

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
BEAR MOUNTAIN MASTER PARTNERSHIP, BEAR MOUNTAIN DEVELOPMENT
HOLDINGS LTD, 18 ON 18 DEVELOPMENTS LTD., AND BEAR MOUNTAIN RESORT
MANAGEMENT CORP.

BETWEEN:

HSBC BANK CANADA

PETITIONER

AND:

BEAR MOUNTAIN MASTER PARTNERSHIP
and others

RESPONDENTS

APPLICATION RESPONSE

Application response of : HSBC Bank Canada (“HSBC”)

THIS IS A RESPONSE TO the Notice of Application of Turner Lane Development Corp.
 (“Turner Lane”) filed July 20, 2010.

Part 1 ORDERS CONSENTED TO

HSBC consents to the granting of none of the orders set out in Part 1 of the Notice of
Application.

Part 2 ORDERS OPPOSED

HSBC opposes the granting of all of the orders set out in Part 1 of the Notice of Application.

Part 3 ORDERS ON WHICH NO POSITION IS TAKEN

HSBC takes no position on the granting of none of the orders set out in paragraphs of Part 1 of the Notice of Application.

Part 4 FACTUAL BASIS

1. Capitalized terms used herein have the same meaning as those provided in the Consolidated Plan of Arrangement (the "Plan") filed by the CRO on behalf of the Debtors pursuant to the Procedural Order of this Court made July 5, 2010.
2. HSBC initiated these CCAA proceedings. HSBC is by far the largest creditor of the Respondents, being owed in excess of \$250 million. HSBC propped up the Respondents prior to the commencement of the proceedings in order to facilitate the completion or en bloc sale of the Development, believing either of these options to be in the best interests of all creditors, as opposed to a liquidation by secured creditors of their individual collateral. To that end, HSBC advanced more than \$25 million in the 14 months preceding the Initial Order, and has advanced in excess of \$5 million under its existing credit facilities since that date.

First Report of the CRO dated May 14, 2010, para. 40

3. All of the Assets are encumbered by, among other things, mortgages and general security agreements granted by the Respondents in favour of, among others, HSBC, BMO, Romspen and CareVest. There would be no funds available to make payments to the unsecured creditors (including HSBC in respect of the unsecured portion of its claims) of any of the Respondents in the event of a bankruptcy of the Respondents or other liquidation scenario.

First Report of the CRO dated May 14, 2010, paras. 28-31
Fourth Report of the CRO dated June 28, 2010, paras. 47, 48

4. Pursuant to the Procedural Order, the CRO was authorized to file the Plan on behalf of the Debtors and to present the Plan to the General Creditors for their approval at a

Meeting to be convened by the Monitor. In its Fourth Report to the Court in support of its application for the Procedural Order, the CRO opined that :

- (a) the Plan was “fair and reasonable”, in part because: (i) the ability of the Respondents to continue in business and Present the Plan was due to ongoing funding by HSBC; (ii) there would be no recovery for unsecured creditors in the event of liquidation; and (iii) despite a lengthy marketing process, no other offers had been made for the Development; and
- (b) it was appropriate to file a consolidated plan of arrangement, in part because: (i) some key contracts were entered into by more than one of the Debtors; (ii) it was unclear in some cases which Debtors certain creditors contracted with; (iii) there was no equity in the Assets after the claims of secured creditors; and (iv) it would be costly and create administrative complications to pursue multiple plans of arrangement.

Fourth Report of the CRO dated June 28, 2010, para. 48

- 5. Following its appointment, the CRO determined that certain suppliers were critical to the Development and, accordingly, that it was necessary to pay their pre-filing debts to ensure continued supply of goods and services to the Development. On May 20, 2010, the CRO obtained an Order of this Court authorizing it, *nunc pro tunc*, to make payments on account of pre-filing obligations to suppliers deemed by the CRO to be critical and declaring that the claim of each such supplier paid by the CRO (the “Assigned Claims”) would be deemed to be assigned to HSBC. All payments made to critical suppliers were, of course, funded by HSBC.

**First Report of the CRO dated May 14, 2010, para. 36
May 20, 2010 Order of this Court**

- 6. Under and pursuant to the Plan:
 - (a) there is one Class consisting of the General Creditors, which effectively consists of the Debtors’ unsecured creditors, including secured creditors for their deficiency claims. HSBC is a General Creditor for its deficiency claim and the unsecured Assigned Claims;
 - (b) the Assets, with certain exceptions, are to be transferred to one or more wholly-owned subsidiaries of HSBC, which will continue to market and sell the Assets;

- (c) General Creditors (other than HSBC) are each to receive \$500 on or before the Implementation Date and are thereafter entitled to their pro rata share of one-third of the net proceeds realized from the sale of the Assets in the next three years; and
 - (d) the Claims of all General Creditors, except HSBC, are to be compromised and released. HSBC's unsecured claim against the Debtors survives and its secured claims continue to encumber the Assets.
7. Turner Lane was given notice of these CCAA proceedings and of the hearing of the Petition. It chose not to file an Appearance in these proceedings, in part because: (i) it anticipated that its unsecured claim would be significantly compromised in the proceedings; and (ii) it filed a proof of claim and believed it would be entitled to vote on any plan of arrangement presented to creditors.

