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2011 CarswellQue 13411, 2011 QCCS 6376, J.E. 2012-365, EYB 2011-199183

Homburg Invest Inc., Re

In the matter of the plan of compromise or arrangement of: . . . Homburg Invest Inc., Debtor-Petitioner, and The Entities Listed In Annex 1, Debtors-mises-en-cause, v. The Cadillac Fairview Corporation Limited, Statoil Canada Ltd., Bos Solutions Ltd., Canadian Tubular Services Inc., Keywest Projects Ltd., Mhi Fund Management Inc., Spt Group Canada Ltd., Premier Petroleum Corp., Tucker Wireline Services Canada Inc., Surge Energy Inc., Moe Hannah McNeill LLP, Logan Completion Systems Inc. and CE Franklin Ltd., Mises en cause, and Samson Bélair/Deloitte & Touche inc., Monitor

Quebec Superior Court

Gouin J.C.S.

Heard: November 7 - November 18, 2011

Judgment: December 5, 2011

Docket: C.S. Qué. Montréal 500-11-041305-117

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Me Jocelyn Perreault, for Monitor

Me Gerry Apostolatos, Me Stefan Chripounoff, for Statoil Canada Ltd.

Me Mark E. Meland, for Cadillac Fairview Corporation Limited

Me Louis Dumont, Me Martin Poulin, for Tucker Wireline Services Canada Inc.

Me Mathieu Lévesque, for BOS Solutions Ltd., Canadian Tubular Services Inc., Premier Petroleum Corp, Moe Hannah McNeil LLP

Me Alexandre Panneton, for Surge Energy Inc.

Me Philippe G. Giraldeau, for Taberna Europe CDO I PLC, Taberna Europe CDO II PLC, Taberna Preferred Funding VIII, Ltd. and Taberna Preferred Funding VI, Ltd.

Me Joseph Reynaud, for Trustees

Subject: Insolvency; Property

Gouin J.S.C.:

1. INTRODUCTION

1. INTRODUCTION

1 The Court is seized with an « *Amended Motion for an Order Confirming the Re-Assignment and Assignment of certain Agreements and the Release of HII's Obligations under these Agreements* » (the « *Motion* ») pursuant to Sections 11, 11.3 and 32 of the *Companies' Creditors Arrangement Act*[FN1] (the « *CCAA* »), and presented by the Debtor Homburg Invest Inc. (« *HII* »).

2 The Motion is made further to various disclaimer notices relating to lease, assignment and sublease agreements with respect to premises (117,568 square feet) in a « B » rated building located at 635, 8th Avenue South West, in Calgary, Alberta (the « *Premises* »), and other related agreements, amongst HII and the mises-en-cause.

3 Essentially, HII is requesting an order to be released from its obligations under these agreements in order to achieve a viable compromise or arrangement in its CCAA proceedings.

4 The granting of such an order would have the effect of enforcing immediately the obligations and undertakings of the mise-en-cause Statoil Canada Ltd. (« *Statoil* ») under these agreements vis-à-vis the landlord and subtenants of the Premises.

5 Capitalized terms not otherwise defined herein have the same meaning as in the Motion.

2. MOTION WILL BE GRANTED

6 The Court will release HII from its obligations under the Assignment, the Head Lease and the Subleases, and will enforce the re-assignment of the Head Lease and the assignment of the Subleases to Statoil, in accordance with the contractual default remedial procedure already provided for under the Assignment and the NDAs.

3. RELEVANT FACTS

7 The Head Lease[FN2] between The Cadillac Fairview Corporation Limited (« *Cadillac* »), as landlord, and Statoil, as tenant, dated October 11, 2005, provides for the renting of the Premises, for a term of up to June 30, 2018, in consideration of a total monthly rental of approximately \$567,000, namely a yearly basic rent of approximately \$34 per square foot, plus operating costs, taxes and other sums agreed to be paid thereunder.

8 At the end of 2009, Statoil needed larger premises and became aware that HII was looking to sublet space it had taken over in an « AA » rated building located in Calgary, called « *Jamieson Place* », for nearly the same basic rent per square foot as for the Premises.

