Q.B. Action No. 0901-11866
Registry: Calgary

IN THE ALBERTA COURT OF QUEEN'S BENCH

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.**

MEMORANDUM OF ARGUMENT

Relief Sought

1. Romspen Mortgage Corporation ("**Romspen**"), seeks an order:

   a) terminating the *CCAA* proceedings;

   b) lifting the *CCAA* stay and the stay imposed by the Receivership Order either generally or in respect to the Bearspaw property;

   c) Setting aside the DIP Facility in its entirety or, in the alternative, limiting the DIP Facility to the amount advanced under the Initial Order;

   d) in the further alternative, if the matter is to continue under the *CCAA*, and if the DIP Facility is not set aside, then orders to the effect that:

i) any further DIP funds spent are to be secured by charges against the unencumbered properties and/or charges subordinate in priority to the interests of the secured creditors generally or the Bearspaw mortgage specifically; and

ii) the DIP funds may be used only for purposes relating to the *CCAA* Applicants' business or to effect a plan of arrangement and not to defray the costs of any unsecured creditors.

Proceedings to Date

2. August 10, 2009: Initial Order granted by Madam Justice Kent providing for a stay of proceedings as well as debtor in possession ("**DIP**") financing in the amount of $1 million, an administration charge in the amount of $250,000 and a directors' charge in the amount of $250,000, all secured in super-priority to the interests of all creditors. The only companies excluded from the proceedings due to a lack of equity were associated with Mr. Couch's daughter (Couch August 7 affidavit para 24; September 2 affidavit p. 4)

3. August 27, 2009: Madam Justice Kent granted an Order amending the Initial Order to, *inter alia*, clarify that the stay does not affect the Alberta Security Commission's Cease Trade Order or its proceedings against the directors.

4. September 4, 2009: Madam Justice Kent extended the stay of proceedings to October 2.

5. October 2, 2009: Madam Justice Kent extended the stay of proceedings to October 8.

6. October 8, 2009: Mr. Justice LoVecchio granted:

a) An Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("***CCAA***"):

i) extending the stay of proceedings to December 8;

ii) extending the DIP Facility to $2.5 million;

iii) clarifying which terms of the Initial Order or the Receivership Order (see below) would prevail in the event of a conflict; and

iv) granting a receiver's charge in the amount of $250,000 in super-priority to the interests of all creditors as well as in super-priority to the administration charge and the increased DIP lender's charge (the directors' charge was removed due to the findings of the Monitor's investigation discussed further below); and

b) An Order under the *Judicature Act*, R.S.A. 2000, c. J-2 and the *Business Corporations Act*, R.S.A. 2000, c. B-9 appointing the Monitor, Ernst & Young, as Receiver-Manager (the "**Receiver/Monitor**") of all of the *CCAA* Applicants' assets and undertakings based on the concession that confidence had been lost in prior management.

7. October 16, 2009: Mr. Justice LoVecchio granted an Order pertaining to the notices to be provided by the Receiver/Monitor.

8. On or about October 27, 2009: Romspen and Investit Financial Inc. ("**Investit**") filed Notices of Appeal in respect to the Orders made on October 8, 2009.

9. November 4, 2009:

a) Romspen and Investit applied to the Court of Appeal for a stay of the Order extending the DIP Facility to $2.5 million – at the request of the Court, and by consent, the stay was granted to November 13;

b) Mr. Justice Wilkins found there was no equity in the Tsehum Harbour property, ordered that the *CCAA* stay was lifted as against Fisgard Capital Corporation's ("**Fisgard**") foreclosure proceedings and held that none of the charges in the Initial Order (as amended by the October 8 Order) could prime Fisgard's mortgage over the Tsehum Harbour property.

10. November 13, 2009:

a) Madam Justice Paperny heard Romspen and Insvestit's applications for a stay pending leave to appeal, which applications were denied by judgment pronounced November 16.

b) Mr. Justice Horner varied the October 8 Order, without prejudice to any arguments available to Romspen in respect to this issue, to allow the DIP Lender to waive the conditions precedent which had not been met.

