Action No. 0901-04199

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF FAIRMONT RESORT PROPERTIES LTD., LAKE OKANAGAN RESORT VACATION (2001) LTD., LAKE OKANAGAN RESORT (2001) LTD., AND LL DEVELOPMENTS LTD.

BENCH BRIEF OF RESORT FUNDING LLC IN OPPOSITION TO PORTIONS TO THE APPLICATION BEFORE THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE ON JULY 29, 2009 AT 10:00 A.M.

Davis LLP
Livingston Place
1000 - 250 2nd St SW
Calgary, AB T2P 0C1

Larry B. Robinson, Q.C.
Solicitors for Resort Funding LLC

Blake, Cassels & Graydon LLP
Suite 3500
855 2nd St SW
Calgary, AB T2P 4J8

Kelly J. Bourassa
Solicitors for the Monitor, Ernst & Young Inc.

Macleod Dixon LLP
3700 Canterra Tower
400 3rd Ave SW
Calgary, AB T2P 4H2

Howard A. Gorman
Solicitors for Fairmont Resort Properties Ltd., Lake Okanagan Resort Vacation (2001) Ltd., Lake Okanagan Resort (2001) Ltd., and LL Developments Ltd.

Borden Ladner Gervais LLP
1000 Canterra Tower
400 3rd Ave SW
Calgary, AB T2P 4H2

Patrick T. McCarthy Q.C. and John Ircandia
Solicitors for FRPL Finance Ltd. and FRPL Management Ltd.

A. PORTIONS OF APPLICATION THAT RESORT FUNDING INTENDS TO OPPOSE

1. Resort Funding opposes

   (a) extension of the stay or if the stay is to be extended, the length of the extension;

   (b) proposed priority to protect the KERP; and

   (c) the court authorizing and approving the terms of the Chief Restructuring Officer Compensation Agreement.

B. THE EXTENSION THE STAY

2. Professor Sarra states the test to be applied in extension applications;

> "In applications for extensions of the initial thirty-day stay period, the court applies tests of good faith, due diligence and balancing of prejudice to creditors in determining whether to extend the stay period."[1]

3. Resort Funding is clearly being substantially prejudiced. Funds which Fairmont has contracted to receive as trustee and agent for Resort Funding are being received by Fairmont and used to fund its activities during the restructuring.

[Lisa Henson's July 28, 2009 Affidavit, para. 2]

4. The date since the Initial Order, Fairmont has failed to remit Note receipts for 5 months totally approximately $1.8 million.

[Lisa Henson's July 28, 2009 Affidavit, para. 5]

5. While the amount due to Resort Funding has increased from the date of the Initial Order to now, the value of the only collateral held by Resort Funding to secure that indebtedness has reduced from $12,211,931.87 as at February 28, 2009 to $10,725,981.39 as at June 30, 2009 assuming the Notes are completely collectible. This amount currently decreases by approximately $340,000 per month.

[Lisa Henson's July 28, 2009 Affidavit, paras. 4 and 6]

6. As between Fairmont and Resort Funding, there can be no question that Resort Funding has security on the Notes. But for the fact that Fairmont purported to give FRPL Finance Ltd. and FRPL Management Ltd. security on these same Notes on the eve of its CCAA filing, apparently in consideration of certain forbearances, there would be no doubt about Resort Funding's priority position with respect to the Notes.

---

[1] Rescue! The Companies' Creditors Arrangement Act by Jenis Sarra, page 42. (Schedule "A")

7. Even were it to develop that Resort Funding fails to establish its first priority position in the Notes, it clearly has a second priority position and a right to require FRPL Finance Ltd. and FRPL Management Ltd. to marshal since they have security for their indebtedness against real estate as well.

8. Whatever priority Resort Funding has for its security interest, such interest is being prejudiced with each passing month that receipts are not applied to the Notes, by additional DIP being advanced to fund ongoing operations and as other charges are given priority in these proceedings in priority to the security interest claimed on the Notes.

9. Resort Funding stands to gain nothing from the success or failure of Fairmont's restructuring efforts with the exception only that if Resort Funding is not repaid through the receipts on the Notes, it has an unsecured recourse position for its deficiency against Fairmont.

[Lisa Henson's June 8, 2009 Affidavit, para.25]

C. THE KERP

10. Counsel for Resort Funding has been provided with a copy of the Confidential Affidavit. A review of Schedule "A" of that Affidavit, the scope of the package disclosed by the review and the current economic climate would suggest that the KERP goes beyond what is likely needed. In any event, Resort Funding would suggest it unlikely that most of the individuals who would receive the benefit from the KERP are involved in administering the only assets that Resort Funding is interested in. If priority is needed to protect the KERP obligation, that priority ought to be given against the assets the individuals must be involved with, namely the real estate assets of Fairmont.

D. THE CHIEF RESTRUCTURING OFFICER COMPENSATION AGREEMENT

11. While Resort Funding is only impacted by the contract if it finds itself participating in the pool of unsecured creditors and this CRO is participating as well, Resort Funding nonetheless submits that it is overly generous for a CRO who was employed by Fairmont in a senior position at the time of its failure to be receiving the bonus contemplated by this agreement in the numerous circumstances in which it could be earned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th day of July, 2009.