9 Thus, the market rental was favourable for such a move by Statoil, although the yearly basic rent per square foot for the Premises was then down to approximately \$15 to \$16[FN3].

10 However, HII had to agree to take over the Premises and the related Head Lease, and Statoil was to remain liable for all of the tenant's obligations[FN4] thereunder.

11 Statoil clearly knew that HII, a real estate investment and development company, did not intend to use the Premises, but rather to sublease it to third parties.

12 Therefore, in order to protect itself against lower rental to be expected from subtenants of the Premises, Statoil proposed to Cadillac that, in the event of a default by HII under the Head Lease, Cadillac would allow the subtenants to remain in the Premises on the same terms and conditions as in the subleases (the « *Proposed Assignment* »)[FN5].

13 Cadillac refused the Proposed Assignment.

14 The Assignment[FN6] of the Head Lease, as proposed by Cadillac, was signed on April 5, 2010 between Cadillac, Statoil and HII, providing, *inter alia* :

[. . .] Notwithstanding the within assignment (or any disaffirmance or disclaimer of the within assignment), the Assignor shall remain liable during the balance of the Term of the Lease for the observance and performance of all the terms, covenants and conditions contained in the Lease. »[FN7]

15 Moreover, Statoil undertook to pay to Cadillac an assignment fee of \$2.5 million (the « *Assignment Fee* »), to be unaffected by any disclaimer or termination of the Head Lease[FN8].

16 As expected[FN9], HII sublet the Premises to eleven Subtenants[FN10], at a yearly basic rent of approximately \$14 per square foot.

17 Cadillac consented to each and every Sublease, subject to the following :

[. . .] The Sub-Tenant shall be jointly and severally liable with the Tenant to observe and perform the Tenant's obligations in the Lease with respect to the Subleased Premises; »[FN11]

Only the Subtenant, Surge Energy Inc. was successful in limiting its liability to \$14 per square foot.

18 In order to protect their exposure under this joint and several liability with HII, each of the Subtenants requested that, concurrently with the Subleases, NDAs (Non Disturbance Agreements) be signed with Statoil [FN12], providing, *inter alia*, for the latter's obligation to cure[FN13] a default of HII[FN14] :

2. OBLIGATION OF STATOIL TO CURE

If at any time prior to the expiration of the Sublease Agreement :

- (a) The Landlord intends to terminate the Head Lease due to the default of Homburg;
- (b) The Landlord delivers a notice of default (the « **Notice of Default** ») to Homburg;
- (c) The Landlord provides Statoil with a copy of the Notice of Default; and
- (d) Homburg fails to rectify the default (the « **Default** ») specified in the Notice of Default within the required time;

then Statoil shall, without further notice or demand, exercise its rights contained in the Assignor's Right to Cure. In particular and without limiting the generality of the foregoing Statoil shall:

- (i) rectify the Default within the required time;

(ii) accept the reassignment of and assume all of the rights and privileges of and fulfill and perform all of the covenants, duties and obligations of the Tenant under the Head Lease; and

(iii) honour the rights of the Subtenant pursuant to the New Sublease Agreement (as defined below).

19 This obligation of Statoil to cure a default of HII under the Head Lease and provided in the Assignment [FN15], is as follows :

11. ASSIGNOR'S RIGHT TO CURE - If the Landlord intends to terminate the Lease, the Landlord agrees to deliver to the Assignor a copy of the notice of default which the Landlord delivers to the Assignee. The Assignor shall have the same period of time to remedy the default as the Assignee plus an additional five (5) business days and upon the rectification of such default by the Assignor all rights of the Assignor under the Lease and all of the rights of the tenant under the Lease shall be reassigned to the Assignor without the requirement of any further documentation and the Assignee shall surrender up possession of the Premises to the Assignor forthwith. Upon such reassignment the Assignor shall be entitled to all rights, title, estate, interest and benefits arising under the Lease, including without limitation the right to all rents and benefits arising under any subleases of the Premises. All the forgoing shall be without prejudice to all rights and remedies which the Assignor may have against the Assignee in respect of any breach of the Lease by the Assignee or which the Landlord may have against the Assignee or Assignor pursuant to the Lease of this Agreement.