11. November 23, 2009: Madam Justice Kent, at the request of the Receiver/Monitor, adjourned the application of 1533021 Ontario Inc. seeking court approval of the sale of the Orillia property for $1.7 million (a condition of the sale was court approval by November 24) on the basis that the property subject to the sale may not have been

sufficiently described in the contract. The sale collapsed in the absence of court approval and, as a result, the continuation of the hearing was unnecessary (Grillandini December 2 affidavit at Exhibit "B").

12. November 27, 2009: Mr. Justice LoVecchio ordered that:

a) the application of the *CCAA* Applicants and the Receiver/Monitor seeking confirmation that the October 8 Orders would have been made "had the true facts been before the Court" be put over to the hearing before Madam Justice Kent on December 4, 2009; and

b) the advanced but unspent DIP funds held in counsel to the Receiver/Monitor's trust account were to remain in that account pending further order of the court (understood to be approximately $968,000 of the $2,000,000 advanced representing the amount of the increased DIP facility net of the payout of the initial DIP lender as well as fees and costs).

13. Romspen and Investit agreed to adjourn the hearing of their applications for leave to appeal set for December 1 due to the November 27 Orders of Mr. Justice LoVecchio and the agreement of the parties that the adjournment would not be used in opposition to any arguments made on this application.

Facts

Parties

14. Romspen is a secured creditor of Shire International Real Estate Investments Ltd. ("**Shire**") pursuant to a mortgage loan participation agreement with Investit relating to a mortgage encumbering the Bearspaw property.

15. The 21 *CCAA* Applicants are Shire and 20 other single purpose real estate development project companies (the "**Project Companies**") (Couch Aug. 7th affidavit at para. 4). The *CCAA* Applicants are related companies that, prior to these proceedings, had common ownership and management. Ms. Cleone Couch was the President and sole Director of most of the *CCAA* Applicants (Couch Aug. 7th affidavit at para. 1), including Shire.

CCAA Applicants' "Business"

16. The *CCAA* Applicants were said to be in the business of financing, purchasing and contracting for the development of real estate (Third Report at para. 7). Only 7 of the Project Companies actually own real estate (Third Report pp. 19-20, 35-100). The properties are unrelated, unconnected plots of primarily bare land dispersed over various provinces and countries. None of the real estate owned by Shire or the Project Companies has been, or is currently, the subject of development (Couch Aug. 7th affidavit at para 10).

17. The *CCAA* Applicants are dormant, have no "going concern" operations and have "few staff" (Couch Aug. 7th affidavit at para. 35).

Restructuring Plan

18. The "restructuring", discussed over 3 of the Third Report's 208 pages, is a liquidation of assets by the Receiver/Monitor with the advice of, but no control by, a small number of "stakeholders".

Plan of Arrangement or Compromise

19. Since August 10, through the course all proceedings and 8 Reports of the Receiver/Monitor, the only reference to making an arrangement or compromise may be found in the 5th Report. The reference is to the effect that an arrangement is one option some *CCAA* Applicants *may* consider in the liquidation process. There is no indication as to what a realistic arrangement might look like.

Debtor in Possession Financing

20. The initial DIP Facility was used to fund a forensic investigation (the results of which are summarized below). The increased DIP Facility is intended to be used to carry out the liquidation process (apart from the $100,000 ordered to go towards defraying the costs of the investors party to the class action lawsuit) (Monitor's Supplemental Report at para 9). That is to say, the vast majority of the DIP Facility has paid, and is intended to be used to pay, professional fees.

21. The DIP lender's commitment letter provides for minimum advances of $500,000 at 18% interest. There is no evidence regarding what attempts, if any, were made to obtain the best possible terms.

Equity

22. Certain Orders in these proceedings appear to have been made on the basis of apparent equity in the assets of the *CCAA* Applicants. The existence of equity is the wrong test. As discussed below (under the heading "Inappropriateness of Debtor in Possession Financing"), it is also wrong in fact.

