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, 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., 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.**

Applicants

BRIEF OF LAW OF THE SHIRE GROUP
FOR FRIDAY, DECEMBER 4, 2009 AT 8:30 A.M.

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I. INTRODUCTION

1. This is an application by the Shire Group to (a) continue the stay of proceedings granted by this Honourable Court in the Initial Order; and (b) confirm, or alternatively order afresh, the relief granted by Justice LoVecchio on October 8, 2009, which includes an Order for an increase in DIP Financing and an Order to appoint Ernst & Young Inc. as Receiver. With respect to the extension of the stay, this is a proper case for CCAA proceedings, the Shire Group has exercised due diligence and it has proceeded with the restructuring in good faith. With respect to the DIP Financing and Receivership, all of the reasons for granting DIP Financing by Justice LoVecchio remain applicable and, notwithstanding the error in the valuation of one of many properties, there remains substantial value over and above the claims of secured creditors, such that no creditor will be unduly prejudiced by the granting of additional DIP Financing.

II. FACTS

2. The facts concerning this case are set out in numerous Affidavits and Monitor's Reports and, in particular, the Third and Ninth Monitor's Reports relied upon in support of this application and will not be duplicated here, except for those of particular relevance.

3. In the period leading up to the Orders of October 8, 2009, the Monitor and counsel for the Shire Group undertook substantial work to produce a report (the Third Report of the Monitor) which sets out (a) the source and use of funds invested by investors in the Shire Group; (b) the fact that President, Cleone Couch, did not personally take investors' funds; (c) the need for reconciliation of amounts invested by investors but applied to investments in other properties or general administrative expenses; (d) the frequently difficult issues with respect to title to each of the properties, and with respect to the terms under which investors invested with respect to each property, along with the charges and encumbrances on each property; and (e) the values of each property and the claims against each property to the extent the information was available at the time.

4. The 200-page Third Report of the Monitor was relied upon by Justice LoVecchio at the October 8, 2009 hearing. The Report contained a table which set out the values of the property over and above the claims of secured creditors. These values were qualified to the extent that they were based on the best information available, and it was represented

to the Court that a critical next step was to obtain current appraisals on a number of these properties and to invite proposals to either purchase or recapitalize the entities that own the properties, along with plans to compromise creditors in that regard through a Request for Proposal ("RFP") Process. As set out in the Sixth Monitor's Report, a mistake in that table was discovered in late November which would have reduced the excess value available from $16.7 million to $13.1 million against $2.5 million in DIP Financing. A copy of the transcript from the October 8, 2009 proceedings is appended to this Brief under Tab 1.

5. Justice LoVecchio considered the fact that a Creditors' Committee had been proposed, which included the major stakeholders, and he directed that an additional representative of the secured creditors be nominated to sit on that Committee, which has been done. Since that time, the Creditors' Committee has met on a number of occasions. Among many other issues, the Committee has considered a number of different consultants to assist in the restructuring and have chosen a company called Foxbridge Asset Management Ltd.

6. As set out in the Ninth Monitor's Report and the Affidavit of Cleone Couch sworn December 2, 2009, some of the progress in these proceedings has been delayed due to applications by Investit Financial Inc. ("Investit") and Romspen Mortgage Corporation ("Romspen") to stay these proceedings pending appeal, along with the mistake that was discovered once success in those applications had been achieved. These events meant that the DIP Financing was not advanced, except to the extent that Echo Merchant Fund II Ltd. has paid out the prior DIP Lender (who was then in default), deducted certain fees permitted according the to the DIP Term Sheet and delivered the balance to counsel for the Monitor/Receiver where it is held in trust pending the decision of the Court in the within application.

7. Since October 8, 2009, the Applicants have attended in this Court on October 16, 2009, October 27, 2009, November 4, 2009, November 13, 2009, November 23, 2009 and November 28, 2009. They have prepared for and have attended the Court of Appeal on November 4, 2009 and November 13, 2009, where Madam Justice Paperny denied the stay application made by Investit and Romspen. Copies of her Reasons are appended to

this Brief under Tab 2. In addition, the Applicants have prepared Briefs for the Court of Appeal, both for the stay application and for the application for leave to appeal, which was scheduled for Tuesday, December 1, 2009, but has been adjourned by consent, pending the outcome of this application.

III. ISSUES

A. Have the Applicants met the burden of showing that the extension to the stay of proceedings should be granted?

B. Is DIP Financing as proposed appropriate in the circumstances?

IV. ARGUMENT

A. Have the Applicants met the burden of showing that the extension to the stay of proceedings be granted?

8. The stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") is intended to maintain the *status quo* for a period of time so that proceedings can be taken under the CCAA for the welfare and wellbeing of the debtor company and of company's creditors: (See *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 141 (B.C.S.C.)) [Tab 3]. It is well known that the test for extending a stay of proceedings requires that the Applicants meet three conditions: (a) that circumstances exist that make the Order appropriate; (b) that the Applicants have acted and continue to act in good faith; and (c) that the Applicants have acted and continue to act with due diligence (Section 11(6), CCAA).

9. These proceedings have been undertaken to enhance the value of members of the Shire Group for all stakeholders. The Applicants and the Monitor/Receiver have pursued and continue to pursue a Plan or Plans of Arrangement with respect to the group or individual entities. The financial and legal due diligence, which was undertaken in the first two months of these proceedings, was a necessary pre-condition to inviting and considering proposals with respect to the companies that control individual properties. The Request for Proposal Process was and remains an integral part of this restructuring, but its implementation has unfortunately been delayed by the lack of funding in the past two month period. It is submitted that an extension of the stay is appropriate to allow this

process to unfold and allow the stakeholders an appropriate opportunity to prepare and consider a Plan of Arrangement.

10. There can be no question that the Applicants continue to act in good faith. With respect to due diligence, the sheer number of court proceedings that have occurred since October 8, 2009, all of which have been undertaken without any security of payment by the professionals involved, alone demonstrates due diligence. The President, Cleone Couch, has continued to work for the companies, canvassing restructuring opportunities without payment. Moreover, the fact that a Management Committee has been established, that there have been several meetings, that a number of professional development companies have been canvassed and that one has been chosen and prepatory work has been done, shows substantial progress toward implementing the RFP Process. The Applicants have implemented an inclusive process and have clear plans to move forward with their restructuring.

11. On the basis of the foregoing, it is submitted that the extension to the stay of proceedings should be granted.

B. Is DIP Financing as proposed appropriate in the circumstances?

12. Although it is technically not applicable to these proceedings, as the Shire Group obtained CCAA protection prior to September 20, 2009, the amendments to the CCAA with respect to the test for DIP Financing appropriately set out the factors the Court should consider in determining whether DIP Financing is appropriate. Sections 11.2(1), (2) and (4) of the amended CCAA read as follows:

> 11.2(1) Interim Financing – 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

> (2) Priority – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (4) Factors to be considered – 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.
> [emphasis added]

It is submitted that all of these factors point to the appropriateness of DIP Financing in the present circumstances.

(a) The period in which the companies expected to be subject to proceedings under the Act.

13. It is expected that these proceedings will continue into March or April of 2010. Prior to that time, there is a reasonable possibility that some funds will be realized from the sale or restructuring of at least one of the companies, which will lessen or remove the requirement for any further DIP Financing. The plans put forward by the Applicants are realistic in the circumstances.

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

14. The appointment of Ernst & Young Inc. as Receiver addresses any issue raised by this factor. The stakeholders have an indisputably reliable officer of the Court who has final say and authority over these proceedings. The President of the individual companies, Cleone Couch, continues to seek restructuring alternatives and to assist in the process of maximizing value for all stakeholders.

(c) Whether the company's management has the confidence of its major creditors.

15. There can be no doubt that this process is supported and endorsed by the 2,800 investors who invested approximately $70 million in the Shire Group. Even with respect to secured creditors, of the many secured creditors involved, it has only been a minority that has opposed the process (Romspen is merely an investor in Investit, which holds one mortgage over one property). With respect to these entities, it is submitted that the question is whether they are unduly prejudiced, rather than whether they support the process.

(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made with respect to the company.

16. The Applicants have definite plans to implement an RFP Process immediately upon the DIP Loan being approved. The sole purpose of this process is to invite proposals to maximize value with respect to each or all of the members of the Shire Group. These proposals will in all likelihood involve a compromise by some creditors. If the DIP Financing is not approved, the result is likely to be either a receivership by the present DIP Lender on the basis of funds already advanced, or a disordered liquidation in which the interests of 2,800 stakeholders will not be represented.

(e) The nature and value of the company's property.

17. As set out in the Ninth Report of the Monitor, even on the most conservative view available, according to the data prepared by Romspen, there appears to be at least $6 million in value over and above the claims of secured creditors. On a more appropriate conservative valuation, there appears to be $11 million in value over and above the claims of secured creditors. On this basis, the secured creditors are not being asked to carry these proceedings on their backs, rather, it is fully expected that these proceedings will have no impact on them beyond a delay in taking proceedings which will allow the Shire Group and the Monitor/Receiver to attempt to realize better value for all stakeholders.

18. Although the property of the Shire Group is real property, it is inaccurate to say that it is completely undeveloped. As set out in numerous materials filed with this Court, many of these properties have development permits, architectural drawings and the like. On some of them, there are development agreements with third party developers in place, on which the process of development has begun. Significant funds have been expended in development already. What is required is that the individual projects be marketed to third parties appropriately. If this is done, it is expected that alternatives to sale may be found, which will likely involve the compromise of existing creditors in many cases. In other cases, a sale may be the most appropriate alternative.

(f) Will any creditor be unduly prejudiced?

19. As set out above, there is sufficient value over and above the claims of secured creditors so that no creditor will be unduly prejudiced by these proceedings.

(g) The Monitor's Report referred to in paragraph 23(1)(d) [of the CCAA], if any.

20. The Monitor and Receiver, Ernst & Young Inc., has prepared a number of reports in support of these proceedings. In the most recent, Ninth Report of the Monitor, the Monitor expresses its support for the process as the best way to maximize value and as a method which does not unduly prejudice any creditor.

V. RELIEF SOUGHT

21. The Applicants respectfully request that this Honourable Court grant an Order:

(a) Directing that the stay of the proceedings in the Initial Order in this action be extended until January 30, 2010, or such other date as this Honourable Court may direct;

(b) Confirming the Orders of Justice LoVecchio granted October 8, 2009, as amended by subsequent Orders, notwithstanding an error in the Third Report of the Monitor, addressed in the Seventh Report of the Monitor;

(c) Permitting the Shire Group and the Monitor/Receiver to draw on all of the DIP Financing granted, if necessary;

(d) Alternatively, granting the relief set out in the Orders of Justice LoVecchio granted October 8, 2009, as amended by subsequent Orders, afresh;

(e) Approving the RFP Project Agreement dated December 1, 2009 between Ernst & Young Inc. and Foxbridge Asset Management Ltd. ("Foxbridge"); and

(f) Such further and other relief as counsel may advise and this Honourable Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of December, 2009.

BENNETT JONES LLP

Per: ______________________

KEN LENZ
Solicitors for the Applicants

Estimated Time for Argument: 20 minutes.

TAB 1

Action No.: 0901-11866
E-File No.: CVQ09SHIRE
Appeal No.: ____________________

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 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.,TSEHUM HARBOUR EQUITIES LTD., TSEHUM HARBOUR BONDS LTD. and ORILLIA INVESTMENTS LTD.

P R O C E E D I N G

Calgary, Alberta
October 8, 2009

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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October 8, 2009	Morning Session
The Honourable	Court of Queen's Bench
Mr. Justice LoVecchio	Of Alberta
K.T. Lenz	For the Applicants
J.M.B. Clark	For Investit
J.D. Blair	For the Investors
H.D. McLellan	For the Investors
D.S. Nishimura	For the Numbered Company
J.F. Collins	For the Monitor
P.R. Leveque	For 153021 Ontario
R. Camplin	Court Clerk

THE COURT: Mr. Lenz.

MR. LENZ: Justice LoVecchio, I am here on behalf of the applicants in this CCAA matter of Shire International Real Estate and a number of related companies. I'll just introduce other counsel. Mr. Collins is here on behalf of the monitor, Ernst & Young.

THE COURT: Yes.

Submissions by Mr. Lenz (Other)

MR. LENZ: Mr. Blair and Mr. McLellan are here on behalf of a group of investors that began a class action - approximately 20 percent is what I'm told they represent now.

Mr. Leveque is here on behalf of a numbered Ontario company which holds the mortgage on an Ontario Orillia property.

Mr. Clark is here on behalf of Investit Financial which holds the first mortgage on the Bearspaw property.

Mr. Nishimura is here on behalf of the second mortgage holder on the Bearspaw property. I think that's it.

This is an application by this group of companies that I'll refer to as the Shire Group for three items or four items depending on how you characterize it. First is to extend the provisions, the stay provisions, of the CCAA to December 8th. The second is to appoint Ernst & Young as a receiver within the context of the CCAA, and in the context of that to establish a management committee to advise Ernst & Young on basically the -- the companies' affairs going forward. And the last - and undoubtedly most controversial - is to approve further financing in the context of these proceedings.

If I can just begin as a preliminary matter to talk about a couple documents because as is not unusual there has been some last minute matters. The first -- the first three I am going to pass up -- well let me pass up four documents here to Your Lordship. What they are is an affidavit of Leanne (phonetic) Couch (phonetic) which appends the dip term sheet which was pending in the last application, or last affidavit, and said it was. It also appends an offer which has been shown to the Court. It's a counter offer. Before -- that is not filed, the terms were concluded at 4:30 last night but I will undertake to do so.

Second, the two orders we are seeking, there are some minor changes to those orders, from what was given to you. They deal with two changes which I have black-lined, which I'll also pass up. They deal with two small issues. One is a receiver's charge which would be limited to 250,000. On the standard form of order it's not so limited at all. And the second really deals with clarifying that in the event of a conflict between Ms. Couch's powers under the CCAA and the receiver's powers, receiver wins. Last, the monitor prepared a supplemental report on dip financing last night. So those are the four documents, Sir. If I may pass those up. The orders we want to sign. And for your Court's reference, there are black lines of that order, that was presented to you, the black line in the receiver order, standard form of receivership order.