Affidavit #1 of Leslie Bjola, sworn July 20, 2010, paras. 5, 7

Part 5 LEGAL BASIS

8. It is too late for Turner Lane to object to the Plan, other than as to its fairness at the application for the sanction order. Turner Lane had notice of the proceedings and chose not to become involved because it expected its claim to be significantly compromised. Its opportunity to make submissions concerning whether the Plan ought to be filed on a consolidated basis and as to proper classification was on the application for the Procedural Order. Had Turner Lane simply filed an Appearance, it would have had notice of that application and could have made submissions during the two days over which the motion was argued. Instead, it chose to lie in the weeds and raise its concerns weeks after the Procedural Order was made.

Re Armbro Enterprises Inc. (1993), 22 C.B.R. (3d) 80 (Ont. Comm. Ct.) at para. 9

9. It is noteworthy also that Turner Lane has not given notice to all the other creditors of its application to have the Plan withdrawn, notwithstanding that to do so may well be contrary to their interests in seeing a recovery under the Plan.

Overview

10. The three concerns raised by Turner lane in relation to the Plan appear to be as follows:
 - (i) whether it ought to be filed on a consolidated basis; (ii) the classification of the creditors; and (iii) whether the Plan is fair and reasonable. Generally, the time for considering issues regarding:
 - (a) the classification of creditors, is before the meeting(s) of creditors to vote on the plan of arrangement; and
 - (b) the time for considering issues regarding the fairness of the plan of arrangement, is on the application for the sanction order.
11. Questions pertaining to the fairness and reasonability of a plan of arrangement, including as to whether a secured creditor should be entitled to vote its deficiency claim in support of a plan of arrangement, whether a creditor included in a class has a conflict of interest, whether a creditor should be entitled to vote multiple claims of other creditors that it has acquired, are questions of fairness to be decided on the application for the approval order (otherwise referred to as a “fairness hearing”).

Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 12 (ACQB) at paras. 34, 35, 46
Re San Francisco Gifts Ltd. (2004), 5 C.B.R. (5th) 92 (ABQB) at para. 47
Highland Capital Management, LP v. Uniforet Inc. (2003), 40 C.B.R. (4th) (QSC) at para. 15

The Filing of a Consolidated Plan

12. The Court will permit the filing of a consolidated plan of arrangement based on the balancing of equities. The primary issue is whether there is any evidence that doing so will result in any additional prejudice to one or more creditors. Additional considerations include the intertwining of the debtors’ business operations, difficulty in segregating assets, unity of interests in ownership and the existence of intercorporate loan guarantees. Most significantly, where there is no evidence of a meaningful difference in recoveries for creditors of each of the debtors, a consolidated plan is appropriate.

Re Atlantic Yarns Inc., 2008 NBQB 144 (NBCQB) at paras. 29-36
Re Canadian Airlines Corp., *supra*, at para. 43

13. As reported by the CRO (noted in paragraph 4, above), there are at least four reasons that a consolidated plan of arrangement ought to be filed in this case. Generally, those reasons can be summarized as indicating that there was a distinct lack of corporate identity, both in terms of how the Debtors operated their business and in terms of which of the Debtors various creditors have claims against. This alone would militate in favour of a consolidated plan of arrangement.
14. The overriding factor in this case is that all of the Debtors' assets are over-encumbered and unsecured creditors (i.e. the ones affected by the Plan) would recover nothing if the Plan were to fail. In other words, there is no prejudice, only a benefit, to the General Creditors resulting from the consolidated Plan. In that regard, creditors of the Debtor Bear Mountain Master Partnership are in no different position, notwithstanding that as creditors of a partnership they also have claims against the general partners. In the event of a bankruptcy and liquidation, the general partners' assets vest in the partnership estate, the assets of which are charged in favour of HSBC.

Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, section 141(1)

Classification of Creditors

15. Creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest taking into account the nature of their legal rights, the nature and rank of any security they may have for their claims and the remedies available to the creditors in the absence of the arrangement being sanctioned. The Court must consider the nature of the creditors' legal rights vis-à-vis the debtor, and not vis-à-vis other creditors, and in that regard, the Court may consider what effect the bankruptcy of the debtor would have on the claims sought to be included in one class.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, section 22(2)
Re San Francisco Gifts Ltd., supra, at para. 11
Re Canadian Airlines Corp., supra, at para. 19

16. In considering the classification of creditors, the "non-fragmentation" approach is preferred to the "identity of interest" approach so as to avoid the creation of a multiplicity

of classes and the ability of creditors to create veto positions for themselves. In other words, classes should only be broken up where absolutely necessary to recognize significant, material distinctions among the creditors.