Monitor's Findings

23. The Third Report contains a number of findings impugning the *CCAA* Applicants' management and business structure. A primary finding is that of the approximately $67,400,000 raised from investors and placed in the Project Companies' bank accounts, $51,300,000 eventually was transferred into Shire's bank account (para. 17(k)). These inter-company transactions were performed without investor approval or supporting documentation and do not balance on the underlying general ledgers (para. 17(q)).

24. Ms. Couch, the president and sole director of Shire and the individual real estate development companies, appears to have personally benefited:

  a) Ms. Couch profited through transactions in which she has acted as a vendor, either personally or through a company in which she was associated, in sales of property to Shire or the individual real estate development companies (*inter alia*, paras 125 and 214);

  b) used corporate credit/funds for personal expenditures (para 17(f)-(h)); and

  c) had Shire finance related party (i.e. her daughter's company) land acquisitions or "joint ventures" through undocumented loans (*inter alia*, para 17(u)).

25. Other findings of note include:

a) Terms of offering memoranda were not followed, including:

i) Properties to be purchased were sometimes not acquired or acquired by entities other than as contemplated;

ii) Funds were not returned when a transaction did not complete; and

iii) Third party mortgages were obtained despite the fact that the Project Companies had sufficient funds from investors to complete the relevant property acquisitions (para. 17(v)).

b) Legal documentation and accounting information is incomplete or missing, both generally and in respect to significant transactions (paras 12, 14 and 17(a), (b) and (t)(i));

c) The *CCAA* Applicants have never filed income tax returns since inception (para. 17(c));

d) Financial statements were not created until after commencement of these proceedings (paras. 17 (e));

e) The *CCAA* Applicants' books and records are deficient and many are missing (paras. 17(a) and (b));

f) The value of the assets held by the Project Companies and Shire is significantly less than the total value of funds raised (para. 17(w));

g) Management has intermixed personal and corporate expenditures to a significant degree (paras. 17(f)-(h));

26. These activities resulted in, *inter alia*, an investigation by the Alberta, Saskatchewan and Manitoba Securities Commissions and concomitant issuances of Cease Trade Orders by those Regulatory Bodies. A class action lawsuit expressly alleging fraud was also brought on behalf of the investors (Couch Aug. 7th affidavit).

LAW

Preliminary

27. This may appropriately be considered a hearing *de novo*. A court may set aside an order made under s. 11 of the *CCAA* at any time if it concludes that the circumstances do not exist, or no longer exist, to make such an order appropriate (*Re Marine Drive Properties Ltd.*, 2009 B.C.J. No. 207 (S.C.) at para 29). Further, as the Initial Order was obtained *ex parte* and the first substantive Report of the Monitor arrived at 4:30 pm the evening prior to the hearing before Mr. Justice LoVecchio on October 8, this matter ought to be considered in light of all of the facts.

Lack of a Plan of Arrangement or Compromise

28. There is no evidence of an intention on the part of the *CCAA* Applicants to propose a plan of arrangement or compromise. The failure of the *CCAA* Applicants to offer a plan of arrangement or compromise is fatal to the continuation of these proceedings.

29. The fundamental purpose of the *CCAA* is to facilitate the making of compromises and arrangements between companies and their creditors. The *CCAA* is designed for the

Court to play a supervisory role in the maintenance of the status quo in order to give insolvent companies time to gain the approval of their creditors of a compromise or arrangement – unless it becomes apparent such approval will not be forthcoming (*Reference re Companies' Creditors Arrangement Act*, (1934), 16 C.B.R. 1 at 2 (S.C.C.); *Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)). As quoted from Holden & Morawetz in *Re Fracmaster*, [1999] A.J. No. 566 (Q.B.) at para 19:

> The C.C.A.A. has a broad remedial purpose giving a debtor an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to find a plan that will enable him to meet the demands of his creditors through refinancing with new lending, equity financing or the sale of the business as a going concern....
>
> [emphasis added]