So -- okay, Sir, I am -- if I may, I'd like to begin by just talking about some general background to the Shire group of companies. If I can spend five or ten minutes on that. I realize you weren't involved in the first application before Justice Kent, although I understand, you know, you've got a lot of the materials. May I begin like that?

THE COURT: I have a lot of materials but I think if anyone was reading the newspapers, I've been fairly occupied for the last four and a half weeks.

MR. LENZ: I know that. I know that.

THE COURT: And only finished yesterday.

MR. LENZ: Okay.

THE COURT: And received a monitor's report which is an inch thick.

MR. LENZ: It is.

THE COURT: At 4:30 yesterday afternoon.

MR. LENZ: Okay, well let me --

THE COURT: Mr. Lenz, in all fairness, I have not read a lot of material and I want to be as helpful as I can. You know I will be.

MR. LENZ: Yeah.

THE COURT: But I am going to need a lot of help to the extent there's going to be any kind of controversial decision to be required to be made today.

MR. LENZ: Okay.

THE COURT: Because I just haven't had time to prepare.

MR. LENZ: Well cutting to the chase, which is what I am going to deal with at the end of these -- end of my submissions, is the controversial part of this is probably going to be the dip financing rather than anything else. But I think to get there, some background is in order, so --

THE COURT: Sure.

MR. LENZ: -- if I can begin. There -- the Shire -- the first company on the style of cause, that Shire International Real Estate Investments Ltd, really began in 2006 when the principal, Ms. Couch, acquired another company and changed its name. The Shire generally was in the business of raising money through investors -- from investors and acquiring properties with a view to develop it -- develop them.

The -- the general structure of -- of I would say the core Shire companies, which are the -- the first 8 or 10 on the style of cause, was that they are 60 percent -- the shareholdings are 60 percent owned by a public company called Iologics Systems Inc and 40 percent owned by Shire. That structure was implemented because it allowed

Shire to raise money from the public through their RRSP's.

Having said that, neither Shire nor Iologic has the real economic interest in these companies because essentially money was raised via television ads, radio ads, newspaper ads. There was a sales force and so on from a broad group of investors, some 2,800 investors in total, some of whom are in the courtroom today I believe, in, you know, comparatively small amounts, 10, 20, 30, 40,000. I think the largest one might be 800,000 but most of them much smaller than that. They were raised mostly in the form of bonds with a pref share attached, and sometimes in the form of mortgage units.

If I can turn Your Lordship to the monitor's report, I think that the structure is clarified and a lot of what I am saying here. Page 34 of the monitors's report -- pardon me, page 35 of the monitor's report. There's a table on page 35 which lists the projects on the lefthand side and the price -- the purchase price or appraised value in the first column. And when I was referring to the money on which the investors gave money -- these were done through an offering memorandum and so on. But anyway, that that --

THE COURT: You say you have got the purchase price and the appraised value, it is not indicated which are which, but is it -- is it the lowest of the two --

MR. LENZ: Yes.

THE COURT: -- that appears in this column?

MR. LENZ: Yes.

THE COURT: So this is --

MR. LENZ: This is the best guess we have as to value.

THE COURT: But to the extent it's the purchase price, there is a perception or belief the appraised value would be in excess of the purchase price.

MR. LENZ: Well, because these properties were purchased between essentially late 2006 and mid 2008, in most cases the values would go down. I guess generally on commercial property the values would go down, but I think for the most part, on the main ones, the Bearspaw one and it's in the monitor's report and it will come up later today. We have an appraisal which we got last week for 10 million. Mr. Clark has other appraisals which run into the $7 million range. And there's an issue on whether the lenders are under water on Bearspaw. And in fact that I think will be one of the biggest things in front of you today.

THE COURT: Well it seems to be a fairly important issue.

MR. LENZ: It is. It is. But just to go through here, the second column are third party mortgages. On Bearspaw there's 8.1 million - a first and a second - and on these different projects, which are basically spread out, there's some in Ontario, some in B.C., some in Alberta, and the Halama Gardens one is actually a project in Hawaii.

The third column, mortgage units, there were -- there were other bonds or mortgage units. On two properties mortgage units were sold to investors and so they form a charge against the property.

The next column is purchase price less mortgages. And that we are showing , which will be an important issue for discussion today, $16.7 million.

The last one are the class 'B' preferred bonds and so these were all the bond holders who contributed money -- who raised money for bonds, $51 million of them. So if you add the $51 million to the mortgage units you get the total amount raised by the Shire -- by Shire International and the Shire group over the past couple of years. And that's the 2800 investors.

THE COURT: Now, when you show it this way it looks like the mortgage bonds of 20 million, say the class 'B' at 20 million are somehow attributable to the Bearspaw. I did read a bit. And the investigation suggests that there's a huge issue here as to who owes what to whom, and who has interests in what property.

MR. LENZ: That's right.

THE COURT: This suggests there's a little certainty to that. Is that part of what the investigation is all about to make sure that this in fact is representative of what the situation is?

MR. LENZ: Yes, My Lord. So when we came to this -- well when I became involved in this mid summer of this year, yes, it immediately became apparent that Shire International had a practice. They would raise money through these other companies pursuant to operating memorandums. They'd consolidate the funds into Shire. Some of those monies would go back to developing the properties that people actually put money on. Some of them would go to maybe purchasing another property. Some of them would go -- you know, the -- and --

THE COURT: So money was raised --

MR. LENZ: -- we had to try and sort all that out, and that's what the monitor has been trying to do.

THE COURT: Money was raised on a segregated basis and invested on a consolidated basis, or used on a consolidated basis.

MR. LENZ: Yeah, I mean, I think that -- I can't concede that it was raised on a segregated basis, but yes, that is the central issue, Sir, the absolute central issue, and it's a serious concern, I will say that.

THE COURT: M-hm.

MR. LENZ: So just continuing on, generally the sales pitch that Shire used with respect to these properties was as developed they had put the offering memorandums and there is one appended to an earlier affidavit, but generally if we buy this property, we develop it, these are the general costs, these are the -- these are the returns. In some cases, like the Bearspaw property for example, it was, you know, about to be annexed by the city, it since has been, and -- and there were other things incorporated into that. And there has been development activity on the properties. There have been in many cases building permits or development approvals granted. In one case at least there's an agreement with a developer which is a difficult agreement to sort out, I'll tell you. But in a couple of other cases there are preliminary agreements with developers and some work that's been done.

So some progress was made, but to be fair, Shire was exceptionally good at raising funds and dealing with investors and they were not -- and to be successful they probably had to be a lot better at a) development, b) accounting, and c) dealing with legal issues. And they weren't.

So in the fall or the second half of last year hit, it became impossible -- difficult or impossible to continue to raise money. This was compounded by a particularly bad investment, Halama Gardens. Alberta Securities Commission became involved, started proceedings against Ms. Couch and a number of the Shire companies, but not all. A cease trade order was entered against Ms. Couch and Shire International and I think one or two other companies. I think it was on June 15th of 2008. That cease trade order was not entered on the basis of any sort of final findings, it was entered on the basis that they didn't think that she was giving proper disclosure in a timely way so there hasn't been a final determination, but nevertheless, any hope of raising money went away with that cease trade order.

Shortly thereafter a class action suit was commenced by Mr. Blair. And in that period, and the period leading up to CCAA on August 10th, you know, Ms. Couch continued to support the company. She paid the bills on her own personal credit card, hasn't been reimbursed of course - this was before I became involved - and we went into the CCAA on August 10th. At that time Shire had been evicted from their premises and was looking for new premises. They were out of money and the CCAA order was granted.

And since then we have premises. The first item for business was just trying to stabilize operations and find out what we had. The stay was initially granted for a month and then at the end of that month we received an additional stay and we had a short stay, about a six day stay, six days ago. So this is really the fourth appearance on this matter.

The monitor's report - and I'll get into that a little bit more later - has a lot to say about how these companies were managed. And I am not going to dwell on the point, Sir, but I will point out, because it's important, that Ms. Couch, who is stepping aside, the president of all of these companies and the director of all of these companies - the sole president and director - that she did not personally take funds. And she has sworn that in three affidavits, and that is confirmed to date by the monitor's findings in paragraph 17 and 18. I am not saying that things weren't managed -- that things were managed the way they should have been, I'm not saying anything like that, and people may have lots to say in the future as to whether that amounts to negligence or some personal liability, but she didn't personally take money out of this, and this distinguishes this case, I would say, from a lot of cases, or certainly any case I've seen of this nature. The reality is Ms. Couch is -- is owed some money from the company, from Shire International, but that's an issue for another day.

So there are the three applications before you today. The first is to extend this stay of proceedings in the CCAA. The test, as is well-known to Your Lordship, is whether Shire has exercised due diligence and has a reasonable prospect of success.

These companies were filed into CCAA about, you know, two months ago - August 10th. And I would -- I would say the progress that has been made since that time, in furthering the proceedings, has been extraordinary, and particularly in the last month.

At the last extension to the stay application we said what we want to do in the next month is come back with an accounting report which shows the sources and uses of funds. Where the funds came in, where they went, whether any money went to Ms. Couch, so that the 2800 investors and everyone else could have an idea what happened to the money. And that involved - because Shire's accounts were not in a good state, you know, going through general ledgers and documents and so on, and that has been completed. And that is the first half of this monitor's report which goes through at a high level of -- you know, a level of detail that this was all over 100 pages drafted, to try and set out for everyone what happened to money, where it went.

And ultimately what's happened, and one of the things that has to be sorted out, is some investors -- there's going to be company debts owing and that has to be finally sorted out. But, you know, they have gone from a position where they didn't have financial statements for two years to where they have not only financial statements for one year - they are still one year behind - but that's in progress, and they know exactly where the money went.

The second thing that we promised to do and said we had to do before we could move forward with any kind of restructuring was we had to do some legal due diligence on these properties. That is the second half of the monitor's report. Exhibit -- appendix 2 are materials prepared by my offices after going through boxes of documents on each property. There -- the company -- you know, there was so many deals that happened and there are -- there are agreements that are partial, and there are agreements that are missing, and there are JV agreements, and a lot of it was done without legal advice or counsel or input, and so that had to get sorted out so people understood a) where the money went in the monitor's report, and b) what they had. Because if you don't know what you have, it's pretty hard to do any kind of -- even talk about any kind of restructuring or -- or even a sale for that matter.

The third thing we promised to do at the last stay extension application was to further the idea of some kind of creditors' committee. There are people that have expressed an interest and we have a creditors' committee structure as set out to schedule 'A' to the receiver's order, which has been circulated to the service list and is provided to you. So we have got an inclusive process.

And last, of course, we want a framework to move forward. Well one of the things that's being proposed today is a receiver, and I'll get into that in a minute, but the next step for this company, and what has to be done in the next two months, should Your Lordship agree with what we are seeking, in my submission, is they have to -- they have -- now that they know what they have, some kind of limitation for proposals, and canvassing of whether or not some kind of plan or compromise or ultimately some of these properties will be sold, is reasonable, that has to get put in place right away. And in the context of that they should be hiring somebody with development expertise - we'll talk about this a bit more later - and that should be done right away. But the idea -- certainly my idea - and I won't have control of this anymore if my application is granted - would be that some kind of process like that would be put in place immediately and that the investors would get conclusions on that process in the next six to eight weeks.

THE COURT: Mr. Lenz, what troubles me is this seems to be a half bankruptcy.

MR. LENZ: Yeah.

THE COURT: By putting a receiver in place. And by doing it as a half bankruptcy, as opposed to a real bankruptcy, and try to stay within the ambit of the CCAA, you are asking the Court to impose upon everybody a cost, either through the dip financing, or the way the plan goes forward, that they have no choice in the costs of whether they want to participate in that, and that troubles me. Because that's really what's going on here.

MR. LENZ: Well, my next part of the application is the -- is the application on the receiver, so I'll address that now.

THE COURT: Well if this company was in bankruptcy there would be a receiver and we wouldn't need a receivership order, there would be one, and the secured creditors could do whatever they want and the rules would be different. But you are wanting me to keep this together --

MR. LENZ: Right.

THE COURT: -- as a half bankruptcy --

MR. LENZ: Right.

THE COURT: -- to prevent all of the things that the bankruptcy would incur - involved at least - and the CCAA was designed - and I appreciate many CCAA applications, with the best of intentions at the outset, turn into liquidations.

MR. LENZ: Right.

THE COURT: I am searching for something in this one, from what I've read or I have heard from you, that this has any realistic prospect, at this point, of being anything other than a systematic liquidation.

MR. LENZ: Yeah.

THE COURT: I haven't read one thing that would convince me of that, and if I can't be convinced of that, there's no basis for the extension of the stay and keeping this in the CCAA and forcing everybody, whether they like it or not, to contribute and grinding everybody through the dip financing.

MR. LENZ: Right. Well, let me -- let me say a couple things on that -- right on that, before I turn to my submissions on the receivership order.

The -- okay, if it -- if this application is not granted today what will -- what will happen I think is that's part of the question. I mean --

THE COURT: Well would be a bankruptcy. There would be a receiver.

MR. LENZ: Yes. If the -- I mean if either the company assigns itself into bankruptcy or someone petitions them into bankruptcy, there will be a bankruptcy.

THE COURT: Sure.

MR. LENZ: There is nobody else applying to put in a receiver. We are trying to -- we are trying to put in a receiver in part because we see that as -- as --

THE COURT: Who is we?

MR. LENZ: -- it's akin to a bankruptcy.

THE COURT: Who is we? Who is we?

MR. LENZ: The Shire group is bringing the application to put a -- these companies -- receivership order in place.

THE COURT: But there's going to be a new management committee. The Shire group per se is out.

MR. LENZ: The Shire --

THE COURT: They're out.

MR. LENZ: Well, on the management committee, the proposed structure of that committee is that Ms. Couch would be on the committee, that Ilogic would have a representative on the committee, that Mr. Blair's clients would nominate something (sic) to be on the committee, that there would be another bond holder representative and the monitor would be chair. So what we're trying to do is address the issues of the stakeholders on the committee but I do think that existing management would add value on that committee because frankly a lot of the knowledge in this company is -- is not on paper, and it's not -- I mean the thought is to add value through this process, not to, as you say, grind everyone in a process they don't want to be in.