Re Woodward's Ltd. (1993), 20 C.B.R. (3d) 74 (BCSC)
Re San Francisco Gifts Ltd., supra, at paras. 11, 30

17. The identity of the creditors to be included in a class and their reasons for supporting or opposing a plan of arrangement are irrelevant considerations, so long as their legal interests are the same as other creditors in the class and there is no bad faith in their inclusion.

Re Canadian Airlines Corp., supra, at paras. 19 and 27

18. In circumstances where one or more creditors in the class are to be treated differently under the plan of arrangement than other creditors in the same class, it may be appropriate to include those creditors in a different class. That is not, however, always the case. Where the party funding the plan of arrangement is treated preferentially, but the plan is otherwise fair to creditors, the funding party may be included in the same class as the other creditors. This is reflected in the comments of Blair J. in *Re Armbro Enterprises Inc., supra* (at para 6): "RBC's co-operation is a sine quo non for the Plan, or any plan, to work, and it is the only creditor continuing to advance funds to the Applicants to finance the proposed reorganization. It does not seem unfair or unreasonable to me that it should receive some additional incentive to support the Plan."

Re Woodward's Ltd. (1993), 20 C.B.R. (3d) 74
Re San Francisco Gifts Ltd., supra, at para. 49
Re Uniforet Inc. (2003), 43 C.B.R. (4th) 254 (QSC) at paras. 20, 21
Re Armbro Enterprises Inc., supra, at para. 6

19. Under the Plan, HSBC's unsecured claims (as distinct from those of other General Creditors) are not to be compromised, but rather continue as against the Debtors. That is not objectionable in this case, for several reasons, first and foremost of which is the fact that HSBC (an arm's length creditor) is the party funding these proceedings and the Plan itself. In addition, HSBC is not to receive any distribution under the Plan and (unless any

of the Assets are transferred to one of the Debtors pursuant to the Plan) its claims will remain against shell companies only. Its only hope of recovery would likely be through a sale of the company to a party seeking to utilize tax losses.

20. In, the claims of HSBC to be included in the General Creditors Class consist of its deficiency claim and the claims of other General Creditors assigned to it in accordance with the May 20, 2010 Order of this Court. It is trite that deficiency claims can be voted as unsecured claims in a class of unsecured creditors in CCAA proceedings, as may assigned claims, though both are issues for the fairness hearing.

Re SemCanada Crude Company (2009), 57 C.B.R. (5th) 205 (ACQB) at paras. 23 and 25

21. There is no legal distinction between HSBC's claims against the Debtors and those of the other General Creditors. All are arm's length creditors whose claims arise out of their contractual relationships with various of the Debtors. In the event that the Plan fails and there is a bankruptcy or liquidation of the Debtors, HSBC's deficiency claim and the claims assigned to it, as well as the claims of the other General Creditors, will go unsatisfied.
22. There is no doubt that HSBC supports the Plan, and well it should. It is the party that initiated these CCAA proceedings in recognition of the fact that the completion of the Development or its sale en bloc as a going concern was in the best interests of all creditors, including itself. To that end, it has financed every step of the process and is the party funding the Plan, all of which will cost several millions of dollars. Nothing in HSBC's actions could constitute bad faith.
23. Under the Plan, as distinct from the other General Creditors, HSBC's unsecured claims

Part 6 MATERIAL TO BE RELIED ON

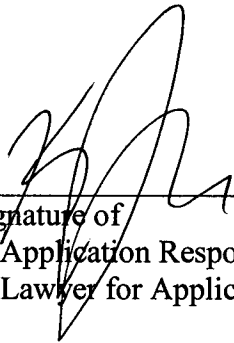
24. Affidavit of Leslie A. Bjola sworn July 20, 2010;
25. Affidavit of Marshall Curtis sworn March 24, 2010;
26. First Report of the CRO dated May 14, 2010; and

27. Fourth Report of the CRO dated June 28, 2010

The Application Respondent estimates that the application will take four hours.

- The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.
- The Application Respondent has not filed in this proceeding a document that contains an address for service. The Application Respondent's ADDRESS FOR SERVICE is: N/A.

Dated: 23-Jul-2010



Signature of
 Application Respondent
 Lawyer for Application Respondent

Kibben Jackson

The Solicitors for HSBC Bank Canada are Fasken Martineau DuMoulin LLP, whose office address and address for delivery is 2900 - 550 Burrard Street, Vancouver B.C. V6C 0A3 Telephone: 604 631 3131 Facsimile: 604 631 3232. (Reference: Kibben Jackson/245056.217)