30. In *Cliffs Over Maple Bay Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, two mortgagees appealed from an order extending the *CCAA* stay and authorizing a $2,300,000 DIP Facility. The B.C. Court of Appeal allowed the appeal on the basis that the chambers judge had failed to consider the fundamental purpose of the *CCAA*. As held by the Court at paras 26 and 31:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.
>
> ...
>
> The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Re Fairview Industries Ltd.* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Re Ursel Investments Ltd.* (1990), 2 C.B.R. (3d) 260

(Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

[emphasis added]

31. The Court of Appeal also expressed disapproval of any order extending the *CCAA* stay in the absence of a vote by the creditors where the intended course of action is: 1) a liquidation of assets (i.e. the RFP process in the present case); or 2) to allow the debtor companies to attempt to fulfil a critical prerequisite to a plan of arrangement (i.e. the ongoing investigation performed in the present case – if we were to assume an intention to eventually make a proposal).

32. In the case at bar, not only is there no evidence of an intention to propose a plan of arrangement, due to the nature of the "business" and the assets, it is inherently improbable that a realistic proposal could be made. There is no suggestion in the CCAA Applicants' or the Receiver/Monitor's materials as to what a suitable plan of arrangement might look like.

33. Further, as in *Re Octagon Properties Group Ltd.*, [2009] A.J. No. 936 (Q.B.), it is highly improbable that any compromise or arrangement proposed by the CCAA Applicants would be acceptable to the first mortgagees. Any proposed compromise or arrangement would be bound to fail.

Inappropriateness of the CCAA Proceedings

34. The key issue concerning the exercise of the Court's jurisdiction under the *CCAA* is whether a stay of proceedings against the debtor ought to be granted. The applicable

section of the *CCAA* (under the prior version of the Act as applicable here) is section 11(6) which provides as follows:

> The court shall not make an order under subsection (3) or (4) unless
>
> > (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
> >
> > (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

35. Thus, on the statute, the test is whether a stay is "appropriate in the circumstances". To the extent the Court has discretion as to whether a stay is appropriate, that is a discretion which must be exercised judiciously, on proper principles and upon giving appropriate weight to the relevant factors.

36. The circumstances of this case do not warrant the continuation of the *CCAA* process:

    a) there is no active business;

    b) there is no prospect of the business being revived;

    c) the assets consist of disparate and dispersed plots of bare land;

    d) there are no jobs at risk;

    e) there is no intention to make a plan of arrangement;

    f) any plan of arrangement would be bound to fail;

    g) secured creditors have not been treated equally;

    h) there was a justifiable loss of confidence in prior management; and

i) the interests of Shire and the unsecured creditors are best served by other processes – foreclosure and *Bankruptcy and Insolvency Act* proceedings respectively.

37. This appears to be the first case where a court has applied the *CCAA*, over objection of mortgagees, to a series of dormant, single purpose real estate development project companies.

38. The substantive facts at issue in the present case are not dissimilar to those at issue in *Re Encore Developments Ltd.*, 2009 BCSC 13. The *CCAA* Applicant in *Re Encore* was a real estate developer who owned six projects. None of those projects were undergoing development at the time of the application (three pieces of bare land, one unsold house, and two completed subdivisions of vacant lots). The Court held that the matter did not warrant the maintenance of the *CCAA* stay at paras 22 – 25:

> ...There was no project development work in progress. The projects were either bare land or completed subdivisions awaiting sale. There was no active business being carried out that required shielding by a *CCAA* stay.
>
> It is also probable that there was no equity in any of the projects. Contrary to the representations of Encore at the hearing of the petition, the reality is that there is a likely substantial shortfall to the secured lenders. The Marascape project has an existing shortfall on an "as is" basis.
>
> There is really no principled basis for putting in place or maintaining a stay that would prevent the real estate lenders from enforcing their security in the conventional manner should they so choose....
>
> [emphasis added]

39. In *Re Tuan Development Inc.*, 2007 BCSC 1827 Sigurdson J. considered *CCAA* proceedings involving a resort development on Salt Spring Island. Sigurdson J. noted that the mortgagee had opposed extension of the *CCAA* protection given the nature of the

business in issue – a dormant single project real estate development. While noting that there was merit to that argument, Sigurdson J. rejected that submission *because the mortgagee had consented to the initial CCAA order* (para. 36). In the present case, the Mortgagees have objected to the protection of the *CCAA* from the outset.