I mean, one of the dangers if we don't go this route -- well first of all, the only person that would put in a global receiver, and they might do it, and they have probably have a right to do it, is the dip lender, which already exists, has been in place for more than two months. Now there's only 900 or 900 and some thousand drawn on that dip but if they put in a receiver, then we have essentially the same process that I am advocating today without the underlying CCAA structure. This -- this structure basically has been borrowed from Concrete Equities. It's the same structure as is there, number one.

But the other alternative, if they don't put in a receiver, and the application is denied, the stay is lifted, Ms. Couch remains in possession and control. If she takes my advice she'll resign as president and director off most of these companies. She's probably try and sell some of the others so she can mount a defence, and -- and we're going to have, in that circumstance, in my submission, a disordered restructuring in which there are claims from all quarters against different companies and there would be no accounting for the co-mingling of funds or the -- and the loans back and forth. And that, I think, is not in the interests of the stakeholders at large. It might be in the interest of one or two secured creditors but I don't think it's in the interests of the 2800 other investors and I know --

THE COURT: No, and that's --

MR. LENZ: -- that they're subordinate so --

THE COURT: That's the problem. The problem is you have to give me a reason --

MR. LENZ: Right.

THE COURT: -- to force the secured creditors to otherwise finance something they don't want to finance.

MR. LENZ: Okay.

THE COURT: That is what this is about.

MR. LENZ: Yeah. And I will do so, My Lord. I will do so. I want to come -- if I can come to that, I don't think that this is a case where they are being asked to finance something that -- all they are being asked is to stand down and I think that there is more than sufficient equity here that -- that the benefits of the procedure that we're advocating outweigh the alleged hardship to the two or three secured creditors. And that's -- I will come to that point. I don't believe that they are in a position where they are -- I mean, it's very different than some of the other cases cited by Mr. Clark, in my submission.

Why are we applying for a receivership order as the company? I mean, that's not an application you see every day. Well, Ms. Couch has stated in her affidavit that - and I think recognized rightly - that she's not in a position to carry on. She has the ASC order. She has adverse publicity. It's impossible for her to carry on and effectively propose any kind of proposal on any of these companies. I will come to how I think some plans could be done on a go forward basis.

And honestly, it's time that somebody with better skills in development, in real estate, was put in place to try and realize on these -- either realize on these properties or come up with plans for stakeholder groups. And so she's prepared to step aside and she's prepared to stay on the committee, and we'd like to preserve the optionality of staying in the CCAA because there are some instances in which a plan would be appropriate.

And let me talk about one of those now, because you've asked me. I mean, one of the issues that we'll hear more about later on is -- is Bearspaw. It's a property purchased by Shire a year or two ago for $14,100,000. Investit Financial has a mortgage on it for about 7.1, might be 7.5 with fees now. There's a second mortgage for about a million. Investors invested a total of $18 million allocated to that property.

Shire does have plans, and it has got development -- some development approval, and it has hired architects, and it has done a lot of the preparatory work to doing some kind of development on that property. If -- it was always contemplated, and it's in the offering memorandum, that that property would be a several year hold, four or five year hold of which a couple years have run now, and that if these plans were carried to -- to fruition, or even if the hold period was -- was carried out, investors would receive 40 or $50 million. Now the mortgage are in default today. But if investors are prepared to put --

or given the opportunity to put some amount of money in, to pay out the first, quickly, I understand, but then they don't lose most everything.

If the first -- if this property is sold - and maybe that's the right thing to do - but if it's sold right away when we will realize, on our appraisal, 10 million, on Mr. Clark's appraisal 7 or 8 million, but in any event there will be nothing for the $18 million investors. And that -- that is one of the things that people of course take a risk on when they invest in a property.

But even on that property, if -- what the time will do is give people an opportunity to decide whether they want to continue to see whether there's some kind of restructuring can be done, and I don't doubt for a minute that the first won't compromise. I mean, of course somebody who has security and adequate equity is not going to compromise. I mean there is no question. The question is whether all of the -- the bond holders will compromise and also whether or not it can be financed, and whether these development plans are realistic. And that is something I think that has to be addressed, and frankly Ms. Couch is not in a position to do it in a credible way because of her situation. And I think that could be done in the context of the CCAA and receivership order in the midst of it.

I mean, the receiver, what it does is it gives safety and security from everyone, that they are essentially getting the process that they would get either under bankruptcy or under an application by the existing dip lender to put a receiver in.

There -- I mean, some of the other properties, Sir, have -- have similar issues or similar roles. But we're proposing a management committee that will give the stakeholders a say in this and I have indicated who we intend to be on it. Ms. Couch will not have control of that committee. It's not set up that way. She's there to try and help the process, and -- and generally trying to get value for investors and stakeholders which is -- is the goal of these proceedings. It's not -- I mean, it's an unusual application in that we are basically saying we see this as the best way forward. I am not going to be that involved. Ms. Couch is not going to be as involved but it's the best way forward for everyone.

THE COURT: Let's look at the list of things here in the order.

MR. LENZ: Yeah.

THE COURT: It says in one of the affidavits that it's not anticipated the full two million five will be needed.

MR. LENZ: Right.

THE COURT: The position of Mr. Clark may be a little different. If you don't need two million five, why ask for it.

MR. LENZ: Right.

THE COURT: I know it's nice to get it in place but it seems to me the issue here -- I have no difficulty that something has got to be done to get this thing organized and understand exactly -- and that takes time. One cannot do that kind of thing overnight and one need only look at all this paper to know there's a lot of complexity here --

MR. LENZ: Yeah.

THE COURT: -- and you just can't sort that out overnight.

MR. LENZ: Right.

THE COURT: You don't have to convince me on that. But you do have to convince me that it's appropriate that somebody else fund it, and if it is not evident from the material that the funding you are requesting is needed, it seems to me it may be easier to get what you want if you really ask for only what you think you really need and come back.

MR. LENZ: Right.

THE COURT: If you have to come back in December and ask for another \$500,000, it may be, Mr. Clark, at that point, he sees a lot of progress, his opposition may not be quite as great.

MR. LENZ: Right. So --

THE COURT: And so sometimes these things are in a stage --

MR. LENZ: Yeah, I know.

THE COURT: -- process. Second, I would have very serious difficulty approving a director's charge of \$250,000 given what I have heard about investigations. The administrative charge of the receiver charges, no matter what happens --

MR. LENZ: Right.

THE COURT: -- you cannot ask outside professionals to give their time to sort all this out. They'll be on top -- that's just the way it is.

MR. LENZ: Right.

THE COURT: And you can't get the people to participate otherwise. But I am not sure I would have a lot of sympathy for a director's charge at this point, given these circumstances and given we're looking at dip financing and that --

MR. LENZ: Yeah.

THE COURT: -- the role of management such as it was is being diminished. The creditors do not appear to have confidence and that's what is going to be a management, and that's fine, it's just the way it is.

MR. LENZ: Yeah. Let me -- I'll address the second point and then the first point. So the director's charge wa sin the first order. Whether it continues, you know, the question is whether or not it's useful to have the optionality that the CCAA affords to do some kind of compromise, when really there's a receiver doing a lot of the work itself, whether -- everything that could be done in terms of the receivership could be done outside.

But it was granted before. The only additional that we're proposing in that order is the receiver's charge and -- and then the rest of it remains as it was before. But, you know, I understand what you're saying about the director's charge, Sir, and you know, it -- with respect to though the quantum of the dip, we are asking for $2.5 million.

The first thing that has to be done is the first dip lender has to be paid up. And so he's already in there. He's got all his rights. And that's -- it's somewhere between 900 and a million dollars.

THE COURT: Right.

MR. LENZ: So we're asking for a million five incremental. The cash flow statements - and the monitor can speak to this a little more closely - will show that, you know, a lot of the -- there was -- one of the things that will happen by putting the receiver is some of the GNA will be eliminated. There will be some people that we think probably should stay around but not very many, so we'll probably eliminate 50 or $60,000 a month in GNA costs. And again Mr. Collins can speak to this probably better than I can.

On the other hand, we are contemplating hiring -- if the -- and this will be the committee and the receiver's decision, not mine anymore, but if -- as approved by the Court. But the company that Mr. Blair's clients have suggested is a company called Foxbridge and they are experienced in developing and -- and there are senior people that were I think initially bankers and then got into development, and they are reputable, so if they were going to get into some kind of an indication for proposal plan, or evaluate alternatives, or even sell property, the committee, or the monitor, or the receiver would want to retain someone like that. Well they are going to have fees. Some of the committee members are professionals. They are going to have some fees and that has to be negotiated and we haven't done that. So there -- anyway, I think the bottom line is to get through to the end of the year - well, I just -- I'll have to check and see how much they needed. I was concerned about running out of money over Christmas and I think the million five would be enough to get us to the end of February and it may be that less is better in these circumstances because yeah, I understand the concern.

But the -- on the dip financing, let me deal with those submissions, because that's really the third application and that's the hard one here. And if it's not granted we can't go forward. We can't go forward with a receiver. If the reciever is not funded by anyone. We can't go forward with CCAA. And --

THE COURT: But do you need the full additional million and a half at this point?

MR. LENZ: I have to talk with Mr. Helka (phonetic) and Mr. Collins. I don't believe we need the full million and a half but I think we probably need a million to get -- but I'm not sure. I'd have to --

THE COURT: Okay.

MR. LENZ: -- I'd have to go look at the cash flows, which frankly are appended at -- as exhibit -- as the last appendix to the monitor's statement. It's just that I --

THE COURT: Appendix page 3?

MR. LENZ: Yeah, appendix 3. Sir, I am not very good at the accounting stuff to be quite honest. Yeah, so they -- they put in a million three and we were asking for a million five. And if I look at it to Sdecember 11th, there would be 376,000 left of the million three, so that means it's about $900 (sic) to the extension of the stay period being sought rather than a million five.

One of the difficulties with it though, Sir, and I guess if this was a concern what I would suggest is that there be a further order which says that although the dip financing is approved, you are not allowed to see the cash flow without further order of the court, and then you basically -- you are effectively limited.

You know, immediately on the dip financing there's a bunch of fees triggered. There's fees to the dip lender. You know, we've got a payout Tyros and they're -- but essentially it looks like it's about 900 to the end of the stay. But we wouldn't want to lower the dip amount globally because then you have to pay another fee if you want to get more and it's necessary. But we would want to restrict, if Your Lordship thought it appropriate, the amount we can use without order of the court. And since the receiver has full control of it, it's not going to happen by accident.

Okay. On the dip financing. Sir, I -- we're not -- I am going to pass up something that just really -- because I think it's easier to address it, it's more of an aid memoir, but it really is 11.2 of the CCAA -- the Amended CCAA which -- I've got copies here for my friends if -- but what it is is the amendments that deal with dip financing and I'm passing it up and telling you that I don't think this -- these amendments, although they were enacted and apply in this case, but they give me something to focus my argument on dip financing on. 11.2(4) are the factors to be considered. It essentially codifies the common law. I understand they are in force but if you file before September 18th they don't apply. We filed before September 18th, they don't apply here. But considering these factors, I submit dip financing is appropriate here.

You have already put your finger on the main issue, and the main issue here is whether there's undue hardship to the mortgage companies and whether there's a realistic prospect of any kind of plan being put in place. But the period. Well we've only been in this process for two months and we've made incredible progress. We are asking for another two months. And I think this whole process should be done in six.

How the company's business and financial affairs are managed. Well, what we are proposing is that the receiver be inserted. There can't be any question about the integrity going forth. We've always made sure that no money was leaking out and that it was all carefully controlled. So I mean I think that now we have got an inclusive management committee in an advisory role so the stakeholders will have a say. So I think on that basis we have to have met whatever test there is for dip financing.

Whether the company's management has the confidence of its major shareholders. Well I think we have -- it depends where you sit on the priority chain. I mean, I think that we have two secured lenders who will not be happy with what we're seeking and we have unsecured creditors who are -- who want this to proceed.

Whether the loan would enhance the prospects of a viable compromise or arrangement. Well, I think we have to get to the point where we have to say whether there is that. And I think that within each company it might be an individual arrangement but until we got to this point where we knew exactly what we had, we couldn't tell. Now if the loan is to facilitate a process where we invite proposals, it doesn't have prospects.

Nature and value of the company's property. Well let me now turn back to what I referred you to at the beginning because the last two items to consider, nature and value of the property and whether any creditor would be materially prejudiced really come down to this. If I go -- if we go back to page 35 of the monitor's report, I am hoping this gives Your Lordship some comfort. So what this shows on page 35 the purchase price or the appraised value - and I think in most cases it's the appraised value - of the property and which investor have invested and that adds up to $38 million as the project companies.

And then we have what's called Shire. If you turn the page there are a number of projects where Shire put in money. These are projects that are owned directly by Ms. Couch which have been filed in these proceedings, because this is where the money went. And there's about $6.3 million there. There's 3.6 in mortgages that washes out. There's about $2.7 million in value in companies that right now investors have no claim over. If they get judgments they will have a claim over it but there is no judgment and there -- and those are being put and made available as security for the dip loan.

So if I go back to page 35, because the point here - and my instructions from the client are to try to make this right, as best as you can, with what we have. And so everything where the money was put is being put all together and trying to be presented as one so that these things can be sorted out as best as we can and there's no question there's been significant loss of value.

Anyway, going back to page 35 at the bottom of the first column, those add up to 44,624,000. The third party mortgages add up to 18,435,000 and the mortgage units are 17,514,000. So far as I know that the mortgage unit holders are not opposing this. They are basically Olympia Trust and Ilogic which are sister companies and they are going on the committee and we've been in some contact with them as we've gone ahead.

But nevertheless they are secured debt so -- but when we add those both together, purchase price less the mortgages, we end up with 16,699,000.

Now, it may be that some of these numbers are incorrect on the values. But we have $16.7 million standing against $2.5 in debt. We are not asking the mortgage companies to bear this on their backs. At the end of the day, on the best information we have, there should be more than enough money so that they are not prejudiced by this application and -- and what I think is clearly better for the 2800 stakeholders and the other people involved with these properties, a process that's clearly better for them can be implemented. The monitor has filed a report as well which basically goes to that.

Sir, I am going to conclude by -- well before I conclude, let me just say -- I'll address very briefly some of the cases cited by Mr. Clark. Now this isn't a case where there was any misrepresentation to get the initial order. Two of the three cases were ex-parte applications where they came in and didn't do proper disclosure. We did that. This also isn't a case where, you know -- this isn't a case where we are talking about setting aside debt because there wasn't disclosure made or anything like that. We are way past that. We got the initial order. We gave some notice of that. There was a come back application. You know, we continued on for another month. There was further application three weeks ago -- or three -- six days ago.