DAVIS LLP

Per: ______________________________
Larry B. Robinson, Q.C.
Solicitors for Resort Funding LLC

SCHEDULE "A"

Court of Queen's Bench held that while the *CCAA* does not grant the court express power to stay proceedings against non-corporate entities, the court has inherent jurisdiction to grant a stay of proceedings where it is just and convenient to do so. The court concluded that given the complex corporate and debt structure of the Calpine group, the cross-border nature of the proceedings, and the evidence before it that irreparable harm could accrue to the Calpine group if the stay was not granted, it was just and reasonable to stay the proceedings against the partnerships.[40]

6. Extension of the Stay

After the initial 30 day period, which is the maximum period that the initial stay is available under an initial order, an applicant can seek to extend the stay for longer limited periods. The court's granting or denial of an extension of the stay order will depend in part on the amount of confidence creditors and the court have in the progress being made by the debtor in its negotiations for a viable workout plan.[41] In applications for extension of the initial thirty-day stay period, the court applies tests of good faith, due diligence and balancing of prejudice to creditors in determining whether to extend the stay period.[42] The applicant must establish that circumstances exist that make the order appropriate; and that the applicant has acted and continues to act in good faith and with due diligence.[43]

The British Columbia Supreme Court has held that the debtor corporation has an obligation to demonstrate measurable and substantive progress towards a plan if an extension is to be granted, and the court will also consider the economic impact on stakeholders and members of the surrounding community.[44] Thus, even where the exercise of discretion is not as constrained by express requirements as it is in the sanctioning of the plan, there is a substantial degree of certainty in the tests applied to the exercise of that discretion. As with the initial stay order, the extension of a stay is only a temporary suspension of creditors' rights.

Generally, the court wants assurance that corporate officers understand the reason for the firm's insolvency, so that they have a realistic sense of whether there is a potentially viable plan that can be devised. On granting an extension, the court can order the monitor to report cash flow projections on a regular basis to senior creditors

---

[40] *Calpine Canada Energy Ltd., Re* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.) Romaine J.; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

[41] Janis Sarra, "Judicial Exercise of Inherent Jurisdiction under the *CCAA*", (2004) 40 Canadian Business Law Journal 280.

[42] Section 11(4), *CCAA*; *Royal Oak Mines Inc., Re* (1999), 1999 CarswellOnt 625, [1999] O.J. No. 709 (Ont. Gen. Div. [Commercial List]), Blair J.; *Playdium Entertainment Corp., Re* (2001), 2001 CarswellOnt 3893, [2001] O.J. No. 4252 (Ont. S.C.J. [Commercial List]), additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Simpson's Island Salmon Ltd., Re* (2005), 2005 CarswellNB 781, [2005] N.B.J. No. 570 (N.B. Q.B.).

[43] Section 11(4), *CCAA*.

[44] *Skeena Cellulose Inc., Re* (2001), 2001 CarswellBC 2226, [2001] B.C.J. No. 2226 (B.C. S.C.).

so that they have timely notice of any further deterioration in the financial position of the debtor corporation.[45]

The courts have held that approval of the creditors is not a prerequisite for extension of a stay; rather, the extension is for the benefit of all the company's stakeholders, not just the creditors.[46] All affected constituencies must be considered, including secured, preferred and unsecured creditors, employees, landlords, shareholders and the public generally. The Ontario Court of Appeal in *Stelco Inc.*, held that it must be a matter of judgment for the supervising judge to determine whether a proposed plan is doomed to fail, and that where a plan is supported by the other stakeholders and the independent monitor, and is a product of the business judgment of the board, it is open to the supervising judge to conclude that the plan was not doomed to fail and that the process should continue.[47]

In *Rio Nevada Energy Inc.*, considering whether to extend a stay under the *CCAA*, the Alberta Court of Queen's Bench held that:

> ¶ 32 As to whether circumstances exist that make the continuation of the stay appropriate, there are a number of factors that must be taken into account. The continuation of the stay in this case is supported by the basic purpose of the *CCAA*, to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court and to prevent manoeuvres for positioning among creditors in the interim; *Re Pacific National Lease Holding Corp.; Meridian Developments Inc.* v. *Toronto Dominion Bank.* Westcoast has not satisfied the Court that an attempt at an acceptable compromise or arrangement is doomed to failure at this point in time. Negotiations for restructuring a sale or refinancing are ongoing, and there has been a strengthening of the management team. Rio Nevada continues in business, and plans are underway to remediate its two major wells, which will significantly increase the company's rate of production. A Monitor is in place, which provides comfort to the creditors that assets are not being dissipated and current operations are being supervised. The extension sought is not unduly long, and is supported by the secured creditors other than Westcoast. The costs of the *CCAA* proceedings are likely no less onerous than the costs of a receivership in these circumstances, and the relief sought under the *CCAA* less drastic to all constituencies than the order that would likely have to be made in a receivership.[48]

Where a company sought and received a stay under the *CCAA* as a means of achieving a global resolution of numerous product liability actions, and a complainant alleged bad faith as to activities of the debtor pre-filing of the *CCAA* application, the Ontario Superior Court held that the good faith test in considering an extension of the stay relates only to the debtor's conduct during the *CCAA* proceeding, not to

---

[45] *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C.).

