Action No. 0901-11866

**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 SHIRE INTERNATIONAL REAL ESTATE INVESTMENTS LTD., SHIRE CAPITAL LTD., HALAMA GARDENS LLC, SHIRE ASSET MANAGEMENT LTD., WINN RIVER RESORT LTD., FORT MCMONEY PROPERTIES II LTD., HALAMA GARDENS LTD., MAPLES AND WHITE SANDS INVESTMENT LTD., FORT MCMONEY PROPERTIES LTD., CHEMAINUS PROPERTIES LTD., SKAHA LAKE DEVELOPMENT LTD., TSEHUM HARBOUR LTD., BEARSPAW AT 144TH AVENUE LTD., BEARSPAW AT 144TH EQUITIES LTD., BEARSPAW AT 144TH BONDS INC., TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD., ORILLIA INVESTMENTS LTD., 0726028 B.C. LTD., 0675816 B.C. LTD. and BOSUN'S HOLDINGS LTD.

Written Submissions of Fisgard Capital Corporation

RELIEF SOUGHT

1. Vacating the Orders of LoVecchio J. pronounced October 8, 2009 and Kent J. pronounced August 10, 2009 (the "Initial Order");

2. Directing that the stay of proceedings in the Initial Order in this action be terminated forthwith;

3. Alternatively, an Order Directing that the stay of proceedings in the Initial Order as against Bosun's Holdings Ltd. ("Bosun's") and 0675816 B.C. Ltd ("675") be terminated forthwith;

4. Further or alternatively, a declaration that the assets of Bosun's and 675 are not charged by the Debtor In Possession Financing ("DIP");

5. Abridging time for service of this application, if necessary, and deeming service to be good and sufficient; and

6. Such further and other relief as counsel may advise and this Honourable Court may permit.

FACTS

Background

7. Fisgard is a secured creditor of Bosun's and 675 who, though not petitioning companies, were added to the proceeding and afforded the protection of the proceeding retroactively and whose assets were exposed to the DIP pursuant to the Order of LoVecchio J. pronounced October 8, 2009.

8. Fisgard was served with notice of the petitioning companies' initial application for a CCAA stay in August 2009. Fisgard elected not participate in the proceedings for the following reasons:

   a) Neither Bosun's nor 675 were included in the initial CCAA application. Bosun's was specifically excluded on the basis that Ms. Couch was not an officer and there were two other directors (Couch Affidavit, sworn August 7, 2009, para. 2);

   b) Shire International Real Estate Investments Ltd. ("Shire") and Tsehum Harbour Ltd ("Tsehum Harbour"), two of the petitioning companies, were guarantors on Fisgard's mortgage loan to Bosun's and 675. Fisgard was content to pursue its remedies against the primary debtor outside the CCAA.

9. Pursuant to an indebture of mortgage and general security agreements dated May 28, 2008, Fisgard advanced $2.45 million to Bosun's and 675. The mortgage charged the following lands:

   Town of Sydney
   Parcel Identifier: 009-231-901
   Lot A District Lot 12 and Section 15, Range 3 East, North Saanich District Plan 45998

(the "Bosun's Lands")

10. The mortgage has matured and the full amount owing is now due. As of September 3, 2009, Bosun's and 675 owed Fisgard $2,564,339.52 plus per diem interest of $908.58 (affidavit of Hali Strandlund, p. 16 at paras. 14-15, see also p. 38 at paras. 13-14).

11. There is a second mortgage on the Bosun's Lands in the amount of $500,000 in favour of Thomas and Vicki Melville. Excluding liens, the charges on the land total approximately $3 million.

12. There is no equity in the Bosun's Lands after payment of secured creditors. DR Coell & Associates Inc. appraised the Bosun's Lands to be worth $2.93 million as of September 22, 2009 (Strandlund Affidavit, October 26, p. 220).