This is not an application where there is simply a company trying to resist a mortgage lender and it's a contest between two parties where the CCAA has been -- is being misused. It's a -- it's a case where we have a lot of stakeholders who won't have any representation without a process like this.

And finally, this is not a case where it's at all obvious, or even close to being obvious, that we're doing this on the backs of the secured creditors. There -- on all the evidence we have, and the monitor has been looking at it for some time, there should be more than adequate funds to sustain the dip that we're seeking and all this, what I submit is the best alternative available, in a bad situation, to go forward. So those are my submissions.

THE COURT: Thank you. Who is going to be next? Mr. Collins, are you going to speak next or --

MR. COLLINS: Only if you would like me to, My Lord. I propose to -- for the monitor act clean-up, if you will, if there's anything that's not covered.

THE COURT: Fine. Maybe we should hear from Mr. Clark, because you are being painted as the person who is oposing this.

MR. CLARK: Can I speak over here?

THE COURT: Wherever you wish, Mr. Clark.

Submissions by Mr. Clark (Other)

MR. CLARK: I'll try and talk loud. On page 3 and 4 of the -- of the brief that I prepared --

THE COURT: Yes.

MR. CLARK: -- I tried to calculate how much would be owing against the Bearspaw property, if the property was sold by December 31st, 2009.

THE COURT: Right.

MR. CLARK: And that number, assuming a 3 percent real estate commissionn, was $8.8 million. There's been two professional appraisals done by my client at considerable cost. I don't know whether there's other appraisals on the other lands to support th enumbers that are set out on page 35 of the monitor's report. And what they put in for the Bearspaw property is 9 million, notwithstanding that I've got two appraisals that say fair market value substantially less than that. And --

THE COURT: Well but --

MR. CLARK: -- forced sale value at 5.9.

THE COURT: Note 1 -- note 1 says it's the mid point of two other values and I assume that this Tony Omura is independent. If Tony Omura isn't independent, this is just sort of an in-house number, it might go to the -- that this is not as clean a deal as verybody suggests but there is no --

MR. CLARK: Mr. Omura did the appraisal when it was bought and so I suggested in my brief that -- that he had somewhat of the -- there should be some concern addressed because he's appraised the property when they bought it, now he's appraising it again when it's in trouble. Is he -- is he going to be concerned about his original appraised number --

THE COURT: Well --

MR. CLARK: -- whereas I have got two independents that are significantly different.

THE COURT: If Mr. Omura is independent of the Shire group, it would seem to me absent some evidence that he's got another ulterior motive in all of this, I think he should be -- he's entitled to some deference that he is in fact independent.

MR. CLARK: And that now --

THE COURT: And the appraisal is at September 15 so it is not -- again --

MR. CLARK: I appreciate that.

THE COURT: -- you know, I don't want to throw stones at Mr. Omura unless there is some basis for doing that. And I haven't heard any so --

MR. CLARK: Well if you read the three appraisals, it's quite interesting comparing the comparables Mr. Omura uses with the comparables used by the other two. The other two have four that are similar and there's only one that's similar amoung all three.

THE COURT: Okay, we're not --

MR. CLARK: In any event --

THE COURT: We're not getting into all those details at this point, we are simply --

MR. CLARK: That's right. Well what I -- to get -- to cut to the chase, my client would like to be out of the CCAA. Let's let my client's property go into the foreclosure procedure. If the investors want to gang together and redeem the property, and buy my client out, terrific. All the protection that could go to the Shire group would be there in the foreclosure proceeding. We won't be subject to the dip financing and run that potential risk. We have got appraisals that show what our value is. We're at serious risk to be paying this dip financing.

The other important thing is that none of the appraisers indicate that this property has potential of $40 million in value.

THE COURT: No, but Mr. Clark, I am not -- I'm not -- your analysis is sort of right but it's not completely right. Your client has the potential to gain a significant up side in how they get treated through a CCAA procedure. It's always been my belief that's one of the reasons why it's appropriate to keep secured creditors around, of one of the fundamental differences between the CCAA and the BIA.

You -- your client, as part of a plan under the CCAA, where they may be under water had they gone their own way, may get a little more money because they can take some money to the unsecureds in other properties that's not otherwise available. That's why Mr. Lenz's argument that when you look at a consolidated basis, which is what they are trying to do, there is excess value in these other properties that do not have specific charges on them.

MR. CLARK: Well that's assuming the values are right.

THE COURT: In a bankruptcy proceeding your client would have no interest in any of that.

MR. CLARK: That's true.

THE COURT: But under CCAA a plan might make some of that excess value available and it would be a perfectly logical thing to do, particularly as you face, just as you've quite correctly pointed out, you're potentially being ground down a little here by the dip financing, but it can all balance itself out. It is whether one believes there is some value to looking at this for a few more months, and that's where the prejudice issue comes in. And just because you have an appraisal that says your client may be a little under water right now, based on that appraisal, I'm not sure you have demonstrated prejudice at this point, given those other factors.

So maybe you better do a little more talking at this point because you are not persuading me.

MR. CLARK: The plan for development for this property cannot exist in the near future until the City of Calgary gets into that neck of the woods and the appraisals went on -- all three of them went on to talk about when the potential for development is and it's in the mid to long term range, five, six years, maybe more down the road. It depends on what the economy is going to do over the next little while.

So here we are sitting with a piece of property that is going to continue to have two mortgages running on it, at significant interest rates, building up interest when the potential for development is four, or five, or six years down the road.

THE COURT: But we are talking two months. That's all they have asked for is two months. They haven't asked for five years. They are going to have to face the music. The question is, do they let you walk away from the show today or do they keep you in the audience for a couple more months.

MR. CLARK: That's really right.

THE COURT: That's really --

MR. CLARK: That's right.

THE COURT: -- what we're talking about. We are talking about you staying around for a couple more months and then we see what happens. And if I were to restrict the draw down, without further approval of the Court, we can monitor precisely the prejudice you ultimately may face.

MR. CLARK: I guess my comment with respect to the dip financing is why isn't it getting placed on some of the properties that are clear title without mortgage units, and if it's such a great security, $16 million, why do we have a 21 percent interest rate. And if it's got priority -- and if it's got priority over secured lenders --

THE COURT: But, Mr. Clark, the whole question of what dip financiers charge, and what we see in these, is a whole separate issue. I --

MR. CLARK: No, but isn't it relevant to the value of the land? Like if you've got -- if you've got -- if you have got a super --

THE COURT: No, I mean --

MR. CLARK: -- priority on all this property, and there's $16 million in equity, why are you lending at 21 percent with huge fees.

THE COURT: Sir, I can't -- that would be completely inappropriate for me to comment on what is right and what is wrong in that area.

MR. CLARK: Well the application hasn't brought a number of different proposals to the table to show what other lenders might agree to lend on dip financing.

THE COURT: Do you want to have a half an hour with your client, see if they want to be the dip financier? They may be able to pick up 18 percent and get this deal.

MR. CLARK: Well I think they are already in it for -- they are already in it for 16 on the first mortgage.

THE COURT: I appreciate that. But usually what happens in these is the people who have the first mortgages are usually the first to step up as the dip financiers. But again, I don't -- I am not -- I don't want to -- I am simply saying one can't, because the interest rate on dip financing is what, 21 percent, that means this is off the wall. It isn't off the wall. It is a part of what happens in these re-organizations. Maybe one doesn't like it. Maybe one likes it. I express no view on that. It is just what happens.

MR. CLARK: Well I think you've got to the crux of my argument. I mean, my argument is I don't think there's equity there. I don't think in two months anything is going to be different. I don't see why we should be out of the -- out of the CCAA into foreclosure, have the property listed for sale, and if there's equity it goes back to the -- to the Shire group and to the -- to the CCAA. It just allows the sale to take place. There's nothing in my respectful submission, that a committee that a monitor, that an expert in development can say other than oh, we got some development land that's maybe got some potential six or seven years down the road.

THE COURT: But, you know, the unsecured creditors at this point have -- they don't know what they think is right or wrong, they need some time to do analysis. And so that's really --

MR. CLARK: And we've provided two appraisals to indicate the value.

THE COURT: Understood, and they have another. And I am not going to get into a contest as to who is right and who is wrong in the appraisals. The Court has simply been apprized there is potentially a difference of view as to what this property is worth based on three pieces of paper that exist out there. I am not saying one is right, or one is wrong, I am simply saying there's a difference of view on that and that's --

MR. CLARK: But I don't think there's a difference in view on what can be done with the land.

THE COURT: Thank you, Mr. Clark. Mr. Nishimura?

Submissions by Mr. Nishimura (Other)

MR. NISHIMURA: Sir. As Mr. Lenz advised at the beginning, I act for a numbered company which is the second mortgagee on the Bearspaw land, the same land that Mr. Clark's client has a first mortgage on. My client has a vendor take back mortgage so just by way of background, it is not a professional lender to my knowledge. It sold the property and hasn't been fully paid for it. It took the precaution of having a vendor take back mortgage.

My client supports the position of Mr. Clark in that it opposes the extension of the CCAA with respect to this particular property. Obviously we have no standing with respect to most of the companies that are in the CCAA and the assets that they hold.

The -- I'd like to make a few points about what's being proposed here. Firstly - you may or may not have seen this because of your limited time with the file - which, I should advise, is my situation as well. I am pinch-hitting for someone else today. But this is not a -- this is a CCAA that has a large number of companies but no consolidation of these estates. There was at first instance dip financing approved of which 900,000 I understand has been drawn. That now has security over all of the assets of all of the companies in the CCAA.

Notwithstanding the fact that different companies have different assets, they have different equities in those assets. What is being proposed today is that, as you said, some sort of half bankruptcy is being proposed, which is of concern to my client. And what's being proposed is that a management committee which seems to have representation for all stakeholders with the exception of creditors, and particularly with the exception of secured creditors taking part in that committee and deciding what's to be done with these companies and all of their assets, and how is this dip financing going to be spent. That's of concern to my client.

If you -- with particular regard to the Bearspaw property, you'll have seen from the supplemental receiver's report which is thankfully the small one that's -- that's before you, there is an estimate of value for the different properties and a calculation of what's left over after third party mortgages who are independent lenders, or like my client vendor take back mortgages, but otherwise not related to the companies, and then the mortgage units which I understand are a subset of the investors. The investors can invest in bonds or they can buy mortgage units. There are different ways of investing in the properties and different ways of having security over the value for that investment.

And Mr. Lenz points to the bottom line for all of the companies, for all their assets of approximately $16.7 million in --

THE COURT: Right.

MR. NISHIMURA: -- I will put it, hopeful equity because --

THE COURT: Mr. Nishimura, we don't need editorial comment in terms of using a word like "hopeful."

MR. NISHIMURA: Well they hoped that they were the appraised value. That's what everyone hopes. They hoped they are worth more than that. Of course --

THE COURT: They've suggested they have a value --

MR. NISHIMURA: Right.

THE COURT: -- of an expectation hopefully that'll be greater than that.

MR. NISHIMURA: Sure. But you'll see also from this analysis that not all properties are created equal. That there are properties that have significant mortgage compared to the equity. And there are properties which have significant -- have no mortgage attached to them, and there are properties which have a small amount. And you'll note that the -- one of the top of the list, the Bearspaw property has an appraised value of $9 million. It has mortgages stated there to be equal to $8.1 million. That's pretty close. Leaving -- leaving an equity of $900,000 which is -- if you look at the different properties, the smallest difference among -- between the value of the property and the mortgages, if you go by percentages. There is $9 million and almost 8 million of that is taken up by mortgages.

On page 3 of Mr. Clark's brief he lists the encumberanbces again the property, so that includes those mortgages but it also includes property taxes and real estate commissions. But of course on top of those -- and that's -- leads to encumbrances worth about $8.8 million.

THE COURT: Right.

MR. NISHIMURA: On top of that of course we have under the first CCAA order, we have the first dip charge, so almost another million dollars there.

THE COURT: No, but it's not all going to be attributable to that property because --

MR. NISHIMURA: Well --

THE COURT: -- the dip charges -- well no, Mr. Nishimura, I am not buying into that for a second. The dip charge is on a consolidated basis and that can only work to the advantage of you and Mr. Clark's clients --

MR. NISHIMURA: Well --

THE COURT: -- at the end of the day.

MR. NISHIMURA: It can work to a detriment in this fashion, Sir. If in six months this whole proceeding falls apart and the company goes into liquidation --

THE COURT: Right.

MR. NISHIMURA: -- there's no obligation on the dip financier to exercise that dip charge against all of the properties on an equitable basis.

THE COURT: I understand. I understand.

MR. NISHIMURA: So the Bearspaw property can be sold. If it's the first one sold, the dip financier is going to take its loan just from that property. There's no limitation on what the dip financier has to -- has to do in terms of -- in order to enforce its charge.

THE COURT: M-hm.

MR. NISHIMURA: So it's joint and several liability for all of these properties. So potentially yes, the first dip charge can be 100 percent attributable to the Bearspaw property, as can the administrative charge. I don't know where we start with the administration charge but it's -- it's another potential liability, as is the director's charge of $250,000.

Now, that's as is. So there are present encumbrances totaling --

THE COURT: Mr. Nishimura, with the greatest of respect, that's -- that implies that the monitor, the receiver, the Court would not do anything to make sure that it did not happen that way. And I am not -- I am not accepting that. You are putting forth a theoretical possibility which is clearly correct, but it implies a mode of conduct which would be completely contrary to the philosophy of the consolidated basis of approach to this.

MR. NISHIMURA: Well I'm glad -- I'm glad to hear that, My Lord. And that brings me to what I would propose as alternative relief. We of course support Mr. Clark in his attempt to instead of having a half bankruptcy receivership over all these assets, to at least let the secured creditor on the Bearspaw property exercise its rights, get this property sold right now while it -- while it's still conceivably not under water, and leave the equity in whatever it might be to the receiver or trustee in bankruptcy.

If that's not the case. If this dip financing is approved, we propose -- we propose that the dip financing order include a provision that the dip charge be allocated in an equitable manner among all the properties.

