Action No.: 0901-11866

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

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

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

BRIEF of 1533021 ONTARIO INC.
For Applications to be Heard Friday, December 4, 2009

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Introduction

1. The Applicants, through the Monitor, apply to extend the stay of proceedings and for an Order permitting a further advance of Debtor in Possession ("DIP") financing.

2. 1533021 Ontario Inc., is the 1st mortgagee of land owned by Orillia Investments Ltd. in Orillia, Ontario. It, along with other secured creditors, opposes any extension of these proceedings. It further seeks a direction of this Court that Orillia Investments Ltd. be exempt from the proceedings and that 1533021 Ontario Inc. be free to enforce its mortgage security as it sees fit.

3. It is submitted that the circumstances of this case do not warrant the extension of any further stay of proceedings or any further advance of DIP Financing. 1533021 Ontario Inc. has, and continues to be, prejudiced by a process which serves no useful purpose to it or the other creditors of the Shire Group. The Applicants have not satisfied any of the requirements for extending and expanding the CCAA process. The CCAA process, to the extent it involves Orillia Investments Ltd., should be brought to an end.

Secured Creditors are Prejudiced by these CCAA Proceedings

4. These proceedings are solely for the benefit of the former management of the Shire Group and a large group of unsecured creditors who made improvident investments in it. Secured creditors, such as 1533021 Ontario Inc., have and will receive no benefit from this process.

5. To date, the only parties who have benefited from this process are the management of Shire, which has had an investigation conducted at the expense of its creditors, and the class action litigants, who have been granted an advance of as much as $100,000.00 towards their legal costs. It is most anomalous that these parties, which have no security in the assets of the Shire Group and no claim to any priority, could have their legal and professional fees paid by the secured creditors as a group.

Transcript of Proceedings, October 8, 2009; p. 45; lines 30 - 39; p. 51, lines 23 – 25

6. The terms of secured lending arrangements reflect the risk of the loan and the perceived value of the security taken. Mortgagees, like 1533021 Ontario Inc., expect to be able to enforce their security in accordance with its terms in the event of a default. They further expect that the

Courts will enforce valid security agreements. These expectations have been thwarted by this process.

7. The secured creditors have been unable to enforce their security as they see fit and have seen their security postponed to other financing, for which they receive no benefit and which they may ultimately have to repay themselves.

8. 1533021 Ontario Inc. has been particularly prejudiced by these proceedings. It has attempted to enforce its security in a difficult real estate market in Ontario. However, it has been obliged to go to the trouble and expense of participating in proceedings in another jurisdiction in order to enforce its mortgage. This situation is neither fair nor reasonable.

9. In previous proceedings before this Court and the Court of Appeal, the Court has been persuaded that the secured creditors will not be prejudiced on the basis of a Table provided in the Monitor's Third Report, which intimated that there was equity of perhaps $16,900,000.00 within the Shire Group on a consolidated basis.

Transcript of Proceedings, October 8, 2009; p. 18, line 37 – p. 19, line 34; p. 33, line 20 – p. 35, line 1; p. 46, line 40 – p. 47, line 9

***Investit Financial v. Shire International Real Estate Investments*, 2009 ABCA 380 at para 5 & 11 [Tab 1]**

10. This Table was pivotal in obtaining the extended stay of proceedings and further DIP financing; however, it contained a material error such that the potential equity of the Shire Group, was overstated by at least $3,600,000.00. The Monitor now acknowledges that the equity of the Shire Group, on a consolidated basis, is no more than $12,099,000.00

Monitor's Seventh Report, November 19, 2009, Appendix "A"

11. The Monitor's revised analysis continues to overstate the equity in the Shire Group. In virtually every case the values provided by the Monitor are based on Shire's acquisition cost and do not reflect the best information available of contemporary property values. For example:

a) The Bearspaw Property is said to have equity of $900,000.00. In fact, the mortgages and other charges against that property currently approach the $9,000,000.00 value suggested by the Monitor. Even if that sum can be achieved for this project (and this is seriously in doubt) there is no equity.

b) The Fort McMoney Properties II property was suggested to have a value of $9,600,000.00, based on the price in a conditional offer to purchase. The conditions to that offer were not met and that sale has collapsed. The property was acquired in 2007 for approximately $4,700,000.00 and is burdened by a $6,500,000.00 mortgage. It is doubtful that there is any equity in this project.