40. In *Re Redekop Properties Inc.*, 2001 BCSC 1892 the court refused to apply the *CCAA* to a company whose business was largely landholding noting, among other things, that the relevant protections could be provided by the court in foreclosure proceedings during the course of the redemption period (para. 58).

41. Indeed, the key protections under the *CCAA*, to the extent necessary in connection with a series of single purpose land development project companies, already exist in foreclosure. In any foreclosure proceedings by the mortgagees there will be a redemption period and an opportunity to market the project and/or to obtain alternate financing. The purpose of the redemption period and other protections available in the context of foreclosure are to give the borrower a reasonable opportunity to locate replacement financing, a buyer or an investor. Any sale by a mortgagee would require Court approval. Those protections, developed by courts of equity over the long history of foreclosure proceedings, are substantial and strike the appropriate balance between the rights of the parties.

42. That is why, in decisions relevant to the case at bar, the appropriate process has been held to be foreclosure (e.g. *Cliffs Over Maple Bay*, *supra*, *Re Encore*, *supra*, *Re Octagon Properties Group Ltd.*, [2009] A.J. No. 936 (Q.B.) and *Re Marine Drive Properties Ltd.*, *supra*). That conclusion is implicitly confirmed by the fact that secured creditors in the present case have been allowed to commence or continue foreclosure proceedings (e.g.

properties owned by companies associated with Ms. Couch's daughter, and that were subject to foreclosure, were excluded from these proceedings from the outset on the basis of a lack of equity; Fisgard was allowed by court order to pursue foreclosure in respect to the Tsehum Harbour property; and 1533021 Ontario Ltd. was allowed to continue with its foreclosure process in respect to the Orillia property while remaining subject to these proceedings).

43. Given the nature of the "restructuring" contemplated, it is relevant that a receiver(s) appointed by the creditors would be equally capable of selling the *CCAA* Applicants' assets (*First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 78 D.L.R. (4th) 585 (Ont. S.C.) and *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada*, [1992] O.J. No. 374, at para. 43)). There is no evidence that the secured creditors utilizing the rights they bargained for would be disorderly, inefficient or provide a lower return.

44. Any receiver(s) appointed ought to be answerable to the creditors and preserve and realize the assets for the benefit of the secured creditors. The receiver ought not to have a charge in priority to the interests of the secured creditors if not appointed by them (*Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 201 (Ont. C.A.)).

45. Further, the appointment of the Monitor as the Receiver in these proceedings gives rise to numerous concerns, both real and potential, in respect to conflicts of interests. Is the Receiver to monitor itself? Would the Monitor ever find itself in its role as the Receiver to be lacking in good faith and/or due diligence? Is the Monitor to ignore the profit it stands to make as Receiver where the appropriateness of continuing *CCAA* proceedings

arises? Is the proposal to be put forward by the Receiver? How does the Receiver/Monitor balance the duties it owes to parties with conflicting interests?

46. While there ought to be a forum where the concerns of the investors may be heard and addressed, *CCAA* proceedings are not designed or intended to be used for that purpose. A full array of appropriate procedures and mechanisms are provided by the *BIA*. A trustee in bankruptcy has sweeping powers to serve the interests of unsecured creditors, including: taking possession or obtaining orders for the production of books, documents and property, including those of third parties (ss. 16(3), 158(b), 164 and 189); commencing legal proceedings (s. 31(d)); selling or otherwise disposing of the bankrupt's property (s. 31(1)(a)); examining the bankrupt or any other person reasonably thought to have knowledge of the bankrupt under oath; etc. Indeed, the *BIA* has been used effectively in other recent, high profile matters involving alleged fraud (including the forensic investigation of a group of related companies), for example, in respect to the Ian Thow and Eron Mortgage matters (e.g. see, *Re Thow*, [2009] B.C.J. No. 1744 (S.C.)); .