13. Bosun's does not have liabilities exceeding $5 million.

14. Fisgard commenced foreclosure proceedings against Bosun's and 675 in the Supreme Court of British Columbia on September 25, 2009 and pursuant thereto caused a Certificate of Pending Litigation to be registered on title to the Boson's Lands on September 25, 2009 (Affidavit of Hali Strandlund, exhibits A – E).

15. Fisgard served Bosun's and 675, among others, with its foreclosure petition showing Owen Bird Law Corporation as Fisgard's solicitor.

16. Owen Bird Law Corporation is shown on the title of the Bosun's Lands to be the solicitors of record for Fisgard in the foreclosure proceeding since September 25, 2009.

17. Owen Bird Law Corporation was not served with the Applicants' motion returnable October 8, 2009 seeking to afford Bosun's and 675 the protection of the CCAA proceeding (the "October 8 Motion").

18. Fisgard's solicitors of record in Alberta, Bishop & McKenzie LLP ("Bishop"), were served with the October 8 Motion. However, Bishop was only retained with respect to

the Shire Group of Companies and Tsehum Harbour. Bishop was unaware that the proposal to add Bosun's and 675 as parties and amend the Style of Cause in the October 8 Motion directly affected Fisgard's interests.

19. The transcript of the hearing of the October 8 Motion discloses no discussion of adding Bosun's and 675 as parties. The Applicants did not bring Fisgard's foreclosure proceeding to the court's attention.

Monitor's Findings of Misconduct on the Part of the CCAA Applicants

20. The Monitor's Third Report makes a number of findings of misconduct on the part of the CCAA Applicants (e.g. paras. 17(a)-(c), (e)-(h), (u)-(w)). Of the approximately $67,400,000 in funds raised from investors, $51,300,000 eventually ended up in Shire's bank account (para. 17(k)) – without investor approval, supporting documentation or balancing on the underlying general ledgers (para. 17(q)).

21. Three pages of the 208 paged Third Report address "restructuring". The "restructuring" is, in substance, a liquidation of assets. To date, no intention to propose an arrangement or compromise has been put forward, much less a vote.

22. Prior DIP monies paid professionals to sustain these proceedings – i.e. an investigation.

LAW

Preliminary Submissions – Notice

23. Fisgard submits that the service of the Notice of Motion on Bishop, who was retained in regards to the Shire Group and Tsehum Harbour (guarantors on the debt owing to Fisgard), was not sufficient notice to Fisgard in the circumstances.

24. Owen Bird Law Corporation, Fisgard's solicitor of record in the foreclosure proceedings commenced September 25, 2009 in the BC Supreme Court, served Bosun's and 675, among others, with the foreclosure petition and supporting documents. The Bosun's Lands are located in British Columbia.

25. Given that Fisgard's foreclosure rights were affected by the October 8 Motion, it was encumbent on the Applicants to ensure that Fisgard solicitors in British Columbia were duly notified of the Applicants' motion to add Bosun's and 675 as parties to the CCAA proceeding.

26. Even if notice to Bishop constitutes sufficient service, which Fisgard denies, given that Fisgard was not represented at the hearing, the CCAA Applicants had an obligation to fairly disclose any relevant information to the court. This is especially so considering the court specifically warned counsel at the beginning of the hearing that it had not had an opportunity to read much of the material and it would need assistance with respect to any controversial issues (Transcript, p. 3, lines 11-18).

27. The CCAA Applicants failed to bring Fisgard's foreclosure proceeding to the court's attention. The project companies' counsel represented that there were four items in the application, but neglected to mention in oral submissions the addition of Bosun's and 675 or any potentially controversial matters relevant to their addition.

28. A loss of priority clearly affects Fisgard's interests. The October 8 Order not only expanded the scope of the CCAA stay to include new debtor companies, it also exposed Fisgard for the first time to DIP financing.