Affidavit of D. Bodie, para 4, Exhibit "C"
Third Report of the Monitor, Appendix 2

c) The value of the Skaha Lake property appears to be on the order of $1,000,000.00 and not $2,500,000.00 as suggested by the Monitor. This results in an overstatement of the available equity by about $1,500,000.00.

Affidavit of D. Bodie, para 4, Exhibit "D"

d) The Tsehum Harbour property is said to have equity of $600,000.00. This property was the subject of proceedings before Justice Wilkins on November 4, 2009, where he made a finding of fact that there was no equity in that property. In light of this finding, it cannot be said that there is equity of $600,000.00 available to meet the expected DIP charges.

Transcript of Proceedings, November 4, 2009; p. 40, line 21 – p. 41, line 39

12. The Table also fails to include other costs and expenses which would be incurred in any realization. It will be necessary to pay significant real estate commissions and other professional fees to effect the sale of $30 million - $40 million in real estate assets. These costs are not reflected in the Monitor's analysis.

13. In addition, there may be tax liens or other similar encumbrances which will need to be discharged in the course of any sale (there are unpaid taxes in the Bearspaw project, for example). The Monitor does not appear to have analysed what other encumbrances may be charged against the title to these properties.

14. On any reasonable and conservative assessment, there is little or no equity in the Shire properties. The inevitable result of a continued stay of proceedings and extension of DIP

financing is that the cost of the process will be borne by the secured creditors, including 1533021 Ontario Inc.

15. Justice Wilkins recognized the prejudice that secured creditors face when their security is primed by a DIP financing charge and there is no equity in the property. He ordered that the DIP financing could not have priority in the case of the Tsehum Harbour project. The same result should follow with respect to the Orillia Investments Ltd. property.

Transcript of Proceedings, November 4, 2009; p. 30, line 31 – p. 32, line 20; p. 34, line 36 – p. 35, line 10

The CCAA Proceedings and the Receivership Serve No Useful Purpose

16. Orillia Investments Ltd. is a single project company whose only asset is a parcel of vacant land in Orillia, Ontario. The value of all claims against it is less than $5,000,000.00. Orillia Investments Ltd. is only subject to CCAA proceedings by reason of its membership in the Shire Group as a whole.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 3(1)**

17. Orillia Investments Inc. is unique in that it is the only Shire company that operates in Ontario. It was not managed in the same fashion as other members of the Shire Group. In these circumstances it makes little sense to include it within that group.

> "The Monitor understands that Shire's management maintained 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 understand (sic) 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."

Third Report of the Monitor, October 7, 2009 at para. 20

18. The evidence amply demonstrates that there is no equity in the Orillia Investments Inc. property. The most current appraisal of that property shows a value of $1,700,000.00. 1533021 Ontario Inc. has endeavoured to sell this property for nearly 8 months. The best offer received to date is $1,700,000.00, and that offer was ultimately withdrawn by the purchaser. It is presently unknown whether a comparable price can be achieved for this property.

Affidavit of G. Piccin sworn August 10, 2009; para 7 – 13; Exhibit "B"
Affidavit of G. Piccin sworn November 16, 2009; para 3 – 12, Exhibit "B"
Seventh Report of the Monitor, para 20; Appendix "A"

19. The indebtedness of Orillia Investments Ltd. to 1533021 Ontario Inc., exceeds the value of this property, once real estate and other professional costs are taken into account. It is probable that 1533021 Ontario Inc. will suffer some shortfall on its mortgage. There is no equity available for unsecured creditors of Orillia Investments Inc. or other members of the Shire Group.