THE COURT: I am not sure you want to do that. I think -- I accept what you're saying. I don't know that you have to go that far to say it has got to be allocated amongst all the properties. I think all you need is an indication by the Court and the monitor that listen, when the rubber hits the road at the end of the day, and have a big problem here. Let's not come to court with a proposal that seeks to put the burden of dip financing on the Bearspaw property. Everybody understands your point, which is a valid one, in terms of theoretical. And I think at this point all one needs is an understanding that shouldn't happen. It wouldn't be fair. That would go to prejudice.

But I think doing what you are suggesting, to somehow allocate it, starts to add a bit of science which may be better to keep a little informal at this point, but your point has clearly been made.

MR. NISHIMURA: Thank you, Sir. The only other -- the only other points I would make with respect to whether dip ought to be granted at all - and I am fully cognizant of the fact that absent dip, we are aware my client probably wishes to be in any event. In looking at the factors under the amendments to the -- to the *Act*, which I would submit simply reflect what the Court already does, all the factors the

Court looks at, it's just a codification.

The period in which the companies expected to be subject to proceedings under this *Act.* The proposed financing is now totaling $2.5 and it's estimated that this takes us to December. In my submission, that gets us pretty much nowhere with respect to a potential restructuring. There's no proposal. There's nothing before this Court that indicates that that's going to be any kind of window for this company to -- to prepare a restructuring.

How the company's business and financial affairs are to be managed. Now there's been a proposed management committee which, as I've said, does not involve the involvement of any creditors --

THE COURT: Any secured creditors.

MR. NISHIMURA: Any secured creditors, doesn't seem to involve any ordinary trade creditors either. It involves investors, the present monitor and future receiver, and someone from the present management. And they are going to be spending the money that's authorized under any dip financing, so that the chief stakeholder, the one that's being primed at the next level, has no say.

Whether the company's management has the confidence of its major creditors. . Here again we have to look at each individual company. I can only speak to the -- to the company which owns the Bearsapaw properties and you've seen the confidence that the major creditors have there.

Whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company. There is just no evidence before you that suggests that there is anything in the works, there is any exit strategy here.

And then the nature and value of the company's property, and then whether any creditor would be materially prejudiced. Sir, I can't stand here before you and tell you for certainty that my client is materially prejudiced, but there is that --

THE COURT: Potential.

MR. NISHIMURA: -- large prospect --

THE COURT: Sure, sure.

MR. NISHIMURA: -- and my client is, as a vendor who sold this property for a price and took back a vendor take back mortgage has not been fully repaid, my client has concerns in that regard. So those are all my submissions, unless you have any other questions, Sir.

THE COURT: Thank you. Mr. Leveque.

Submissions by Mr. Leveque (Other)

MR. LEVEQUE: Good morning, My Lord. I act for a numbered Ontario company, 1533021 Ontario Ltd. It is the first mortgagee over a property which is held in the name of a company called Orillia Investments which is a part of this Shriar group.

THE COURT: That's Orillia, the one halfway down on page 5 of the supplemental affidavit?

MR. LEVEQUE: Yes.

THE COURT: Okay.

MR. LEVEQUE: Our client opposes the stay, or the extension of the stay, certainly as it relates to the Orillia Investments company and opposes any dip financing which may come one day to take priority to our client's security. Everyone always pays attention to Bearspaw. I stand up at all of these things but nobody ever says anything about me.

MR. LEVEQUE: I pass you up, Sir, an affidavit of Mr. Pachine (phonetic).

THE COURT: I think they look at that million dollars and they say where is the issue.

MR. LEVEQUE: Yeah, well let's talk about -- we will talk about that, Sir. That affidavit should be in your stack of materials. I just thought I'd pass one up to you so you didn't have to dig around for it. Orillia is a one project company in Ontario. It has a piece of development property over which our client has security. That property was in foreclosure in Ontario prior to these proceedings commencing. It is subject to a sale process under the Ontario foreclosure process and that has been proceeding parallel to these proceedings, I suppose, even though there's technically a stay, efforts are still being made to market the property in Ontario. There has been no sale to date.

You will see from Mr. Pachine's -- well first I want to talk a little bit about Orillia. We don't know much about that company but I wanted to draw your attention to something I saw in the monitor's third report at paragraph 20 which is on page 20 of that report. And the monitor writes this about Orillia; (as read)

> Monitor understands that Shire's management maintain control of the books and records of each of the project companies as well as having signing authority on each bank account. In addition, the monitor understands that Shire essentially acted as project manager for each project company with the exception of Orillia, Chemainus and Skaha Lake and controlled the funds and related disbursements.

So Orillia isn't quite so closely consolidated as perhaps some of these other companies are, at least that's what I take from this comment in the monitior's report.

And just going to this particular property, I echo the concerns of Mr. Clark and Mr. Nishimura. Our client is in a very similar position in Ontario. If you see -- if you go through Mr. Pachine's affidavit, you will see that there is an appraisal there at $1.7 million. The property has been listed at $1.8 million and there has been no action. The only offers which have been received have been in the 1.4 million range and lower and none have been accepted to date. At one -- it's clear that our client is going to take a loss on this mortgage as it presently stands. There's no equity there.

Mr. Lenz took you to -- I just want to deal briefly with this dip financing concern because Mr. Lenz impressed upon you that there's $16 million here to play with so what's everybody worried about. Well Mr. Clark spoke to the Bearspaw matter. The appraised value that shows there is $9 million, which is Mr. Lenz's appraisal, or the mid point of the appraisals Mr. Lenz has. It's not the mid point of the appraisals between Mr. Lenz's appraisal and Mr. Clark's appraisal. So it's the best appraised value.

The actual encumbrances, as we've heard from Mr. Clark, are $8.8 million, so on that property we see that we're really looking at something like $200,000 or perhaps less. The equity there is pretty iffy.

On Orillia, the only other property we have any evidence on, the 2.9 million that it shows there isn't the appraised value, Sir, that's the purchase price three or four years ago. There is no current appraisal taken by the monitor. The only appraisal there is is the one in Mr. Pachine's affidavit at 1.7 million. You'll see there's mortgages at 1.9 so there's a $200,000 shortfall there.

I raise this because the only two properties that we've talked about today are both under water and there isn't $900,000 equity in Bearspaw and there isn't a million dollars equity in Orillia. So the 16.7 is disappearing pretty quickly and we've only looked at two properties. And I suggest to you, Sir, that that 16.7 is a pretty soft number. Mr. Nishimura called it hopeful. It is at best hopeful. It's pretty watery gruel to be allowing dip financing to go ahead which could have the effect of undermining or priming our client's security.

Mr. Lenz correctly states that he must come to you and show due diligence and some prospect of success. There doesn't seen to be any prospects for this group of companies beyond some kind of orderly liquidation. Rather than a half bankruptcy, I suppose we should have a full bankruptcy.

I wanted to draw your attention to what due diligence and prospects for success, the monitor reports, in terms of the Orillia project and we see that at page 105 of the monitor's report. The monitor writes at paragraph 255; (as read)

> Numbered company from Ontario has commenced foreclosure proceedings. Monitor understands the property was originally acquired for 2.9, the mortgage is approximately 1.9.

Next paragraph; (as read)

> Monitor comments that implementing the request for proposal process should clearly indicate the value of the property.

That is the sum total of due diligence we have on Orillia, and I submit that's not due diligence at all. There's no proposal made here to do anything with this property besides sell it. They're proposing we'll go through some kind of valuation process. Well they've had two or three months to do that and they haven't done it. In my submission they've failed to show any diligence with respect to this property and any plan beyond a sale and that's what our client is trying to do in Ontario right now.

In terms of the dip financing, you'll see the monitor's comments at page 103 of its report and there's a couple of things I wanted to draw your attention to here. You'll notice on page 103, Sir, that every paragraph starts with, The monitor understands this, or the monitor believes that, except for paragraph 246. There it's the applicant's belief that there is sufficient equity. The monitor isn't prepared to stand behind that remark, it just reports what the applicant says.

THE COURT: Well, but in fairness --

MR. LEVEQUE: And we've looked at that --

THE COURT: In fairness, the monitor wants to do an investigation. That is part of what the monitor's report is about.

MR. LEVEQUE: Well that's right, but we are not -- the table on page 35 is what the applicant is saying and it's -- it's a problem table. There's -- there's concerns with the accuracy of that table, I suggest to you, Sir.

But this is how the monitor -- Sir, the monitor goes on to say about the concerns of the Bearspaw and Orillia lenders, at page -- at paragraph 247 the monitor says, these concerns may be --

THE COURT: Mr. Leveque --

MR. LEVEQUE: -- partially addressed.

THE COURT: Mr. Leveque, let's assume for the moment that your submissions and Mr. Clark's submissions are correct, that there is $3 million worth of value in the two properties you are talking about, Orillia and Bearspaw. That takes the 16,9 down to roughly 14. Let's assume for the moment half of that is wishful thinking. That takes us down to 7. We are talking about more than -- at least double the dip financing. This is all clearly coming out of the creditors' pockets at the end of the day unless that 16,9 number is so hopeful, so off the wall your client and Mr. Clark's client are -- I'm having difficulty. There is a material prejudice. I understand -- I understand their discomfort. They are saying listen, this is pie in the sky at this point. That's our belief. But where is the real prejudice in you just sitting around - it doesn't appear there's a buyer for the property - is sitting around for another couple of months, that's --

MR. LEVEQUE: Well the prejudice is, Sir, that we may ultimately be exposed to paying some of this dip financing.

THE COURT: That's assuming all of the 16,9 that we're talking about is all -- there's no air of reality to it.

MR. LEVEQUE: Well, and Sir --

THE COURT: And I am giving you -- I am giving you the benefit of the doubt on the three you've suggested. I am taking another half off that without anything other than just to use a mathematical example, and I still come to 7 million bucks --

MR. LEVEQUE: The only three --

THE COURT: -- of which the dip people have first charge on and everybody else will be waiting.

MR. LEVEQUE: That's right, Sir, but the only 3 million of equity that we've looked at turned out to be zero, so the 16, I submit to you, is entirely wishful thinking and it will be the secured creditors --

THE COURT: Well , no, no --

MR. LEVEQUE: -- who are paying this dip financing.

THE COURT: -- I mean that's unfair. That's unfair. You can't say -- you can't say -- let's just use a little example here.

MR. LEVEQUE: It's -- it's the only examples we have any evidence of, Sir, and that's -- I find it troubling.

THE COURT: Take --

MR. LEVEQUE: The other one --

THE COURT: -- Skaha Lake --

MR. LEVEQUE: -- we have some evidence on, Sir --

THE COURT: Skaha Lake. Skaha Lake, 2.5 million with no encumbrances. Are you going to suggest that's zero? Come on.

MR. LEVEQUE: Well I don't --

THE COURT: That's -- let's be fair. Let's be fair.

MR. LEVEQUE: I don't know what the --

THE COURT: I mean, you can -- you can use some math but you have to be a little fair in your math.

MR. LEVEQUE: Sir, my submissions -- I hear you, Sir, and I am hopeful that those observations are correct and it will be this equity which finances the dip financing but my broader submission is this. There's no equity in the Orillia property, clearly. It's not clearly a part of the Shire group in terms of having the consolidated form of management that's been described to you. It's in Ontario. It is subject to a foreclosure proceeding in Ontario which has been proceeding and is subject to the supervision of the Ontario Courts.

THE COURT: And we'll have the big jurisdictional battle at some time -- point in time, whether the stay applies, and --

MR. LEVEQUE: There is no need for -- I suggest to you, Sir, there's no need or useful purpose in keeping that particular property in this process --

THE COURT: Well it is because --

MR. LEVEQUE: -- when it's subject to another process elsewhere.

THE COURT: It is because we may have to make law on where the jurisdiction lies.

MR. LEVEQUE: It's a -- well, the property is in Ontario. The Ontario Courts clearly have jurisdiction over the foreclosure process.

THE COURT: Most CCAA's I've seen have assistance clauses in them.

MR. LEVEQUE: Sir, if you could --

THE COURT: That foreclosure may not be going to final fruition. There may be a few more legal steps before that happens.

MR. LEVEQUE: Were you to -- were you to direct, Sir, that the stay in respect of Orillia would not continue beyond today, Sir, then the Ontario foreclosure proceeding could continue and run its course, the property being sold.

THE COURT: And why would I do that and alleviate the necessity for that jurisdictional fight?

MR. LEVEQUE: That would -- that would solve that problem nicely and -- and then I wouldn't have to come here anymore.

THE COURT: But don't you like Calgary?

MR. LEVEQUE: Sir, I believe you have the gist of my submissions. I maintain that the Orillia project should be exempted from these proceedings. The stay should not continue in respect of that project and thank you.

THE COURT: Thank you, Mr. Leveque. Mr. Blair.

Submissions by Mr. Blair (Other)

MR. BLAIR: Yes Sir. I gleaned from your comments that you're quite alive to the issue of whose money is really at stake in these proceedings and that's the various investors who put up what seems to be around $70 million. Our firm represents, depending on how you do counting in families, somewhere between 550 and 800 of those who cumulatively have put in millions of dollars so they have a significant stake. We received the voluminous materials at about the same time Your Lordship did, so we haven't completed going through, and even consolidating our thoughts on what this is all about but I'll tell you where we are at so far.

With respect to the applications of the secured creditors, obviously we are in favor of the stay continuing and those not proceeding for now. Our clients are also hopeful that some of the numbers that we've been referring to today is wishful thinking and hopeful and I've heard pie in the sky. Obviously we want that number to be as great as possible because that's the amount that goes back to the investors at -- at the end of the day.

And at this point in time there's no question, Ernst & Young has done an enormous amount of work. Bennett Jones has done an enormous amount of work in compiling the legal due diligence. And we finally have a very large volume of information but very little time to digest and make decisions and it might be that when the committee is appointed and the receiver continues to undertake its tasks - and I'll talk a bit about the composition of the committee as we see it in a moment - but as those things happen, there will finally be some competent and professional advice on what should be done with these properties. That should not take a long period of time, certainly well within the two months that we're talking about in this instance.

The Bearspaw property - just to give you one example - people put up $18 million to buy a $14 million property. I don't have all the facts and I don't want to be too pejorative, but it sounds like the vendor take back mortgage actually comes out of this better than anyone else because they got $14 million and still have a take back mortgage which is a relatively very small proportion, and now ironically they are coming and saying well the property actually might be worth 5 or $6 million less than we received for it. So I don't have a lot of sympathy there although I do understand the nature of security.