Inappropriateness of Debtor in Possession Financing

47. These proceedings have too often focused on the Receiver/Monitor's chart and its "illustration" of "apparent" equity. That focus has been misdirected. The grant of debtor in possession financing is an extraordinary remedy, requiring "cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated" (*Re United Used Auto & Truck Parts Ltd.*, [1999] B.C.J. No. 2754 (S.C.), paras. 24 and 28). The Court's inherent jurisdiction to order such

financing and to grant "super-priority" over existing secured debt may only be exercised in extraordinary circumstances.

48. As noted in *Re United Used Auto* (quoting Blair J. in *Royal Oak Mines Inc.* [1999] O.J. No. 709 (Ont. G.D.)), DIP financing is only appropriate if used to "keep the lights on". The benefit provided by DIP financing must be to maintain or increase the value of the business as a going concern (*1252206 Alberta Ltd. v. Bank of Montreal*, 2009 ABQB 355). Indeed, the following summary shows DIP financing has been granted only where it is necessary to temporarily continue the existing ongoing active operations of the debtor:

Re Westar Mining, [1992] 6 WWR 331, 1992 Can LII 1863 (BCSC)	Active mining company. While DIP was ordered, there was no priority over secured creditors (see Re United Used Auto, supra) (para. 3).
Re Air Canada, 2003 CanLII 41831, [2003] OJ No. 1158 (SC)(QL)	Active airline, obviously with thousands of employees, with DIP financing necessary to provide "breathing space" for analysis, planning, negotiation and restructuring (para. 3).
Simpson's Island Salmon Ltd. 24 C.B.R. (5th) 13, 2006 NBQB 006	Active fish farm, requiring DIP financing to grow current harvest of salmon to maturity (paras. 8, 15, 18).
Re Smoky River Coal (2000), 19 CBR (4th) 281, 2000 ABQB 621	Active mine. DIP financing ordered to "keep the light of the company on" (para. 40).
Royal Oak Mines Inc., Re (1999), 6 CBR (4th) 314, 1999 CanLII 14840 (Ont. Gen. Div.)	The company had four active mines and 960 employees. The application for DIP financing was supported by the senior lenders (paras. 2, 3, 24).
Re Manderley Corp.,(2005) 10 CBR (5th) 48, [2005] O.J. No. 3900	Active turf producing business. No evidence that the secured creditor was at risk (paras. 3, 8, 25-27).

Re Federal Gypsum Co., (2007), 40 CBR (5th) 80, [2007] NSJ No. 558 (SC)	Active company with DIP financing necessary to permit company to remain in temporary operation (para. 31).
(2007), 40 CBR (5th) 39; [2007] NSJ No. 559 (SC)	On a subsequent application, further DIP to fund ongoing operations was approved over objection of secured lender, but in circumstances where 95% of burden or any loss of priority would be on government business development corporations, who supported the application (para. 42).
Re Skydome Corp., 1998 Carswell Ont 5922, 16 CBR (4th) 118 (Gen. Div.)	Active business with 160 full time employees and 1100 part time employees and DIP necessary to remain in operation (paras. 5, 6, 8).
Temple City Housing Inc. [2008] 2CTC. 61, 2007 ABQB 786	Active manufacturing company with 170 employees (paras. 3, 4).
Re Stomp Pork, 2008 SKCA 73	Substantial active hog producer in Saskatchewan. DIP was ordered to permit feeding of hogs.

49. In the present case, DIP monies have been, and are intended to be used to pay professionals. Initial DIP monies were used primarily to fund a forensic investigation. Further DIP monies are apparently intended to fund the liquidation of assets.

50. Here, the DIP financing would be used not as a shield, to "keep the lights on" or maintain an active business, but as a sword, to finance a liquidation process equally capable of being performed just as efficiently and effectively by the mortgagees. If DIP funds are denied, no jobs would be lost, as there are none. No "operations" would cease, as none are ongoing.