20 On September 13, 2011, further to HII's default to pay the September 2011 rental (\$561,279.56) under the Head Lease, Cadillac sent a Notice of Default[FN16] to HII and Statoil, requesting the payment thereof on or before September 19, 2011, failing which it would exercise all available rights and remedies, including, at its option, the right to terminate the Head Lease.

21 Cadillac did not request from this Court the lifting of the HII Stay before sending the Notice of Default.

22 On September 16, 2011, upon receipt of the Notice of Default, François Parent of Statoil wrote the following email[FN17] to Wendy L. Cardell of Cadillac :

[. . .] I have in fact received the letter and we are currently consulting with our counsel on the issue prior to making any sudden moves.

Statoil will assume its responsibilities in the matter, no worries.

23 On September 27, 2011, Statoil remedied HII's default by paying \$561,279.56, and François Parent wrote the following email[FN18] to Wendy L. Cardell :

[. . .] We are aware of the contract agreements, and, as stated before, we will take-on our responsibilities, but, also will be waiting for Deloitte's report to agree that all contractual agreements can take effects (sic).
[. . .]

24 On September 30, 2011, and with the Monitor's approval, HII served upon Cadillac and Statoil the Head Lease Disclaimer[FN19] and the Assignment Disclaimer[FN20], both dated September 29, 2011, and to be effective on October 31, 2011.

25 On September 30, 2011, and also with the Monitor's approval, HII served upon each Subtenant the Subtenant Notices[FN21], including the Notices of Consequential Termination of Sublease, dated September 29, 2011, and to be effective on October 31, 2011.

26 On October 5, 2011, HII paid to Cadillac the rent for the period of September 9 (the date of the Initial Order) to October 31, 2011; therefore, Cadillac received double the rental payment for the period from September 9 to September 30, 2011.

27 Cadillac confirmed to the Court that it is keeping in trust this over payment, subject to the parties' respective rights. On the other hand, the second instalment of the Assignment Fee was not paid by Statoil on October 31, 2011, as provided in the Assignment[FN22], nor was the November 2011 rental.

28 On October 5, 2011, Statoil sent a letter[FN23] to Cadillac to advise that the \$561,279.56 for the September 2011 rent was paid in error: (i) HII had already paid the rent for the period of September 9 to October 31, 2011, and (ii) the Notice of Default was a nullity, having been issued in violation of the HII Stay. It therefore demanded the return of the funds.

29 On October 11, 2011 and further to requests received from certain Subtenants pursuant to Section 32(8) of the CCAA, HII provided the HII Reasons[FN24], explaining that it was not economic for HII to retain the Head Lease, the rent payable thereunder being significantly higher than the rents received under the Subleases.

30 As a matter of fact, the expected aggregate net loss for HII, up to the end of the Head Lease's term, would be approximately \$22,573,260.17[FN25], including the tenant improvement costs, namely a monthly net loss of approximately \$245,000, without the tenant improvements.

31 Cadillac and the Subtenants had initially applied to this Court to contest the Head Lease Disclaimer, the Assignment Disclaimer and the Subtenants Notices (the « *Applications* »), but they are prepared to desist from the Applications in the event the Motion is granted.

32 Essentially, the Motion aims at enforcing the various steps to be followed further to HII defaulting under the Head Lease, the whole as provided under section 11 of the Assignment[FN26], and under section 3 of the NDAs[FN27] :

3. TERMINATION OF SUBLEASE AGREEMENT AND ATTORNMENT

Concurrent with Statoil again becoming Tenant under the Head Lease as provided in paragraph 2 above; the Sublease Agreement and all rights of the Subtenant and Homburg as Sublandlord thereunder shall simultaneously terminate. Statoil and the Subtenant agree that the Subtenant shall then immediately be deemed to have attorned to Statoil as subtenant under a new sublease and to have entered into a new sublease agreement (the « **New Sublease Agreement** ») for the remainder of the term of the Sublease Agreement (the « **Remainder Term** »). The New Sublease Agreement and such attornment shall be upon all of the same terms and conditions as the Sublease Agreement as applicable only to the Subleased Premises, except that :

(I) the Sublandlord shall be Statoil;

(II) the term of the New Sublease Agreement shall be the Remainder Term;

(III) notices to be provided to the Sublandlord shall be redirected to Statoil at the address indicated in

paragraph 5 of this Agreement; and

(IV) no credit shall be given for any security deposit or prepaid rent paid by the Subtenant under the Sublease Agreement which has not, as such, been been (sic) transferred to Statoil.