Affidavit of G. Piccin sworn November 16, 2009; para 12

20. Given the location of this property, the Monitor has been unable to take any meaningful steps to evaluate this asset or realize upon it. 1533021 Ontario Inc. was in the process of enforcing its security when these proceedings commenced. It is the party which is best able to undertake that process. Of course, any steps taken to realize on the security will ultimately be subject to the supervisory power of the Ontario Courts. In these circumstances, 1533021 Ontario Inc. should be free to proceed with is realization unhampered by the burden of a CCAA process.

***Re Encore Development Ltd*, 2009 BCSC 13 at para 23 – 25 [Tab 2]**
***Re Octagon Properties Group Ltd*, 2009 ABQB 500 at para 14 & 17 [Tab 3]**

21. No useful purpose is served by maintaining this project within the ambit of the CCAA proceedings. There is no evidence or expectation that a higher or better value can be achieved for this project through a CCAA or a receivership process than can be achieved by the first mortgagee in enforcing its own security.

22. It is also increasingly obvious that the "restructuring" of the Shire Group will involve no more that an organized liquidation of its real estate assets. This is not a proper use of the CCAA.

***Cliffs Over Maple Bay Investments v. Fisgard Capital Corp,* 2008 BCCA 327 at para 27-33 and 36-37 [Tab 4]**

Transcript of Proceedings, October 8, 2009; p. 9, line 5 – p. 10, line 6

Lack of Good Faith and Due Diligence

23. In order to obtain an extension of the stay of proceedings, the Applicants must demonstrate that they have acted in good faith and with due diligence. In the case of Orillia Investments Inc., the Applicants cannot meet this standard.

***Companies' Creditors Arrangement Act, supra,* s. 11 (6)**

24. The Monitor has undertaken no meaningful investigation of the realization or development prospects of the Orillia Investments Ltd. property. In its Third Report, the Monitor offered this commentary about that property:

> "1533021 Ontario Inc. has also commenced foreclosure proceedings against the Orillia Property. The Monitor understands that the property was originally acquired for approximately $2,900,000.00 and the 1533021 Ontario Inc. mortgage is approximately $1,900,000.00.
>
> The Monitor comments that implementing the RFP process should clearly indicate the value of the property."

Third Report of the Monitor, October 7, 2009 at para. 255 & 256

25. That Report also contains some incomplete background information on this project in its Appendix. While interesting, none of that information is of any use in advancing a realization process.

26. This represents *all* of the due diligence that has been undertaken on this project. No further steps have been taken by the Monitor to evaluate this project or effect any realization of this asset since the Monitor prepared and filed its Third Report.

27. When 1533021 Ontario Inc. sought approval of the sale of the Orillia Investments Ltd. Property for $1,700,000.00 in late November, the Monitor raised concerns about whether the

property had been adequately and appropriately marketed and whether sufficient value had been obtained. Though it had concerns, the Monitor offered no information to validate those concerns.

Eighth Report of the Monitor, November 22, 2009 at para. 29 & 37

28. The reason that the Monitor was unable to address these concerns in November was that the Monitor had not conducted any due diligence on the Orillia Investments Ltd. property since the beginning of this process in August. This inactivity does not satisfy the due diligence requirements of the CCAA.

Conclusion

29. It has become increasingly apparent that these proceedings benefit only Shire's former management and its unsecured investor group. The secured creditors of the Shire Group, including 1533021 Ontario Inc., should not be expected to fund realization proceedings for the benefit of other parties.

30. It is now obvious that no useful purpose is being served by any CCAA proceedings as they relate to Orillia Investments Inc. That entity should be exempted from any further proceedings in this matter and 1533021 Ontario Inc. should be free to enforce its security as provided for by Ontario law and practice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Calgary, in the Province of Alberta, this 2nd day of December, 2009.

BROWNLEE LLP

Per: ______________________________

Peter R. S. Leveque
Counsel for the 1533021 Ontario Inc.

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