would be necessary in order to allow for Faskens' "effective participation" in the proceedings and a Representative Counsel Charge was ordered to the extent of $50,000, with priority save and except with respect to the Administration Charge, the DIP Lender's Charge and the security of the Enforcing Mortgagees.

[80] This modest cost for representative counsel at this stage is fair and reasonable and is intended to benefit the proceedings generally. Therefore, the Representative Counsel Charge is properly borne by stakeholders based on the proposed priority: *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at para. 54.

[81] It is anticipated that the Representative Counsel will have met at least to some degree with the investor group prior to the comeback hearing and will be in a position to report to the court on what efforts have been made to organize the group. It is also hoped that by then, the Representative Counsel will have assessed the investor group's interests so as to be able to advise, if possible, what issues might be raised by the investor group. Finally, it is anticipated that Faskens will make efforts to determine whether it is possible to raise retainer funds within the investor group itself for any representation beyond the comeback hearing, rather than securing further amounts from the League Group.

Disposition

[82] The Initial Order is amended and restated on the terms proposed with respect to the DIP financing and the DIP Lender's Charge, save and except that the authorized credit facility shall not exceed $1.6 million. The League Group and the DIP Lenders are to file a copy of the amended commitment letter in this court once that is signed.

[83] The order is granted appointing Faskens as Representative Counsel for the investor group on the terms proposed. The authorized fees for the Representative Counsel will be $125,000, to be secured by a retainer of $75,000 paid by the League Group and a Representative Counsel Charge of $50,000 with the indicated priority.

[84] The remainder of the applications, including the applications of FCC Mortgage Associates Inc. and Export Development Canada, are adjourned to November 18, 2013 to be heard at the same time as the comeback hearing.

"Fitzpatrick J."

Estate Number/Court File No.: 33-2618511

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number/Court File No.:33-2618512

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF LIVEWELL FOODS CANADA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number/Court File No.:33-2618510

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ARTIVA INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

Estate Number/Court File No.:33-2618513

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF VITALITY CBD NATURAL HEALTH PRODUCTS INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

ONTARIO

SUPERIOR COURT OF JUSTICE

(IN BANKRUPTCY AND INSOLVENCY)

(PROCEEDING COMMENCED AT OTTAWA)

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