CCAA does not apply to Bosun's

29. The CCAA only applies to debtor companies that have liabilities in excess of $5 million (CCAA s. 3).

30. Bosun's has liabilities of approximately $3 million ($2.5 to Fisgard and $0.5 to the initial vendors) (Monitor's 3rd report, para. 222). Therefore, in order for the CCAA to apply to Bosun's it must be a company affiliated with one or more of the Applicants.

31. Subsection 3(2) of the CCAA provides that companies are affiliated if one is the subsidiaries of another or both are subsidiaries of the same company or each of them is

controlled by the same person and the two companies are affiliated with the same company at the same time.

32. Subsection 3(3) provides that a company is controlled by the same person if that person holds sufficient shares to elect a majority of the directors.

33. In the absence of evidence that the companies are affiliated or controlled by the same person, the CCAA has no application (*Long Potato Growers Ltd. (Re)*, 2008 NBQB 231, at para. 33).

34. The materials presented to the court on the October 8 Motion – the Monitor's 3rd report and Couch's October 6 affidavit – do not establish that Bosun's is affiliated with the Applicants for the purposes of the CCAA.

35. Ms. Couch is one of 3 directors of Bosun's. She is not an officer. Although the Monitor's 3rd report says that Tsehum Habour Place Holdings Ltd. ("Tsehum Holdings") is the sole shareholder of Bosun's (para. 214), the information attached at appendix 2 does not disclose any shareholder information in regards to Bosun's. Moreover, Tsehum Holdings is not one of the Applicants. Therefore, it is irrelevant whether Tsehum Holdings has a controlling interest in Bosun's.

36. Ms. Couch is one of 3 directors of Tsehum Holdings. She is the president. The Monitor's 3rd report discloses no shareholder information in regards to Tsehum Holdings, even though the Monitor writes at para. 214 that Ms. Couch controls Tsehum Holdings.

37. Ms. Couch is a director and president of Tsehum Harbour. According to its offering memorandum, Tsehum Harbour was to purchase the property from Bosun's. This transaction has never occurred. Bosun's remains the registered owner of the Bosun's Lands. According to the Monitor's 3rd report Ms. Couch is the controlling shareholder of Tsehum Harbour and Shire is the controlling shareholder of Tsehum Harbour Bonds.

38. For these reasons, Bosun's is not affiliated with the Applicants and the CCAA does not apply to Bosun's. Bosun's ought to be removed as a party in these proceedings and the stay as against Fisgard ought to be set aside

No Urgency

39. There is no urgency compelling the court to extend stay protection and DIP financing to Bosun's and 675 because there is no active business to preserve and few, if any, jobs to protect.

40. Bosun's and 675, like all the project companies, are dormant single-purpose real estate development companies with "few staff" (Couch Affidavit, August 7th, at paras. 4, 10 and 35). The Monitor's Third Report discloses no development undertaken by the Applicants in connection with the Bosun's Lands.

41. The purpose of the current CCAA procedure has shifted from keeping the project companies going despite insolvency to completing a systematic liquidation (Transcript, p. 9-10, lines 38-41). When the Receiver was appointed on October 8th, any limited prospect of an ongoing concern restructuring was eliminated. From that point forward, the proceeding was to be a structured liquidation of the CCAA Applicants' assets.

42. The justification in CCAA proceedings to prime secured lenders is premised on the process facilitating the eventual survival of the debtor as a going concern. There is no justification for priming secured lenders to buy time for a liquidation of assets of a company with no active business and few staff. Continuing CCAA proceedings for the primary purpose of financing a liquidation by priming secured creditors is an inappropriate use of the CCAA (*United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (BCSC), at para. 21; *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, at para. 38).

43. Moreover, the protections Bosun's and 675 seek from the CCAA are equally available in practical terms in a foreclosure proceeding (*Marine Drive Properties Ltd. (Re)*, 2009

BCSC 145, at para. 42; *Redekop Properties Inc. (Re)*, 2001 BCSC 1892 at para. 61). Buying time, raising new funds, or selling property can all be the subject of applications in foreclosure proceedings.