And provided that :

[. . .]

The New Sublease Agreement shall be effective on the date the Head Lease is reassigned to or deemed to have been reassigned to Statoil pursuant to the exercise of the Assignor's Right to Cure. [. . .]

33 Therefore, in addition to requesting a release of its obligations under the Head Lease, the Assignment and the Subleases, HII asks that the contractual default remedial procedure provided under the Assignment and the NDAs be implemented and that Statoil step into the shoes of HII.

4. POSITION OF PARTIES

4.1 Position of HII

34 At the time of the issuance of the Initial Order on September 9, 2011, HII was already in default under the Head Lease, having not paid the September 2011 rental.

35 When Cadillac issued the Notice of Default[FN28] on September 13, 2011, the HII Stay was in effect, but it did not affect Statoil's on-going obligations towards Cadillac and the Subtenants under the Head Lease, the Assignment and the NDAs.

36 Upon the expiry of the delay stipulated in the Notice of Default to cure the default, Statoil was obliged, pursuant to Section 2 of the NDAs[FN29] and Section 11 of the Assignment[FN30], to cure the default.

37 As a matter of fact, Statoil complied with this first step and, on September 27, 2011, it remedied HII's default. Its payment was not made in error, but rather to satisfy Statoil's obligations under the Assignment and the NDAs.

38 This contractual default remedial procedure provides also for concurrent steps, namely the re-assignment of the Head Lease to Statoil, and the execution of new subleases with the Subtenants and Statoil, as sublandlord, upon the same terms and conditions as the Subleases, with the few exceptions listed under section 3 of the NDAs.

39 Therefore, no matter (i) the HII Stay, (ii) HII's eventual plan of compromise or arrangement, (iii) the requested release of HII's obligations under the Head Lease, the Assignment and the Subleases, and (iv) whether or not HII proceeds with any of the Head Lease Disclaimer, the Assignment Disclaimer and the Subtenant Notices, Statoil will not be released, in any way, from any of its contractual obligations to Cadillac or the Subtenants under the Head Lease, the Assignment and the NDAs; neither was any such effect ever intended.

40 On the contrary, section 11 of the Assignment and sections 2 and 3 of the NDAs were specifically written to protect Cadillac and the Subtenants in the event of HII's default under the Head Lease

41 Accordingly, in order to avoid any undue delay prejudicial to Cadillac's, and the Subtenants', clear rights,

the Court should order the immediate enforcement of all the steps of the contractual default remedial procedure provided under the Assignment and the NDAs.

42 The foregoing is under reserve of the filing by Statoil, and any other interested person, of restructuring claims pursuant to HII's eventual claims process and plan of compromise or arrangement under the CCAA.

4.2 Position of Statoil

4.2.1 No urgency to proceed with the Motion

43 Statoil pleads that there is no urgency in proceeding with the Motion as ordered by the Court[FN31]. It contends that it did not have a reasonable period of time to prepare for the Motion's hearing.

4.2.2 The Court has no jurisdiction and HII has no legal standing

44 Statoil argues that the Court does not have the jurisdiction to hear the Motion and HII does not have the legal standing and interest to advance the Motion, for the following reasons :

a. the Court cannot decide on contractual rights and obligations which :

- (i) are governed by the law of Alberta;
- (ii) relate to Premises located in Alberta;
- (iii) have a « real and substantial connection » to Alberta; and
- (iv) for which the parties are resident in Alberta;

therefore, the Motion should be adjudicated upon by the Alberta civil courts[FN32];

b. the relief sought under the Motion is not inextricably connected to HII's restructuring as it affects contractual rights and obligations amongst third parties; furthermore, pursuant to Section 11.3(1) of the CCAA, the Court cannot authorize the assignment of agreements to a non-agreeing party.