[46] *Taché Construction ltée* c. *Banque Lloyds du Canada* (1990), 5 C.B.R. (3d) 151 (Qué. S.C.).

[47] *Stelco Inc., Re* (2005), 2005 CarswellOnt 6283 (Ont. C.A.), at para. 24, affirming (2005), 2005 CarswellOnt 5023 (Ont. S.C.J. [Commercial List]).

[48] *Rio Nevada Energy Inc., Re* (2000), 2000 CarswellAlta 1584, [2000] A.J. No. 1596 (Alta. Q.B.).

prior conduct; and the Court was satisfied that the debtor was proceeding with due diligence and good faith and extended the stay.[49]

The Court also held that where product liability actions pertained only to products formerly sold by a debtor, the liability of the third parties was derivative of, and inextricably linked to, the liability of the debtor and as a result, the stay of proceedings was extended in the initial *CCAA* order to the third parties with respect to the product liability actions. The Court held that it was premature to challenge the settlement and release of claims against third parties as part of a restructuring plan prior to the sanction hearing when the restructuring plan will be considered for approval by the court. The Court further held that where creditors have sufficient information with which to consider and vote in respect of a restructuring plan, it is inappropriate and unnecessary to permit such creditors to require further investigation or additional information in respect of pre-*CCAA* transactions involving the *CCAA* debtors, and the court will not approve the appointment of an investigator to that end.[50]

In *Hunters Trailer & Marine Ltd.*, an application for extension of the stay and increase in DIP financing was dismissed by the Court, which held that the debtor had failed to lead evidence that the benefits of extending the stay and granting further DIP financing clearly outweighed the potential prejudice to creditors; and held that there was insufficient evidence of a reasonable prospect of successfully restructuring and a lack of confidence in governance of the debtor.[51] The Court thus allowed the debtor to remain in the *CCAA* process for just under two months, and then terminated the proceeding when it found a lack of evidence of a potential successful restructuring.

Hence, the courts will exercise their discretion not to extend the stay where they find no evidence of progress being made in the development of a plan acceptable to creditors, or where they conclude that there is concern that DIP financing is being used as a means to delay inevitable liquidation, or where there is a lack of confidence in the governance of the debtor corporation.

---

[49] *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]).

[50] *Muscletech Research & Development Inc., Re* (2006), 2006 CarswellOnt 6230 (Ont. S.C.J.).

[51] *Hunters Trailer & Marine Ltd., Re* (2002), [2002] A.J. No. 603, 2002 CarswellAlta 611 (Alta. Q.B.) at paras. 10, 14. Subsequently, during the *Hunters Trailer & Marine Ltd.* bankruptcy proceedings, an issue arose as to the costs incurred during the *CCAA* part of the process. The issue arose in the context of whether or not the trustee had acquired any priority in interests under an insurance policy by giving notice to the insurers. While the Alberta Court found that the interest of the trustee in bankruptcy in the insurance policy was subject to the rights of the assignees of the policies, it held that the trustee should not have to bear the costs of the *CCAA* process, the interim receivership or the bankruptcy. The Court held that notice was only relevant to determining priority among assignees, at para. 90. The Court thus directed the trustee to calculate the cost burden over all security. The only exception was insurance proceeds, if any, payable to one assignee, to the extent that Court had found these potential proceeds exempt from execution.

No. 0901-04199

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF FAIRMONT RESORT PROPERTIES LTD., LAKE OKANAGAN RESORT VACATION (2001) LTD., LAKE OKANAGAN RESORT (2001) LTD., AND LL DEVELOPMENTS LTD.

BENCH BRIEF OF RESORT FUNDING LLC IN OPPOSITION TO PORTIONS TO THE APPLICATION BEFORE THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE ON JULY 29, 2009 AT 10:00 A.M.

Davis LLP
Barristers & Solicitors
1000 Livingston Place
250 - 2nd Street S.W.,
Calgary, AB T2P 0C1

Larry B. Robinson, Q.C.
Telephone: (403) 698-8715
Facsimile: (403) 667-6609

File: 76172-00001

No. 0901-04199

CLERK OF THE COURT

JUL 29 2009

CALGARY, ALBERTA

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF FAIRMONT RESORT PROPERTIES LTD., LAKE OKANAGAN RESORT VACATION (2001) LTD., LAKE OKANAGAN RESORT (2001) LTD., AND LL DEVELOPMENTS LTD.

BENCH BRIEF OF RESORT FUNDING LLC IN OPPOSITION TO PORTIONS TO THE APPLICATION BEFORE THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE ON JULY 29, 2009 AT 10:00 A.M.

Davis LLP
Barristers & Solicitors
1000 Livingston Place
250 - 2nd Street S.W.,
Calgary, AB T2P 0C1

Larry B. Robinson, Q.C.
Telephone: (403) 698-8715
Facsimile: (403) 667-6609

File: 76172-00001