51. It seems that certain Orders have been made in these proceedings on the basis that there appeared to be sufficient equity to cover the DIP Facility. As discussed above, to the extent that was the test applied, it was wrong in law. The premise was also wrong in fact.

There is a real and significant potential for prejudice to the secured creditors generally, and the Bearspaw mortgage specifically, if any DIP Facility is granted super-priority as:

a) there is significant negative equity in the Bearspaw property;

b) there is significant negative equity, or to use Mr. Justice LoVecchio's word, no "coverage", if the assets are viewed on a consolidated basis; and

c) it is probable that there is insufficient equity in any combination of the assets to cover the charges contained in the Intitial Order (much less the extended DIP Facility of the October 8 Order).

52. The Receiver/Monitor's chart at page 35 of the Third Report has been a common point of reference in these proceedings. The chart and the values it ascribes to the *CCAA* Applicants' properties were mischaracterized, or perhaps insufficiently explained, before Mr. Justice LoVecchio. This is of more than usual importance as the Third Report was delivered at 4:30 p.m. the day prior to the hearing. This left insufficient time for the respondents and the Court to review the voluminous materials to their satisfaction in advance of the hearing (p. 3, lines 7, 11 –12 and 16 – 18 of the transcript of proceedings). The matters referred to include:

a) It was submitted that the values were based mostly on appraisals (p. 18, line 19 of the October 8 transcript). That was incorrect. Only two of the values were actually based on appraisals. One of those two appraisals (Fort McMoney) was the subject of the above noted \$3.6 million error and had originally been obtained by prior management for financing purposes. The second appraisal (Bearspaw) was performed by the appraiser who had two years previously valued the property for prior management at $14 million (i.e. $4 – 6 million in excess of the new appraisal).

b) It was submitted that, as between the appraised values and the purchase prices, the lower values had been used (p. 48 of the transcript). While technically correct, it is submitted this fact would not have provided comfort to the Court in relation to the reliability of the values had it been first advised: 1) only two of the figures were from appraisals; 2) the nature of those two appraisals; and 3) no party disputes that the properties were purchased at inflated prices (sometimes from related parties and all at the height of the market between 2007 and 2008).

c) Important passages from the Third Report were not brought to the Court's attention. The Monitor/Receiver wrote at p. 35 "The Monitor cautions that the properties have been disclosed at the purchase price paid or the recent appraised value…*[the chart] is to provide an illustration* of the estimated assets and corresponding liabilities *and the values may not be indicative of current market values*" and more explicitly at p. 36 "The Monitor cautions that *the above information is based on the Applicants' books and records and is for illustrative purposes*" (in light of the investigative findings at, *inter alia*, para 17 of the Third Report, that pertain to the Applicants and their records, it is submitted that the values, if properly characterized, would have been given no weight).

d) The fourth column of the "Project Analysis" portion of the chart is entitled "Purchase Price Less Mortgages" and indicates it totals "a+b+c". That is incorrect. The column treats the net equity of the MWS property as nil when, if one adds "a+b+c", the net equity is actually -$8,024,900. If the $3.6 million error giving rise to the Reconsideration Motion is taken into account together with the MWS deficiency, then on the *CCAA* Applicants' own values (as discussed above, totally unreliable and, as discussed below, entirely discredited by events occurring subsequent to October 8) the column would have totalled $5,074,100 – not $16,699,000. This is of particular importance as, in making his Orders, Mr. Jusice LoVecchio relied on the apparent net equity of the properties on a *consolidated basis* (p. 49, line 5 of the transcript of proceedings).