4.2.3 Subsidiarily, the Assignment Disclaimer should be annulled

45 *Subsidiarily*, Statoil maintains that the Assignment Disclaimer should be annulled for the following reasons :

a. on a preliminary basis :

- (i) Statoil did not contest the Assignment Disclaimer because it is a named party in Cadillac's contestation and therefore benefits from Cadillac's contestation which enables it to appear and argue at the hearing thereof;
- (ii) now that Cadillac is prepared to desist from its contestation, Statoil should be authorized to file its own contestation and the time period to do so should be extended accordingly;

b. the Court's broad discretionary powers do not allow circumventing Section 32(9)(d) of the CCAA which prevents expressly a lessor [sublessor] from disclaiming a lease [sublease];

- c. HII has not established the prospects for a viable compromise or arrangement pursuant to Section 32(4) of the CCAA;
- d. Statoil will suffer significant hardship; and
- e. the Assignment Disclaimer was issued without first being discussed with Statoil, as provided under the Initial Order.

4.2.4 *Subsidiarily, the relief sought cannot be granted as Statoil has not exercised its option to cure HII's default which, in any event, is subject to conditions precedent, not yet satisfied*

46 *Subsidiarily*, Statoil maintains that the contractual default remedial procedure is subject, *firstly*, to conditions precedent being satisfied and, *secondly*, to Statoil exercising its option to cure HII's default, which it is not obliged to do as per the Assignment.

47 Indeed, in the event the conditions precedent are satisfied, Statoil maintains that:

- a. under the Assignment, Statoil has the option to cure HII's default, to have the Head Lease re-assigned to it and to be obligated towards Cadillac thereunder; and
- b. under the NDAs, Statoil has the obligation to cure HII's default vis-à-vis Cadillac, to have the Head Lease re-assigned to it and to honour the rights of the Subtenants under the Subleases.

48 At paragraph 68 of its contestation of the Motion, Statoil adds: « *While there may be some ambiguity as to what legal consequence is effected as a result of the satisfaction of the condition precedents (sic), the condition precedents (sic) themselves are completely unambiguous* ».

49 Those conditions precedent[FN33] are the following:

- a. Cadillac manifests its clear intent to terminate the Head Lease by way of notice or otherwise to Statoil;
- b. Cadillac delivers a notice of default to HII, with a copy to Statoil; and
- c. HII fails to rectify the default specified in the notice within the required time.

50 In accordance with Alberta law, the conditions precedent should be given their literal and « unambiguous » meaning.

51 Applying such an interpretation, Statoil maintains that : (i) it has not been notified *yet* by Cadillac of its *clear* intent to terminate the Head Lease, (ii) no notice of default has been *properly* sent to HII *yet*, the HII Stay having never been lifted, and (iii) the September 27, 2011 default payment by Statoil of \$561,279.56 to Cadillac was issued *in error*[FN34].

52 Therefore, Statoil concludes that the conditions precedent having not been satisfied, its option and obligation under the Assignment and the NDAs have not been triggered, and the relief sought in the Motion cannot be granted.

4.3 Position of Cadillac and Subtenants

53 Cadillac and the Subtenants support the Motion and, if it is granted, they will desist from their contestation of the Head Lease Disclaimer, the Assignment Disclaimer and the Subtenant Notices.

5. ISSUES TO BE CONSIDERED

54 The Court will consider each of the following issues :

- a. Was there urgency in proceeding with the Motion as ordered by the Court?
- b. Does the Court have jurisdiction to hear, and adjudicate upon, the Motion and does HII have the legal standing and interest for the relief sought under the Motion?
- c. What are Statoil's obligations under the Assignment and the NDAs, and were the conditions precedent satisfied?
- d. Is there any reason not to release HII from its obligations under the Head Lease, the Assignment and the Subleases, and therefore not to enforce the contractual default remedial procedure provided under the Assignment and the NDAs?

6. ANALYSIS

6.1 Was there urgency in proceeding with the Motion as ordered by the Court?

6.1.1 Case Management Order #5 dated November 7, 2011

55 On November 7, 2011, Statoil requested that the hearing be postponed to prepare its defence and preliminary objections.

56 While the Court was mindful of giving Statoil reasonable time, it was also concerned about the « uncertainty » resulting from the ongoing litigation and its impact on the Subtenants and HII's restructuring.

