Court of Queen's Bench of Alberta

Citation: Shire International Real Estate Investments Ltd. (Re), 2011 ABQB 654

Date: 20111027
Docket: 0901 11866
Registry: Calgary

In the Matter of 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 Harvour 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 Holding Ltd.

Memorandum of Decision
of the
Honourable Madam Justice C. A. Kent

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[1] I heard two applications with respect to the sale of one of the properties at issue in this case. One was an application by Olympia Trust Company to amend the allocation for payout of the DIP financing. The current allocation was premised upon a fair market value of Ft. McMoney of $10,000,000.00. The sale that I approved was for $6,000,000.00. Olympia Trust argues that they then have an unfair allocation of the DIP financing.

[2] The problem with Olympia's argument is that some other properties have already been sold and therefore their portions of the DIP financing have crystalized. The result would be that the remaining unsold properties, Ft. McMoney I and Orillia, would take a larger portion of the allocation even if their properties sold for a price less than fair market value. Given the history of the sales of all the other properties, that is likely. As said by one of the counsel, given that we are in the middle of this process, it is difficult to "unscramble the egg".

[3] Trying now to readjust the DIP allocation to make it more fair would make it even less fair for the remaining unsold properties. I cannot unscramble the egg so the DIP allocation remains as it currently stands.

[4] The second application is with respect to the distribution of the sale proceeds of the money in the Ft. McMoney II project. There is a mortgage registered, with the amount owing including interest of approximately $9,600,000.00. As stated earlier the Property sold for $6,000,000.00.

[5] Counsel for some unsecured investors in the Shire properties claims that the money should not be paid out only to the unitholders of the Ft. McMoney II mortgage. Rather, the money should be held in trust for the benefit of all investors until the outcome of an ongoing action against the Shire group and others or in the alternative make a *pro rata* distribution to all investors of the Shire group rather than simply to the mortgage unit holders.

[6] By way of background, the Shire Group solicited funds from a number of investors by promoting land projects in a variety of jurisdictions. In fact, the scheme was no more than a 'Ponzi' scheme. Some of the unsecured investors commenced an investors'action against a number of defendants. They are claiming a tracing of funds, freezing assets, an accounting and disgorgement of profits. Dealing specifically with the Ft. McMoney II property, when this action was under *CCAA* supervision, the monitor was able to obtain some facts about the investment. There was an offering memorandum dated March 24, 2008. That memorandum indicated that Shire planned to raise up to $6,500,000.00 in mortgage units with the proceeds to be used to repay certain mortgages and fund the development of the property. At the time that memorandum was issued, the property was secured by a mortgage from Quest. It also is not in dispute that $1,300,000.00 of other investor money was used to purchase Ft. McMoney II. $4,700,000.00 was raised as a result of the memorandum. In addition $1,860,000.00 of other investor money was apparently put against the property. It is not clear what money paid out the Quest mortgage; whether it was all money from the Ft. McMoney unit holders or some from those unit holders and some from the $1,860,000.00 million of co-mingled funds.

[7] Counsel for the unsecured investors argues that it was simply a matter of luck or chance that unitholder money was secured by the Olympia Trust Mortgage. This case is like cases which have held that any recovery should be distributed *pro rata* amongst all affected investors as opposed to preferring those who happened to be lucky enough to have their investment secured against a profitable property. Counsel refers to *Holden Financial Corp. v. 411454 Ontario Ltd.* [1992] [O.J. No. 1783]. In that case, Holden Financial Corporations (HFC) was a mortgage broker. It solicited investors to provide funds for investment in mortgages to be held by HFC. Investors were given a receipt for the investment they made. That receipt was dated, identified the maturity date of the interest of the investment and the interest rate payable. The funds that were received were held in HFC's Trust account until they were advanced to fund mortgages. Eventually a receiver was appointed. The receiver sought direction from the court with respect to the payout of the net proceeds of the assets. The court decided that the proceeds be payed out on

a *pro rata* basis amongst all the investors. One of the arguments was that priority should be given to those whose investment was secured against the land. The court found that the registration in this case was created by the fraudulent acts of HFC and therefore should not otherwise defeat the interest of other investors.

[8] One of the investors had argued that he could identify the property which was security for his funds. The court said that no investor, not even he, could establish that their funds were the specific funds used to advance under a specific security. At page 13 of the judgment, Rosenberg, J. said the following:

> In all cases the actions by HFC as previously listed negated any specific ownership of the security. Once the trust funds and trust investments have been improperly dealt with and monies improperly taken each of the investors is in the position of being unable to trace their specific funds and therefore the trust with regard to that specific amount attributable to each investor has been mixed and cannot be traced.

[9] There are two sets of co-mingled funds that were put into the Ft. McMoney II property. The first is the $1,300,000.00 of investor money used to purchase Ft. McMoney II. Those investors are no different than any other owner of property at the time of the foreclosure. If there is not enough money realized from the sale of the property, they lose their investment. The second set of co-mingled funds is the $1,860.00.00 that was injected into the property. I acknowledge that it may well have been dollars from that fund that helped pay off the Quest mortgage and dollars from the money obtained from the offering memorandum that was lost. However, this case is different then the cases cited by the investors' group. In those cases, the money came in, was put into a joint account and then placed against properties without the investors having specifically chosen the property in which they wanted to invest. Even in Holden, the facts as described by the court are that the money came in from investors without the investors identifying the properties which they chose. In my view, in a case where investors like the Ft. McMoney II investors put forward their money specifically in response to an offering memorandum they are entitled to be paid out upon foreclosure in priority to investors who did not.

[10] In the result, the net sale proceeds will be paid to Olympia pursuant to the trust indenture.

Heard on the 21st day of October, 2011.
Dated at Calgary, Alberta this 27th day of October, 2011.

Justice C.A. Kent
J.C.Q.B.A.

Appearances:

Karen Fellowes / H. Lance Williams
Davis LLP
for Olympia Trust Company

Cory Ryan
Borden Ladner Gervais LLP
for Jennifer Lofgren

Scott Stephens
Owen Bird
for Romspen