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Pacific Shores Resort & Spa Ltd., Re

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

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

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

British Columbia Supreme Court [In Chambers]

S.C. Fitzpatrick J.

Heard: November 2-4, 2011
Judgment: November 7, 2011
Docket: Vancouver S117098

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S. Dvorak, for Monitor

A.A. Frydenlund, S. Stephens, for Fisgard Capital Corporation

D. Toigo, for Unsecured Loan Holders

K.S. Campbell, for Water's Edge Rental Pool Creditors

C.D. Brousson, for bcIMC Construction Fund Corp

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act --- Initial application — Grant of stay — Extension of order

Petitioners obtained order for interim stay of proceedings under Companies' Creditors Arrangement Act (CCAA) — At comeback hearing two secured creditors opposed stay, but petitioners sought to extend it, increase administration

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charge, and obtain order authorizing debtor in possession (DIP) financing — One secured creditor brought cross-application to appoint receiver over its security — Although petitioners were insolvent, there were substantial assets that would be potential source of refinancing or sale, and there was no justification for secured creditors' lack of faith in management — Petitioners had bona fide intention to continue their operations within CCAA and to present plan, and it was likely plan would evolve through negotiation which might result in refinancing of debt and restructuring — DIP financing was necessary to allow petitioners' operations to continue and enhance prospects of viable arrangement, benefits of DIP financing outweighed any potential prejudice to secured creditors, and monitor supported approving it — Petitioners established that they acted in good faith with due diligence; stay was extended; administration charge was increased; DIP financing was ordered — Cross-application to appoint receiver was dismissed since receivership would obliterate every financial interest save for first and possibly second secured lenders.

Cases considered by *S.C. Fitzpatrick J.*:

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — considered

Encore Developments Ltd., Re (2009), 2009 BCSC 13, 2009 CarswellBC 84, 52 C.B.R. (5th) 30 (B.C. S.C.) — considered

Forest & Marine Financial Corp., Re (2009), 2009 BCCA 319, 2009 CarswellBC 1738, 54 C.B.R. (5th) 201, [2009] 9 W.W.R. 567, 461 W.A.C. 271, 273 B.C.A.C. 271, 96 B.C.L.R. (4th) 77 (B.C. C.A.) — followed

Hunters Trailer & Marine Ltd., Re (2000), 2000 ABQB 952, 2000 CarswellAlta 1776, 5 C.B.R. (5th) 64 (Alta. Q.B.) — followed

Marine Drive Properties Ltd., Re (2009), 2009 BCSC 145, 2009 CarswellBC 285, 52 C.B.R. (5th) 47 (B.C. S.C.) — considered

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 57, 2006 CarswellOnt 720 (Ont. S.C.J. [Commercial List]) — considered

Rio Nevada Energy Inc., Re (2000), 2000 CarswellAlta 1584, 283 A.R. 146 (Alta. Q.B.) — considered

Royal Bank v. Fracmaster Ltd. (1999), (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 CarswellAlta 539, 1999 ABCA 178 (Alta. C.A.) — distinguished

Sharp-Rite Technologies Ltd., Re (2000), 2000 BCSC 122, 2000 CarswellBC 128 (B.C. S.C.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

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s. 11.02(1) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(2) [en. 2005, c. 47, s. 128] — referred to

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

COMEBACK HEARING for petitioners seeking to extend stay of proceedings, increase administration charge, and obtain order authorizing debtor in possession financing; CROSS-APPLICATION by secured creditor opposing stay and seeking to appoint receiver over its security.

S.C. Fitzpatrick J.:

1 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.

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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:

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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

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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 & Development Inc., Re* (2006), 19 C.B.R. (5th) 57 (Ont. S.C.J. [Commercial List]) 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

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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 (B.C. C.A.). 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 *Forest & Marine Financial Corp., Re*, 2009 BCCA 319 (B.C. C.A.) at para. 26, (2009), 273 B.C.A.C. 271 (B.C. C.A.), 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.

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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 (Alta. Q.B.), 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 (Alta. 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 v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para. 12, (1999), 244 A.R. 93 (Alta. C.A.), 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

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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.

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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. [In Chambers]), 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 Investments Ltd.*; *Encore Developments Ltd., Re*, 2009 BCSC 13, 52 C.B.R. (5th) 30 (B.C. S.C.); and *Marine Drive Properties Ltd., Re*, 2009 BCSC 145, 52 C.B.R. (5th) 47 (B.C. S.C.), 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

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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 (B.C. S.C.) 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.

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Stay granted, administration charge increased, debtor in possession financing ordered; cross-application dismissed.

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