THE COURT: You have more admiration for the financial argument.

MR. BLAIR: But the point is, there's no question from these appraisals and there's no question from the premises on which the various investors went in, this property obviously has a great deal of potential and it might be that with competent advice from the Foxbridge group, that Ernst & Young, who are also competent people, might have some kind of a plan for this property that involves paying out or refinancing. But they can't make that decision yet, they haven't even had time to look at it because Ms. Couch has been in control and they haven't had any of the information, the appraisals upon which to base those decisions.

THE COURT: But Mr. Blair --

MR. BLAIR: So they need some time.

THE COURT: -- I hate to interrupt but I want you to make sure you address one -- what you said you were going to talk about the composition of the committee later. I'd like you, when you are doing that, to respond to Mr. Nishimura's point. I think there might be some merit in the composition of the management committee that some representation from the secured creditors. I don't know whether they can amongst themselves agree on somebody, but one of the aspects of this, is very important, is to demonstrate to them, as Mr. Leveque said, that there is -- these other properties really have some value and I think their resistance, because this dip financing is -- is essentially on a consolidated basis, they too might have a different comfort level. But again, if it shows that, you know, when you do all your analysis and this committee works, if this thing can't work it may be that in December you'd come here and say they should be allowed to go their separate ways. I am just thinking out loud, as you know I tend to do.

MR. BLAIR: Well, I'll tell you what I think about the committee. Firstly, Mr. Lenz has done a good job in trying to come up with a plan that I think tries to balance the interests of everyone, but in all fairness, his firm was hired by Ms. Couch and so he naturally has those obligations and duties to her.

When you look at the factors that he presented, an important one of course is confidence of the stakeholders in management and as I probably don't need to tell you, the investors, at least the ones that I represent, have no confidence in Ms. Couch's management.

THE COURT: That's fine. That's fine.

MR. BLAIR: They didn't have any in August and they have less now that they have seen what's happened since. The receiver's report, for example, does mention Ms. Couch getting a salary for the last three months. It talks about some credit card personal expenses that were paid by the companies. These aren't things to decide today but they are things that go towards the composition of the committee and Ms. Couch's continuing role.

So on the committee, we have no trouble with Ernst & Young, Mr. Helka has done an excellent job so far in consolidating this information. This is what they do for a living obviously is --

THE COURT: M-hm.

MR. BLAIR: -- what they've been doing so far and what is proposed they do in the next couple of months. But the committee firstly in our view, unless Mr. Helka says we desperately continue to need Ms. Couch's input - and I can understand over the last couple of months it's useful to say who is this fellow claiming $50,000, what does this contract mean, where is these ledgers, that's all well and good - but my hope would be that the work of Ms. Couch is -- is over at this point in time. I don't see why she should be on a committee. I think she has both a moral and financial interest in being cooperative, but unless Mr. Helka says I need her on the committee, obviously we suggest that a) she shouldn't be, and b) it just obviously makes for a less effective committee to have someone on it who we are continuing to sue.

With respect to Ilogic and Olympia Trust, it's -- it's noted that they - and it appears to be jointly would have a lawyer - but I don't think that works either, and here is why. Ilogic is a public company that discovered a loophole in the *Income Tax Act* to the effect that if a public company owns 60 percent of a private company, people like Ms. Couch and other people that run private companies can tell investors that their investment is RRSP eligible, which of course greatly increases the universe of potential investors. So what Ilogic does is says sure, for a minor subscription fee, which is in the amount of hundreds of dollars literally, they come to own 60 percent of these companies. Their sole existence, sole reason for doing that is because the companies then become RRSP eligible.

And Ilogic in turns gets a fee that strangely is comprised of a percentage of the amount of funds raised from - I hope that's not me - funds raised from the investors. So Ilogic steps in, owns 60 percent, and has a stake in the money coming in from investors because they get a fee on that. So we have sued Ilogic. They are a defendant of this lawsuit as well. We are saying if you are going to provide the structure, provide the offering memorandums, take money based on how much money is raised from investors, you have a duty to look at the quality of the investment and monitor the performance of the companies.

So firstly their presence on a committee again would be disruptive because we are now on a committee with two people that we're suing, which obviously has inherent difficulties. Secondly, they have no stake in this at all. Their stake in this is about the $500 that their 60 percent interest is worth. Now, Olympia Trust, which has some common ownership, does have an interest. They -- they are the entity when people buy mortgage units, Olympia Trust is sort of their trustee, their representative, and so with a couple of these properties there's no question that Olympia Trust has a stake and that they can be foreclosing or making other decisions. But I don't think that the wording, an appointment of Ilogic and Olympia Trust is appropriate. I can see perhaps Olympia Trust -- I'm not really sure frankly what they would bring to the table but we have no objection --

THE COURT: M-hm.

MR. BLAIR: -- per se. Certainly the investors should have, in my view, the main role on that committee.

And then, I am not clear yet, it might be in these documents that we haven't had a chance to digest, ordinarily when a receiver like Ernst & Young is appointed, they get their marking orders from the people with the financial stake in the entire process. Usually it's a big bank that says we are going to appoint a receiver and we will tell the receiver what to do by way of -- of business decisions.

But here there is no bank because Shire essentially financed itself on the backs of the investors. So I certainly don't think that Ernst & Young should be in a position where they are having to take instructions, binding instructions, from the committee. Mr. Collins may have some views on this. They may have already thought out how it's going to -- to work, but we definitely don't think that Ernst & Young should be in a position where they are taking instructions on what to do with properties from a committee that's composed of the person that caused the problem in the first place, someone that we are suing and so forth.

The receiver should be making its own decisions in that regard and if it wants guidance from the investors and from a property manager that Ernst & Young hires such as Foxbridge, that's all well and good. They'd be prudent to take that guidance. But this is why they get the big bucks, apparently well into the six figures so far, is to receive and manage and make these kinds of decisions.

So when you're being asked to constitute a committee, I'd just like to ensure that Ernst & Young nonetheless still has the power to make decisions and if anyone is going to be giving them instructions, it should be a committee -- they should be assisted by their own legal counsel obviously, but they shouldn't be taking instructions at this point from any entity that Ms. Couch has anything to do with. Frankly I believe that it should come from creditors. Those are the ones that have the real stake. You've mentioned that there's these secured creditors. Well there's Olympia Trust and then finally there is the -- the investors.

Admittedly we represent only a proportion of the investors but a significant one, and frankly have been their voice so far. I see they propose another investor from someone who is not invested in the class action. Obviously that would be fine.

We also believe - and having seen the irony evidently of 900,000 being spent so far, and I believe - I haven't looked at the figure yet - but I believe that's mostly on professionals. And even the fees of the secured creditors lawyers here, they go onto the mortgage and that eventually comes out of the properties and out of the investors. But in the meantime, the investors who have $70 million into this and who are hoping that there's something significant left once everyone else has taken their cut, they are -- their interests are only being put forth by about 500, 600, 700 of them who had been forced to contribute money in dribs and drabs so that they can have a voice heard.

And in my submission it would clearly be fair for $100,000 of the dip financing to go to repay the investors. It's also unfair of course that given that any order that happens is effectively for the benefit of all 2800 investors, it's unfair that only 550 interested one should be able -- should have to pay to have the voice of the other 2800 be heard. So in my submission, the dip financing covers that problem as well.

I have discovered this issue with Mr. Lenz and so I do not believe has a problem in principle with it, but I think we left it that well let's leave it up to the committee to decide that. I don't think that works, for obvious reasons, in that the committee has two people on it named who we're suing and who probably would not like to see the investors have the ability to put a voice forward. So I think that that's something that the -- that the Court should do.

I believe those are all my submissions. Obviously we don't want the foreclosures to go ahead until we've had a chance for professional people to have a look and advise on what should be done with those particular properties as well as consolidating all of the other decisions. So we would support the application to that extent. We support the continuation of Ernst & Young. Frankly we'll look at it, but I don't think it really care whether it was in a bankruptcy or receivership scenario, but I do agree with Mr. Lenz that having Ernst & Young come in, take control, bring some order to the process, gather documents, tell us -- tell us all that's been happening. I think that has been a useful and valuable process so far.

THE COURT: Thank you, Mr. Blair. Mr. Collins.

Submissions by Mr. Collins (Other)

MR. COLLINS: Thank you, My Lord. The monitor's submissions will be brief, subject to any questions that Your Lordship has. I just don't --

THE COURT: Are you going to address Mr. Blair's two issues though about does the committee really give direction to the receiver. I didn't see that in the order. I would have thought they were merely there to consult but is there any issue on that?

MR. COLLINS: I don't -- there is clearly an issue as articulated by Mr. Blair that I was unaware of with respect to the composition of the committee, but make no mistake, the final authority as the committee has been formulated, or proposed to be formulated, rests with the receiver. That is, the receiver acts as chairmen of the committee of five and has the (INDISCERNIBLE).

THE COURT: But the committee -- let's suppose Ernst & Young as receiver makes a decision, we think this should be done. That matter is then discussed with the committee and the committee says no it shouldn't be done. Is there any issue as to what's going to be done?

MR. COLLINS: Well there -- there could be, My Lord, and perhaps then the structure of the committee has changed from that of an overall vote to --

THE COURT: It's got to be clear.

MR. COLLINS: -- to a consultation.

THE COURT: It's got to be clear --

MR. COLLINS: Yeah.

THE COURT: -- at the end of the day, the receiver is in control of the process.

MR. COLLINS: Right.

THE COURT: Because the receiver is going to be an officer of the court and it's not going to take directions from the committee. .

MR. COLLINS: All right. Then -- then I believe the structure of the committee would have to be altered somewhat to address that point.

MR. LENZ: That's no problem, already changed that.

MR. COLLINS: Oh, it's been changed.

THE COURT: Okay.

MR. COLLINS: And certainly that was --

MR. LENZ: Sir, that's how -- it's an advisory committee. It's clearly an advisory committee. If there were a conflict like that, the receiver wins.

THE COURT: Well we have got to make that clear.

MR. LENZ: And we -- we made it clear and if someone on the committee then wants to come to court and complain, they have the right to do so under the committee charter.

THE COURT: But the receiver is not obligated to take the direction of the management committee.

MR. LENZ: That's right.

THE COURT: Yeah.

MR. LENZ: The purpose of the management committee on schedule 'B' of the receivership order is to provide (INDISCERNIBLE) and guidance to the receiver, as the receiver completes its obligations under the receivership order. I have put in that extra order, that the receiver has all these powers and so on. The -- in respect of the receiver's powers in paragraph 5, it's subject to the order and the powers of the receiver, so the management committee has the ability to look at and approve material, contracts, budgets, et cetera, but it's subject to the powers of the receiver. So it's certainly my intent to make it advisory, not prescriptive.

MR. COLLINS: Which is the structure that Mr. Lenz borrowed from another file --

THE COURT: Sure.

MR. COLLINS: -- that's before the court right now which is --

THE COURT: And your client is content with that?

MR. COLLINS: They are, which is -- which is working well in that case - I might hasten -- hasten to note, they are different cases --

THE COURT: Sure.

MR. COLLINS: -- but it hasn't come to a circumstance where there's been disagreement. Things are forged by consensus. It's an opportunity to give the stakeholders an opportunity to express their views as to how this is managed on a go forward basis, My Lord. The proposed receiver wouldn't lend its name to this but for the 2800 investors, My Lord. I am not sure there's a practical or workable structure that can be devised to work this out, other than what's before the Court today. There is undoubtedly entities in these proceedings for which any receiver wouldn't consent to act, or a trustee in bankruptcy wouldn't --

THE COURT: Yeah.

MR. COLLINS: -- consent to act absent the substantial and meaningful indemnity and it's for that basis that at this point the consolidated nature of the proceedings is mandated to try to continue to sort --

THE COURT: Sure.

MR. COLLINS: -- through that which happened just with respect to the dip financing and the allocation. I just simply want to draw the Court's attention. Of course we had paragraph 42 in the initial order which is from the template CCAA order, which deals with allocation, permits any party to apply to the Court on notice to deal with allocation of the charges that arise. Without putting too fine a point on it, the monitor obviously agrees with the Court that it cannot conceive of a circumstance where -- where the entirety of the dip obligation, or any charge obligation would be tried to be laid off on any individual secured creditor. That -- that won't happen, My Lord, in these proceedings, if -- if the order is granted without an application before the Court.

And -- and so with that, My Lord, obviously the receiver - the proposed receiver and monitor - consents to its appointment, if the Court is inclined to grant the relief that's requested by the applicants today.

THE COURT: How about the composition of the committee? It seems to me there should be some representatives from - and I don't think at this point a representative of the unsecured is necessary - but it seems to me as - and I am not sure -- I don't know -- Mr. Blair and Mr. Leveque -- Mr. Clark and Mr. Leveque, you have to help me out, are you two communicating? I mean, would it be -- if we were to provide that between the two of you you could come up with a nominee for this committee, does that have any merit to you? I am showing my hand a little that I am likely going to grant this extension but I think there seems to me you should be represented on this committee.

MR. LEVEQUE: I don't disagree, Sir. Mr. Clark and I get along fine, I'm sure we'll work something out in terms of --

THE COURT: So if we had a joint nominee of the two of you to the committee?

MR. LEVEQUE: Sure. Sounds good.

MR. COLLINS: Seems entirely reasonable and sensible.

THE COURT: How about Ms. Couch and Ilogic?

MR. COLLINS: I have not considered it beyond the negotiations that went behind advancing the process to this stage and that which occurred to bring this matter to you today, My Lord. The first that the monitor has heard of my learned friend, Mr. Blair's clients' objections to Ms. Couch and Ilogic was in court today, so we haven't had an opportunity to consider that. If -- if it's of assistance we could stand down and discuss it. Mr. Lenz, on behalf of --

THE COURT: But my own view on that, I think there is some merit to Ms. Couch being on the committee. She obviously has a lot of knowledge about what's going on and she is only one vote amongst many and I take at face value what Mr. Lenz said, there has not been allegations that she wrongfully took money. She has a very real reputational interest in trying to make sure this gets sorted out in a proper fashion and I would have thought that was at least some incentive to be cooperative and given she can't control the committee, it might be useful for the committee.