53. More relevant to the matter at hand is that the values contained in the chart have been shown to be significantly overstated by events occurring subsequent to the October 8 hearing. These events include:

a) Mr. Justice Wilkins' finding of fact on November 4, 2009 that there is no equity in the Tsehum Harbour property (negative difference of $600,000) (Bodie November 25 affidavit at Exhibit "B");

b) The Skaha property was appraised at between approximately $800,000 and $1,400,000 (using the mid-point, negative difference of $1,400,000) (Bodie November 25 affidavit at Exhibit "D");

c) The conditions were not removed on the conditional sale of the Fort McMoney II property and that sale appears to have collapsed (negative difference of about $6,384,000) (Bodie November 25 affidavit at Exhibit "E");

d) 1533021 Ontario Ltd.'s foreclosure proceedings have resulted in a high offer of $1,700,000 and the sale appears to have collapsed (negative difference of about $1,200,000) (Monitor's 7th Report);

e) An error in respect to the value ascribed to the Fort McMoney property came to light (negative difference of $3,600,000) (Monitor's 7th Report); and

f) It has become clear no party disputes that Shire and the *CCAA* Applicants bought properties at inflated values (at times, from prior management, companies controlled by prior management or from persons associated with prior management).

54. The following is an updated version of the chart:

Project	Purchase price/appraised value (note 1)	Third party mortgages (note 2)	Mortgage Units	Purchase price less mortgages (note 3)
	a	b	c	a+b+c
Bearspaw	6,632,500	(8,600,000)		(1,967,500)
Chemainus	522,600			522,600
Ft McMoney	3,400,000	(1,900,000)		1,500,000
Ft McMoney II	3,216,000		(6,490,000)	(3,274,000)
Halama Gardens				
Hawaii Fund				
Orillia	1,700,000	(1,900,000)		(200,000)
Shire Capital				
Skaha Lake	1,100,000			1,100,000
Tsehum Harbour	2,900,000	(2,900,000)		0
MWS	2,000,000		(11,024,900)	(9,024,900)
Project Companies	21,471,100	(15,300,000)	(17,514,900)	(11,343,800)
Shire	4,250,480	(3,635,000)		615,480
Total	25,721,580	(18,935,000)	(17,514,900)	(10,728,320)

Note 1: Bearspaw estimated value is the mid point between the high and low values of the two independent appraisals obtained by Investit.
Chemainus value is the Feb. 2006 purchase price of $780,000 reduced by 1/3 (to conservatively reflect properties acquired before economic down turn and that no party disputes properties acquired at inflated prices).
Fort McMoney value determined by Tony Omura appraisal dated October 10, 2008 (appraisal will be forthcoming that determines a lower value).
Fort McMoney II based on Dec. 2006 purchase price of $4,800,000 reduced by 1/3.
Orillia based on highest offer in 1533021 Ontario Inc.'s foreclosure proceedings and Monitor's 7th report.
Skaha based on mid-point of appraised estimates obtained by Investit.
Tsehum based on Wilkins J.'s finding of fact that there is no equity and his order that no charges may prime that property.
MWS based on May 2008 purchase price reduced by 1/3.
Shire assets' values based on purchase prices reduced by 1/3.

Note 2: Other than Bearspaw, no mortgage amount has been increased despite that interest and legal costs have continued to accrue (and also do not account for real estate agent's commissions).
Shire net equity does not reflect deficiencies on certain properties (para. 61, note 3) as the amounts are unknown.

Note 3: If purchase prices not reduced by 1/3, net equity is - $5,793,400.
Column total treats assets and liabilities on a consolidated basis.

55. Finally, it is worth noting that the DIP lender and the Receiver/Monitor are unwilling to accept charges other than those in super-priority to the interests of all creditors.

Allocation of the Debtor in Possession Financing

56. If the matter is to continue under the CCAA, and if the DIP Facility is not set aside, then:

i) any further DIP funds spent ought to be secured by charges against the unencumbered assets and/or charges subordinate in priority to the interests of the secured creditors generally or the Bearspaw mortgage specifically; and

ii) the DIP funds ought to be directed to be used only for purposes relating to the CCAA Applicants' business or to effect a plan of arrangement and specifically not to defray the costs of any unsecured creditors.

for Counsel for Romspen, Greg J. Tucker

Q.B. Action No. 0901-11866

IN THE ALBERTA COURT OF QUEEN'S BENCH

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.**

MEMORANDUM OF ARGUMENT

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