44. Since mortgage priorities are well established and relatively straightforward, there is little incentive for senior secured lenders to compromise their interests in CCAA arrangement (*Cliffs Over Maple Bay Investments Limited v. Fisgard Capital Corp.*, 2008 BCCA 327, at para. 36).

45. The courts discretion under s. 11 of the CCAA must be informed by the purpose of the CCAA. The fundamental purpose of the CCAA is to facilitate a compromise or arrangement and granting or continuing a stay is ancillary to that purpose (*Cliffs* at paras. 26, 27).

46. The CCAA Applicants have not proffered a compromise or plan of arrangement and have evinced no intention of doing so. Further, a debtor company ought not to use CCAA proceedings to "restructure" or obtain DIP monies in the absence of the making of an arrangement or compromise (*Cliffs* at paras. 26 and 37)

47. Given the nature of the CCAA Applicants' business, and given nature of the Fisgard's security, it is questionable whether the CCAA Applicants could ever propose an arrangement or compromise more advantageous to the remedies pursuant to Fisgard's security.

48. The subsequent cases that have distinguished *Cliffs* have done so on the basis that the debtor company carried on an active business with the support of its stakeholders (*Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, at para. 26; *Nortel Networks Corp (Re)*, 2009 CLB 10254, at para. 44). This is not the case with Bosun's or 675.

49. CCAA proceedings were not designed for dormant companies on a consolidated basis (*Inducon Development Corp. (Re)*, [1992] O.J. No. 8 (Ont. G.D.); *Re Northland Properties Ltd.* (1988), 69 C.B.R. (N.S.) 266 (B.C.S.C.)).

No Equity

50. The Applicant's basis for including Bosun's and 675 is further undermined by the complete lack of equity remaining in the Bosun's lands.

51. There is no equity in the Bosun's Lands after payment of secured creditors (Strandlund Affidavit, October 26, 2009, at exhibit F, p. 220).

52. The price/appraisal value cited at p. 35 of the Monitor's 3rd report of $3.5 million for the Bosun's Lands with $600,000 in equity remaining is out of date and no longer accurate. Moreover, it does not account for maintenance costs, property taxes and accruing interest.

53. The value of $3.5 million was the price of the Share Purchase Agreement dated July 31, 2008. The Applicants concede that the purchase price overstated the actual present value of the properties (Transcript, p. 4, lines 35-37).

54. Where the debtor company is effectively dormant, and the company's equity is misrepresented to the court, and it is clear that the stay and DIP financing could only run by priming the mortgage lenders, neither the stay or DIP financing is appropriate (*Encore Development Ltd. (Re)*, 2009 BCSC 13, at para. 28).

55. Before granting super priority over a debtor's assets "there should be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated" (*United Used Auto*, at para. 28).

56. In oral submissions at the October 8 hearing, counsel for the project companies indicated they were borrowing the proposed structure from Concrete Equities CCAA/receivership proceedings. However, the receivership in that case was not funded by DIP charge (indeed there was no debtor in possession financing or charge). The concrete equities CCAA/receivership was funded by a receiver's borrowing charge that ranked subsequent to "any first mortgage on the respective applicant's or limited partnership's property" (Transcript, p. 11, lines 18-19; Receivership Order by Romaine J. dated July 29, 2009 in Alberta Court of Queen's Bench Action No. 0901-11048, at para. 20; Initial order by

Romaine J. dated July 29, 2009 in Alberta Court of Queen's Bench Action No. 0901-11048.).

ALL OF WHICH IS RESPECTIVELY SUBMITTED

DATED at the City of Vancouver, in the Province of British Columbia, this 3RD day of November, 2009.

OWEN BIRD LAW CORPORATION

Per: ____________________
Alan. A. Frydenlund
Solicitor for the Applicant