Why wouldn't we substitute a nominee of the secured for the company, Invest Logic or whatever it was called? Seems to me make a little more sense.

MR. COLLINS: And is that in substitution for Olympia as well? It was Olympia/Ilogic representative.

THE COURT: Well Mr. Blair didn't -- said he could see how Olympia might have some role to play. Again I'll be guided by -- I don't have a strong feeling one way or the other on that.

MR. COLLINS: Okay.

THE COURT: I have a much stronger feeling on the company and the secureds being unrepresented than the Olympia. I'll be guided by your collective wisdom on that. If your collective wisdom is Olympia has a role to play, that doesn't bother me they're on the committee.

That leaves only the issue then, Mr. Collins, it seems to me given everybody else's expenses are being paid, it is appropriate that the investors have an interest in this and some -- some allocation of funds should be made available to them, it seems to me.

MR. COLLINS: I entirely agree, My Lord, and it's just a question of -- of sharpening our pencils on the cash flows.

THE COURT: Well you suggested 100,000, why wouldn't we say the receiver will, to a maximum of $100,000, make sure that something is done for that group collectively.

MR. COLLINS: I expect in the cash flows as presently constituted, if the dip is proved in the amount that's requested today, that that can be done.

THE COURT: Let me -- again to -- just because I think the secureds need to be helped in this, would it be an unreasonable restriction to say you couldn't draw down on the -- on the additional million five, in excess of a million, without making some kind of application? Again, I don't -- the problem is applications run up costs but I think -- when I looked at the numbers, you may not need the whole million five between now and December and there could be a lot of water under the bridge by then.

MR. COLLINS: I mean, Mr. Lenz is indicating on behalf of the applicants that that's fine. I am wondering if there could be a threshold set today so that we don't have to come back, at least for the first advance.

THE COURT: Oh no, you can just -- you can take anything up to the million without coming back, but if you want to go between a million, or a million five, of the additional funds, you'd have to come back.

MR. COLLINS: Just -- just to be clear --

THE COURT: But it's -- what we're trying to do is cover the contingency he raised, get a dip financing in place with a larger number so that you don't have to go through a refinancing cost if it turns out that you need a little more money.

MR. COLLINS: And just as there's no confusion, when you say a million, My Lord, is that in addition to repayment of the existing dip --

THE COURT: Yeah, sure.

MR. COLLINS: Very well, that's --

THE COURT: You can use a million of the additional million five.

MR. COLLINS: That's -- that's entirely sensible and reasonable again.

THE COURT: Now, the last thing then is really - and I said this really thinking out loud - I have very real sympathy for the position that Mr. Clark and Mr. Leveque have put forward. This -- this has a risk of being run on their backs. I am not satisfied at this point, because of the consolidated basis of which this has been approached, that they're facing material prejudice. But if Mr. Leveque is correct that there is no real hope in respect of that 16 million nine out there, this very quickly becomes run on them. And I think there has got to be a lot of work done between now and the December extension to satisfy ourselves that there is something in there such that this consolidated basis has some merit, because if there isn't, I can tell you, if I'm hearing the application in December as opposed to Justice Kent, their position on taking their properties out of this might be dealt with quite differently.

MR. COLLINS: We understand and the monitor shares the Court's concerns in that regard, My Lord. It comes down to a balancing of prejudice and on the monitor's --

THE COURT: Sure.

MR. COLLINS: -- initial assessment of this. They are satisfied that less violence is done to the secured lenders.

THE COURT: Understood, yeah.

MR. COLLINS: And that message is received at least by the monitor, My Lord.

THE COURT: Fine.

MR. COLLINS: Those are all my submissions.

Ruling (Other)

THE COURT: I think I have given you my order if not, Mr. Lenz. You know what I am going to do.

MR. LENZ: Thank you, and I saw that. Probably means I should keep my mouth shut. But I have to say a couple things about the committee, being since I'm the architect of this document. Yeah, I think it's a good idea to have a secured creditor on a committee. I just don't know how you manage that but if those two want to decide amongst themselves, that's a good idea.

THE COURT: Manage it, but they are going to get back to you, and how long do you need? How long do you gentlemen need, a week, you'll give him a name in a week?

MR. NISHIMURA: Sure.

THE COURT: They'll give you a name in a week.

MR. LENZ: Or even sooner.

THE COURT: Okay.

MR. LENZ: Because I'd like to get the committee started.

THE COURT: Sure.

MR. LENZ: On the issue of -- I won't address the issue of Ms. Couch. It sounds like you are clear on that. On Ilogic/Olympia Trust, well they've shown interest in the proceedings. I will say that --

THE COURT: Well I think Ms. Couch can deal with them.

MR. LENZ: Yeah. I will say --

THE COURT: She can get -- they can put their input in through her.

MR. LENZ: Yeah. I will just underline here that Mr. Blair represents 20 percent and there are a substantial number, and maybe a majority of the investors, that are still supportive of Ms. Couch and I find that -- those comments -- I hope the committee all works together for one goal in mind and that it's not an avenue to further a class action lawsuit. Because that is not the intent. But anyway, I am sure that will happen and I trust Mr. Blair will select the suitable person so it does happen.

I just had a couple of other very brief points. Value. We've got a serious concern about value and I do too. The committee, one of the first items of business is trying to get some kind of an invitation to proposals or offers in, and maybe they should order appraisals, but you know one of the things we struggle with is commercial appraisals are expensive and they are in Ontario and B.C. and so on, and so -- but that may be something that better address right off, given Your Lordship's comments today and so that on December we've got up to date current information for the Court.

THE COURT: I think you have to, Mr. Lenz. I mean, the reality is --

MR. LENZ: Yeah.

THE COURT: -- there is coverage on a consolidated basis --

MR. LENZ: Yeah.

THE COURT: -- if there's value.

MR. LENZ: Yeah.

THE COURT: There is no coverage if Mr. Leveque is correct and, you know, he gave --

MR. LENZ: I know --

THE COURT: -- a very concrete example of how $3 million of that 16,9, won't say is illusionary, there is a real question whether that's there, and that takes 17 to 14 in a hurry.

MR. LENZ: I know. I know, I know, and I won't -- anyway, part of being a litigator is knowing when to stop talking and that's what I am going to do now.

THE COURT: Sometimes the best -- the most important representation that you make is the one you don't make.

MR. LENZ: So, anyway, in my submission it's appropriate. It is the best situation. I hope it -- it gives everyone a sense of how this can work, this process can work for everyone's benefit and that at least we maximize what we can do in terms of value. So that's it.

THE COURT: Now, it seems to me there would have to be a couple of amendments to these orders then that you have proposed.

MR. LENZ: Okay.

THE COURT: Is there any doubt in your mind as to what amendments are required? Do you wish to go through that or --

MR. LENZ: Are we leaving Ilogic Olympia Trust as --

THE COURT: Yes we are.

MR. LENZ: -- as people, and we are just adding --

THE COURT: No, again, Mr. Blair, I didn't keep them in. Olympia Trust can stay on the committee, it's the other company that's off.

MR. LENZ: Ilogic?

THE COURT: Yeah.

MR. LENZ: Yeah, Olympia Trust --

MR. BLAIR: That's what I thought should happen.

MR. LENZ: Yeah, they're -- they're the same -- they act like the same company, that's why --

THE COURT: Well then if they do --

MR. LENZ: -- I put them on there.

THE COURT: -- then taking one off doesn't hurt.

MR. LENZ: I don't mean one for each, I meant one --

THE COURT: Yeah.

MR. LENZ: -- they can choose between themselves and so --

THE COURT: No they can't, it has got to be a representative of Olympia Trust.

MR. LENZ: Okay. Thank you. So Olympia Trust, that has to change. Counsel for Olympia Trust. And then we want to add a member of --

THE COURT: No, Couch stays on.

MR. LENZ: Yeah.

THE COURT: Olympia Trust stays on. Ilogic is off.

MR. LENZ: Yeah.

THE COURT: The investors have a nominee.

MR. LENZ: Yeah.

THE COURT: And between Mr. Clark and Mr. Leveque they are going to give a phone call next week about a nominee of the secured creditors.

MR. LENZ: Okay. And the secured creditors.

THE COURT: And you say it's clear in the order now that that's an advisory committee to the receiver so if it's clear from the order that's what it is, I just want counsel to be sure they are all -- have to approve this order and make sure they are comfortable with that point.

MR. LENZ: Okay. Yeah.

THE COURT: Mr. Collins is going to work with his client to make sure there's a fund of at least up to $100,000 of the dip financing available to the investors to get -- to help them defray some of their expenses.

MR. LENZ: Okay.

THE COURT: That comes into this. The director's charge as per -- is gone.

MR. LENZ: Right.

THE COURT: And the dip financing is approved to the extent of a million five of additional financing, it being understood that it can only draw up to a million without the -- an application to the court and the stay is extended to what, December 4th, is it?

MR. NISHIMURA: December 8th.

THE COURT: December 8th?

MR. NISHIMURA: Yeah.

THE COURT: Now again, I don't -- I am not -- I'm assuming that Justice Kent is case managing this, that the application on that date will be before her. I don't -- it seems to me though, to the extent there are problems, which arise out of what I have done that may be a slight variance or slightly different than what's been done -- to the extent there are problems associated with that, I leave it to you to come back to me and say listen, do you want to sort that out, or you can go to Justice Kent and I will not be insulted in any way that I am not consulted further about this.

By the same token, I offer you, Mr. Lenz, if for whatever reason Justice Kent cannot, or she's away, or you want her and I to talk about this, I will do what I can to assist you.

MR. LENZ: Okay. I appreciate that, Sir.

THE COURT: From my perspective it is -- she should be case managing this on an ongoing basis and while I've enjoyed this morning, you may not see me again.

MR. LENZ: All right. So we will try and get you an order as early as this afternoon, if that works for you.

THE COURT: I am here this afternoon, I have another -- doing another matter this afternoon.

MR. LENZ: Okay.

THE COURT: It shouldn't be long but I will be here some time this afternoon. I will definitely be in tomorrow morning but I can tell you right now I am not going to be in tomorrow afternoon.

MR. LENZ: Okay.

THE COURT: So if you want me to sign this, it's really got to be before 12:00 tomorrow --

MR. LENZ: Yeah.

THE COURT: -- otherwise it will have to wait until next week.

MR. LENZ: It's going to be before 12:00 tomorrow. It has -- just has to get in place. I am also not going to be here after noon tomorrow, so --

THE COURT: Fine.

MR. BLAIR: I still had three little things on it.

THE COURT: Sorry?

MR. BLAIR: I had three little things on it yet that I am not clear on.

THE COURT: Oh sure.

MR. BLAIR: The original committee composition had two investors, one Davida (phonetic) Point and then one for the people that aren't part of the class action.

THE COURT: Yeah, no. So that's two.

MR. LENZ: Is that still the case?

THE COURT: That's two, yeah.

MR. BLAIR: Then I am still somewhat uncomfortable with paragraph 5 of the order that says a management committee is hereby created to oversee the applicants, because I think we all seem to be in agreement that this committee won't be running the applicants or --

THE COURT: Mr. Blair --

MR. BLAIR: -- doing anything other than advising --

THE COURT: -- I don't want to get into drafting.

MR. LENZ: How about --

THE COURT: For me it is clear --

MR. LENZ: Send me your comments.

THE COURT: -- what I went through with Mr. Collins. If there is push comes to shove and the committee says one thing and the receiver says something else, what the receiver says governs. It is an advisory committee. I leave it to you to sort out words that make that concept clear.

MR. BLAIR: Okay, so we will do that. Because I wouldn't think paragraph 5 is totally consistent with that. And the last thing, again I am not 100 percent sure whether Ms. Couch has been getting a salary, and if so how much, and if so by who, presumably the receiver. But obviously at this point in time we don't think anyone that's on this committee should be getting paid for that and I would -- I would not want to see Ms. Couch continuing to get a salary that eats into the financing and everything else, for obvious reasons.

THE COURT: Well, I think there are two different things you are talking about. You are talking about Ms. Couch receiving some kind of remuneration in respect of participation on the committee. I -- I think if you are asking people, particularly outsiders, to participate in this kind of thing, it's appropriate sometimes that they be given some kind of remuneration. These people, they should not be asked to just give of their time to do this. If they have a self interest in it, as obviously some of these people do, it may be they are prepared to say they have other ways of being compensated, their particular loan agreements or whatever would provide for that, in which case they don't need it.

But to the extent somebody would be just giving voluntarily of their time to do something like this, it seems to me that person should -- is entitled, and I leave it to the receiver and the committee to sort out what's fair.

In terms of Ms. Couch's ongoing remuneration vis-a-vis the series of companies, the receiver is in and whether she gets paid anything or not I would have thought is a decision of the receiver.

MR. BLAIR: And see, that's just what I am not completely clear on, so I wanted to raise it here while you are here and while we are all here. For all I know, she's getting $20,000 a month and we obviously would object vociferously to that, but I don't know that that's the case.

THE COURT: I am not going to get involved in that. That's something the receiver will look at. I am not making that decision today. I don't --

MR. BLAIR: Well we'll -- we'll talk to the receiver about it.

MR. LENZ: Thank you, Sir.

PROCEEDINGS CONCLUDED

Certificate of Record

I, Rhonda Camplin, certify that this recording is a record of the oral evidence of proceedings in the Court of Queen's Bench, held in courtroom 1401 at Calgary, Alberta, this 8th day of October, 2009, and I was in charge of the sound-recording machine.

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I, Marg Lavay, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a true and faithful transcript of the contents of the record, and

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TAB 2

In the Court of Appeal of Alberta

Citation: Investit Financial Inc. v. Shire International Real Estate Investments Ltd., 2009 ABCA 380

Date: 20091116
Docket: 0901-0283-AC
0901-0284-AC
0901-0286-AC
0901-0288-AC
Registry: Calgary

IN THE MATTER OF the *Companies' Creditors Arrangement 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., 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.

(the "CCAA Applicants")

Between:

Investit Financial Inc.

Applicant
(Respondent)/Appellant

\- and -

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.

Respondents
(Applicants)/Respondents

And Between:

Romspen Mortgage Corporation

Applicant
(Respondent)/Appellant

- and -

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.

