Court of Queen's Bench of Alberta

Citation: Shire International Real Estate Investments Ltd. (Re), 2010 ABQB 84

Date: 20100204
Docket: 0901 11866
Registry: Calgary

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IN THE MATTER OF THE *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36, AS AMENDED, THE *Judicature Act*, R.S.A. 2000, c. J-2, AS AMENDED AND THE *Business Corporations Act*, R.S.A. 2000, c. B-9, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FOR MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSE HARBOUR BONDS LTD. and ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0475816 B.C. LTD. and BOSUN'S HOLDINGS LTD.

Reasons for Judgment
of the
Honourable Madam Justice C.A. Kent

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[1] I granted a *CCAA* Order on August 29, 2009. The first comeback application was heard by another judge on October 8 2009. He extended the Order until December 8. 2009. Counsel for Shire, supported by the Monitor/Receiver of Shire seeks an extension to the Order, permission to draw on all of the DIP financing previously ordered and approval of a RFP Project Agreement with Foxbridge Asset Management Ltd.

[2] Shire is comprised of 21 companies involved in the land acquisition business. Their business was to purchase property, financed by way of mortgages and private investors. There are about 2800 private investors. At the time the original Order was granted, information about

the value of the properties was scant. The Monitor undertook an analysis of the companies' assets and liabilities and in its Third Report, provided his best estimate of the financial circumstances of Shire. It was the Monitor's conclusion that on a consolidated basis there was about $17,000,000 in excess of the secured debt. It was on the basis of that estimate that the October 8th order was granted. The October 8th Order contained more. In addition to extending the stay, the Chambers judge increased the DIP facility to $2.5 million and set priorities with respect to the DIP charge and other fees, including a receiver's charge of $250,000. Because of the apparent lack of confidence that investors had in Shire management, the Chambers judge ordered that the Monitor in the *CCAA* proceedings also become the receiver manager of Shire.

[3] Subsequent to granting the October 8th Order, the Monitor realized that there was an error in the Third Report such that the apparent equity on a consolidated basis was closer to $12 million. Counsel approached the Chambers judge to determine whether it was appropriate that he reconsider the matter to determine whether he would have made the same order. The Chambers judge determined that I should make the decision as part of the application to extend the stay.

[4] Also after the October 8th Order, Fisgard Capital Corporation who is a secured lender on one of the Shire properties obtained an order from another judge who lifted the stay of proceedings with respect to the companies in which Fisgard had an interest and declared that the DIP charge did not charge the properties held by those companies. He did that because there was no equity in the property. As well, two secured lenders of other properties appealed the October 8th Order. An application to stay the Order was refused. In applying the tripartite test, Madam Justice Paperny, like the October 8th Chambers judge was under the impression that there was $17 million of equity. Her decision indicates to me that her reason for denying the stay was because the risk to the secured lenders was minimal. The final fact which is important to note is that of the DIP facility approved, only the original $1 million has been advanced with the balance held in trust by counsel for the Monitor.

[5] Shire argues that the stay ought to be extended even though the amount of equity available is $12 million, not $17 million as originally thought. It acknowledges that much of the information on value is estimated. There has been no money available to obtained up-to-date appraisals because of the several legal proceedings in the past two months. It points out that there is now a plan or at least a schedule to put a plan into place. The RFP Plan is intended to find a candidate or candidates who would bid on the properties which would in turn maximize value for both the secured lenders and the private investors. The Monitor says that the process up to court approval of the successful bidder(s) would be completed by mid-March.

[6] Shire says that the RFP Plan is realistic and that because of the equity in the properties, the secured lenders are protected. Shire is supported in its application by counsel for 800 of the investors who have collectively advanced $70 million.

[7] There was vigorous opposition to Shire's application by several of the secured lenders. They argue that this is a liquidating *CCAA* and while sometimes a liquidating *CCAA* makes sense this is not an appropriate case. There is nothing about the properties in these companies that

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would attract new investors. These are "bits and pieces" of land geographically spread out that do not lend themselves to being sold as a package. In these circumstances, there is nothing that makes *CCAA* proceedings more likely to achieve the best result for the most parties than allowing the foreclosure proceedings to run their course. They argue that there is no equity in the properties when you consider them on a consolidated basis. The reason for the lack of equity is that the amounts used by the Monitor as value for the property are too high because the information is out of date or otherwise suspect, there is no accounting for any unpaid taxes, liens or other expenses and no recognition that selling these properties would involve real estate commissions and other expenses. Further, they say that on an unconsolidated basis, there is no equity in some properties and those properties should not be primed with the DIP financing. They argue that the RFP Plan is no plan at all. It is at best a plan to make a plan and at worst is proposing to do things some of the secured lenders have been already doing in their foreclosure proceedings.

[8] The secured lenders cited several cases where *CCAA* proceedings have either been denied or the stay not extended, including Cliffs Over Maple Bay [2008] B.C.J. No. 1587 (BCCA), Encore Developments Inc. [2009] B.C.J. 62 (BCSC) and Octagon Properties Group Ltd. [2009] ABQB 500. Specifically addressing Octagon, a decision of this court, counsel said that the only difference between Octagon and Shire is the large number of private investors in Shire.

[9] Having regard to the objectives of the *CCAA*, the large number of unsecured investors is, or more properly, was an appropriate consideration in granting *CCAA* protection. However, that cannot trump the interests of secured creditors when the facts show that continuing *CCAA* proceedings is putting their security at risk. That is so particularly in circumstances where there is a strong likelihood that continuing *CCAA* proceedings will do nothing to enhance the value of the properties and thereby increase the potential for return to the investors. I find that this is the situation here. A realistic estimate of value indicates that the equity available may be approaching the amount of DIP financing, the plan is really not a plan and even as a plan, is unlikely to produce any result more attractive than foreclosure proceedings.

[10] In the result, I decline to extend the *CCAA* stay. With respect to the DIP financing, as I understand it, only $1 million has been advanced and that work done by the Monitor, his counsel and counsel for Shire in the last while has not been paid for. Those bills should not remain unpaid. While there may be instances where upon review of the original *ex parte* order causes the judge to conclude that the DIP should never have been granted because there was inaccurate information provided, that is not the case here. Rather, against the background of a large number of private investors, it was appropriate to grant the initial order to permit the Monitor to look at the state of affairs of Shire so that the court could determine if *CCAA* proceedings were appropriate. That has been done. It has not turned out well, but that does not mean that the professionals who assisted the court should not be paid.

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[11] Finally, there is the allocation of the DIP financing. From the beginning, the *CCAA* proceedings were based upon the understanding that the secured lenders' security was not in jeopardy. As a result, the DIP financing, the receiver's charge and the administration fee should be paid first out of equity in the company and its properties.

Heard on the 4th day of December, 2009.
Dated at the City of Calgary, Alberta this 3rd day of February, 2010.

C.A. Kent
J.C.Q.B.A.

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Appearances:

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for Romspen

David McLellan
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Robert Kennedy
Fraser Milner Casgrain LLP
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Ken Lenz
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