Respondents (Applicants)

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

Application for Stay

Reasons for Decision of
The Honourable Madam Justice Paperny

[1] Investit Financial Inc. ("Investit") and Romspen Mortgage Corporation ("the applicants") seek a stay of orders granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), in which the court authorized an extension of DIP financing, appointed a receiver pursuant to the *Judicature Act*, R.S.A. 2000, c. J-2 and the *Business Corporations Act*, R.S.A. 2000, c. B-9, authorized the receiver to draw down on the DIP facility, and created a receiver charge. The orders were granted on October 8, 2009 and a notice of appeal filed October 27, 2009. The application for leave to appeal is scheduled for hearing on December 1, 2009 and there will be a hearing in the main proceeding on December 3, 2009.

[2] Shire International Real Estate Investments Ltd. (the "Shire Group") was granted protection under the CCAA in August 2009. The initial order granted DIP financing in the amount of $1,000,000 (secured similarly). The Shire Group is composed of 21 companies involved in the land acquisition business. Their business was to locate and secure property by payment of a deposit, and then finance the purchase by a combination of monies lent to it by mortgage companies, such as the applicant Investit, as well as private investors.

[3] An investigation by the Alberta Securities Commission ("ASC") resulted in a cease trade order, which effectively terminated Shire's ability to raise additional capital, which caused a serious cash shortfall, which in turn led to these proceedings.

[4] The Monitor's third report dated October 7, 2009, and relied upon at the hearing was the result of two months' effort to determine the sources and uses of approximately $ 65,000,000 of funds raised by Shire, the legal position regarding the properties, and to consider if restructuring was viable.

[5] At paragraph 35 of the report, the Monitor provided a summary of estimated liabilities and values. It estimated that the properties had a value of approximately $17,000,000 in excess above the secured financing. The position advanced and accepted before the chambers judge was that the present values indicate that there would be sufficient assets to fully repay all secured creditors, and leave a substantial amount of money for unsecured creditors.

[6] Several issues arose before the chambers judge, the most salient being: whether in these circumstances the CCAA could be used in this manner (which effectively subordinated secured creditors on individual properties to DIP financing and other charges); whether this subordination was permissible in the context of a receivership within a CCAA proceeding; whether the continuation of the CCAA proceedings was realistic; and whether the proceedings were, in reality, a liquidation, and who should bear that cost.

[7] After lengthy submissions, the chambers judge concluded that the secured creditors had a significant upside in how they might get treated through a CCAA procedure, which treated the properties and the various corporate entities on a consolidated basis. He considered the appraised value of the properties, and concluded that there was sufficient value in the properties, and therefore that there was no substantial prejudice to the secured creditors in waiting for two months (while Shire attempted to cobble together a plan for a restructuring for the benefit of the secured and unsecured creditors). He indicated that the charges he granted would be dealt with on a consolidated basis, and that the allocation of those charges would be done in a manner that was not prejudicial or unfair to the secured creditors.

[8] The application for leave to appeal is scheduled to be heard by this Court on December 1, 2009. The applicants seek a stay, pending that application and if successful pending appeal.

[9] The test for the granting of a stay is well known as the tripartite test. See: ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1S.C.R. 311.

[10] The applicants must demonstrate that there is a serious question to be tried, that irreparable harm will be suffered if the stay is not granted, and that the balance of convenience favours granting the stay. I am reluctant to express any views regarding the first issue, which will be more thoroughly canvassed on the leave application, but I am satisfied, for the purposes of this application, that there is a serious question to be tried.

[11] The issue of irreparable harm is less clear. The applicants contend that, in the event a stay is not granted, the appeal will be rendered nugatory. I am not persuaded that that is so. The chambers judge specifically concluded that there was no material prejudice to the applicants' financial position in granting the order, and it would appear from the exchanges with counsel during that hearing that certain of the applicants agreed. While there is clearly a dispute over value and some risk to the applicants, in my view that harm cannot fairly be characterized as irreparable.

[12] Nevertheless, were I satisfied that there was a real prospect of irreparable harm, I would then proceed to consider the balance of convenience. In my view, if the stay is granted at this time, the DIP lender will not fund these proceedings and, accordingly, the prospect of advancing the objective of finding a solution for the benefit of all the stakeholders, the articulated purpose of the CCAA proceedings, (to the extent they are properly brought) will undoubtedly be defeated. In the interim, while there is some risk to the position of these secured creditors, the risk, relying on the Monitor's report, is minimal.

[13] For these reasons, I decline to grant the stay as proposed. I am mindful, however, that there is a pending leave application before the Court. Accordingly, I dismiss this application, with leave to reapply in the event the Court on the leave application is prepared to entertain it.

Application heard on November 13, 2009

Reasons filed at Calgary, Alberta
this 16th day of November, 2009

Paperny J.A.

Appearances:

J. McLean and S. Anderson
For the Applicant, Investit Financial Inc.

G. Tucker and S.H. Stephens
For the Applicant, Romspen Mortgage Corporation

K.T. Lenz
For the Respondent, Shire International Real Estate Investments Ltd. et al

S. Collins
For the Monitor, Ernst & Young, Inc.

D. McLellan
Lucia de Wet and Jennifer Lofgren (Not Named Parties)

R. Kennedy
Echo Merchant Fund II Limited Partnership (Not Named Parties)

P. Leveque
1533021 Ontario Ltd. (Not Named Parties)

T. Batty
1206354 Alberta Ltd. et al (Not Named Parties)

TAB 3

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1988 CarswellBC 553

Northland Properties Ltd., Re

Re NORTHLAND PROPERTIES LIMITED et al.

British Columbia Supreme Court

Trainor J. [in Chambers]

Judgment: June 20, 1988
Docket: Vancouver No. A880966

Counsel: *A. Czepil*, for Guardian Trust.

A.G. Sandilands, for petitioners.

R. Ellis and *D. Tysoe*, for B.C. Telephone.

S. R. Stark, for Co-op Trust Co.

G. Thompson, for Bank of Montreal.

Subject: Corporate and Commercial; Insolvency

Secured creditors — Mortgages — Court allowing debtors time to make proposal under Companies' Creditors Arrangement Act — Court ordering no proceedings to be taken by creditors without leave — Court denying leave to commence mortgage foreclosure proceedings but allowing collection of rent under assignment of rents.

Secured creditors — Specific assignments — Assignment of rents — Court allowing debtors time to make proposal under Companies' Creditors Arrangement Act — Court ordering no proceedings to be taken by creditors without leave — Court denying leave to commence mortgage foreclosure proceedings but allowing collection of rent under assignment of rents.

The company had granted a mortgage and executed an assignment of rents which was registered as security for a loan from the trust company. The assignment provided that, upon default under the mortgage, the trust company was entitled to all rents falling due from the date of service of notice to the tenants. The land involved was the only asset of the company.

The company and several related companies ran into financial difficulty and applied under the Companies' Creditors

Arrangement Act for approval to attempt a reorganization plan. An ex parte order was made on 7th April granting the application and providing that any creditor wishing to take proceedings to commence or continue any action or realize upon any security must obtain leave of the court.

The company had not made its 1st April mortgage payment and, following this order, the company informed the trust company that no further payments would be made. At this time the property was worth approximately $340,000 and the value of the mortgage and outstanding taxes was about $450,000.

An application was brought by the trust company for leave to realize on the mortgage and assignment of rents.

Held:

Application granted in part.

The intention of the Act (and the ex parte order) was to allow a judge to make orders which will maintain the status quo for a period of time while an insolvent company attempts to gain the approval of its creditors for an arrangement which would allow the company to remain in operation for the future benefit of both the company and its creditors.

The term "proceedings" should be broadly interpreted to also include non-judicial proceedings which might prejudice other creditors and make an effective arrangement impossible.

The ex parte order generally envisioned that the company was to make a proposal to its creditors by the end of the summer. With regard to this time frame, leave should not be presently granted to the trust company to take any steps with respect to a foreclosure of the mortgage.

As of 1st April the trust company had become vested with the right to take an assignment of rents. The only step which had to be taken was notification of the tenants. That right was in existence prior to the ex parte order being made and should be recognized. This would not prejudice the other creditors as the recognition of the assignment of rents simply put the trust company in a position to receive moneys which it ordinarily would have received if matters had continued on the basis existing prior to 1st April.

Cases considered:

Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd., [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.) — *applied*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25 [now R.S.C. 1985, c. C-346]

Application for leave to realize on mortgage and assignment of rents.

Trainor J. **(orally):**

1 In these proceedings I made an order on 7th April 1988 which contains a provision that all proceedings taken or that might be taken by any of the petitioners' creditors:

> 2 ... shall be stayed until further order of this Court upon notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person against any of the Petitioners be stayed until further

order of this Court, upon notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person except with leave of this Court, upon notice to the Petitioners, and subject to such terms as this Court may impose, and that the right of any person to realize upon or otherwise deal with any security held by that person on the undertaking, property and assets of any of the Petitioners be and the same is postponed on such terms and conditions as this Court may deem proper ...

3 The motion before me today is by counsel on behalf of Guardian Trust Company. He asks for an order that Guardian Trust have leave to realize on an indenture of mortgage and an assignment of rents both made between Unity Investment Company Limited and Guardian Trust Company. The affidavit of the principal of the petitioner companies, Mr. Gaglardi, filed on 30th May of this year contains this paragraph:

4 Unity is a wholly-owned subsidiary of Northland and is the registered owner of a single parcel of property situate in Nelson, British Columbia. Northland acquired all of the issued and outstanding shares of Unity in or about December, 1980 for the sole purpose of acquiring the Nelson property, Unity's sole asset. The vendors had insisted on a share rather than asset purchase at the time.

5 Margaret Anderson, who is an assistant vice-president of Guardian Trust Company, in her affidavit filed on 27th May said:

6 That on or about July 16 1983, Unity Investment Company, Limited, granted a mortgage to Guardian Trust Company which was guaranteed by Robert John Phillip Gaglardi to secure payment of a loan in the principal sum of $500,000.00.

7 I am advised in the course of these proceedings, and I think it is disclosed by the affidavit material which is here, that the present assessed value of the property is about $340,000, that there is currently owing in respect to that mortgage about $400,000, and I believe the taxes are payable in addition to that amount, in the sum of about another $50,000.

8 The Anderson affidavit contains this paragraph:

9 That in addition to obtaining a mortgage from Unity Investment Company, Limited as security for the loan, Guardian Trust Company obtained an Assignment of Rents dated July 13, 1983, which was registered in the Nelson Land Title Office on August 3, 1983, under No. S19466 charging the land and premises described herein.

She further avers:

10 That the Assignment of Rents provides that the Assignor, Unity Investment Company, Limited is entitled to receive all rents until default is made under the mortgage at which time the Assignee, upon notice to the tenants, is entitled to all rents falling due from the date of service of notice.

And further:

11 That prior to April 1, 1988, monthly mortgage payments due pursuant to the mortgage between Guardian Trust Company and Unity Investment Company, Limited had been regularly paid.

And:

12 That following pronouncement of the Ex Parte Order of The Honourable Mr. Justice Trainor in these pro-

> ceedings on April 7, 1988, we were advised by a representative of the "Northland Group" that no further payments would be made pursuant to the mortgage and none have been received.

13 It is in those circumstances that the motion has been made for leave to realize on the indenture of mortgage and assignment of rents.

14 With respect to this particular legislation, I would like to refer to what is said by the court in *Meridian Dev. Inc. v. T.D. Bank; Meridian Dev. Inc. v. Nu-West Ltd.*, [1984] 5 W.W.R. 215, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, 53 A.R. 39 (Q.B.). At p. 113, Mr. Justice Wachowich said:

> 15 This Act, though little used, is one of a number of federal statutes dealing with insolvency. In common with the various other statutes, it envisages the protection of creditors and the orderly administration of the debtor's affairs or assets.

Then he cites authority for that proposition and continues [pp. 113-14]:

16 In the words of Duff C.J.C. who spoke for the court in *A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75:

> 17 ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

> 18 The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

19 I adopt that as a statement of the purpose of this legislation and the underlying purpose behind the order which was made on 7th April last. The particular problem that was dealt with in the *Meridian* case had to do with letters of credit, and there was consideration as to whether or not action upon that letter of credit demanding that it be honoured would amount to a proceeding. There was some discussion of that at p. 117 where he said:

> 20 ... I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act.

21 It is true insofar as that particular case is concerned what he said there is obiter dicta, but it underlines again the general purpose of the Act and the intent to put things in a position for a period of time so that action can be taken for the general welfare and well-being of the company and of the creditors of the company.

22 On that basis it would seem to me that the leave to act on the indenture of mortgage as is requested would be going too far and that that should not be permitted at this time. The time that I am talking about is the time period involved in the implementation of the order that was made in April. There are a number of applications with respect

to the procedures which should be followed which are pending before me at this time, but the proposal generally is that by the end of this summer the proposal should be made to the creditors and an opportunity to have their response to that proposal given to them so that the next steps can be taken.

23 In those circumstances and in that time frame I would not think that it would be appropriate to grant leave to Guardian to take any steps with respect to a foreclosure of the mortgage.

24 That leaves consideration of the assignment of rents. It seems to me that in the circumstances here Guardian was in a position as of 1st April, when there was default under the mortgage, that they then became vested with the right to take an assignment of the rents. The only step which had to be taken was notification of the tenants. There is in the affidavit material some indication that the petitioners in these proceedings generally were aware of the legislation by that time and were giving consideration to the steps which might be taken and which in fact were taken, resulting in the order of 7th April.

25 In those circumstances, it seems to me that Guardian's right to take action on the assignment of rents should be recognized. I cannot, in the circumstances, see that that would prejudice the other creditors. It was a right which was in existence prior to the order being made, and it seems to me as well, on the basis of what I have heard, that it would be in keeping with what has taken place concerning other mortgages. So in essence the recognition of the assignment of rents really simply puts Guardian in the position where they can receive moneys which they ordinarily would have received if matters had continued on the basis that had existed prior to 1st April. In those circumstances the assignment of rents should be recognized, but the application is dismissed with respect to taking any other proceedings or any proceedings in respect to the mortgage.

26 In those circumstances, since the success is divided, I think probably I should just leave the question of costs and make no order concerning costs.

Application allowed in part.

END OF DOCUMENT

Action No. 0901-11866

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, 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., 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.

Applicants

BRIEF OF LAW

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