57 Therefore, the Court refused the postponement and ordered the parties to commence the hearing, with the understanding that the continuation and completion thereof would be on November 18, 2011, thereby giving the parties additional time to finalize their preparation.

58 In these circumstances, the Court ordered the parties to agree on a timetable as provided under Case Management Order #5, dated November 7, 2011.

6.1.2 CCAA procedural process

59 The CCAA, as business driven legislation, aims at protecting insolvent debtors while restructuring their enterprises.

60 The economic and human uncertainty in such situations are of first importance, and the legislator has given the courts the necessary powers and broad discretion under the CCAA[FN35] to proceed efficiently and expeditiously[FN36].

61 The parties are required to move fast in raising issues and arguments to be considered by the courts [FN37].

62 During the hearing, the Court asked Statoil to explain clearly the arguments supporting its position and, except for legal technicalities, it has failed to raise one solid substantive argument. It just wants time to turn over each possible stone and explore all means of defence.

63 Such a position is unacceptable in a restructuring process, particularly in a context where eleven Subtenants are kept wondering whether or not they would be entitled to move into the Premises, or be entitled to stay in the Premises upon paying the rent provided in the Subleases.

64 The present clear circumstances, as related above, demand rapid and innovative solutions to avoid unnecessary prejudice and damages to multiple stakeholders.

65 Fortunately, the legislator has provided the Court with the necessary power to face such a situation; the Court will exercise it.

6.2 Does the Court have jurisdiction to hear, and adjudicate upon, the Motion and does HII have the legal standing and interest for the relief sought under the Motion?

66 The Court is of the opinion that it has jurisdiction to hear, and adjudicate upon, the Motion pursuant to Section 11 of the CCAA and its inherent jurisdiction, and that HII has the legal standing and interest to seek the relief thereunder.

6.2.1 Applicable laws

67 It is not because the Head Lease, the Assignment, the NDAs and the Subleases are governed by the laws of Alberta, that the courts of Alberta have exclusive jurisdiction over this matter[FN38]. In any event, it is consistent with Alberta law for this Court to adjudicate the rights of the parties thereunder[FN39].

68 If it were otherwise, the supervising court in CCAA proceedings would become a « dispatching » court every time there arose a litigious matter governed by the laws of a different province. This is certainly not what the legislator intended in creating an efficient restructuring process under the CCAA.

69 On being properly advised by the parties' experts on the applicable principles and rules, the supervising judge is in a position to adjudicate upon matters submitted for his or her consideration.

70 There is « one command centre » in a restructuring process, and it is with the supervising court which issued the initial order pursuant to Section 11.02(1) of the CCAA.

6.2.2 Third parties rights

71 Statoil argues also that the Court has no jurisdiction as it is requested to adjudicate upon contractual rights and obligations amongst third parties. Statoil also submits that HII does not have standing to present such request, which should be dealt with by the civil courts.

72 But, the Court is being asked to release HII of its obligations under agreements which provide for a specific solution in the event HII defaults thereunder. It is, what the Court calls, the « *contractual default remedial*

procedure ».

73 It implies the re-assignment of the Head Lease to Statoil, and a kind of assignment of the Subleases to Statoil, and the parties are requesting the Court to enforce the related steps provided thereunder.

74 Statoil is not being forced to accept assignments; it is simply being asked to respect its undertakings; it is not in contravention of Section 11.3 of the CCAA.

75 The Court is of the opinion that it has the power to enforce the contractual default remedial procedure, thereby minimizing the prejudice and potential claims in HII's restructuring[FN40].

76 The advantages of doing so outweigh the disadvantages[FN41], and it is supported by the Monitor [FN42]; therefore, the Court will permit its implementation.

6.3 What are Statoil's obligations under the Assignment and the NDAs, and were the conditions precedent satisfied?

6.3.1 Statoil's obligations

77 The Court is of the opinion that there is no ambiguity in interpreting the Assignment and the NDAs.

78 The parties knew exactly what they were negotiating, and the contractual default remedial procedure has been put in place to deal with a depressed rental market and an eventual HII's default.

79 That depressed market, on the one hand, served Statoil's purposes in permitting its moving from a « B » rated building to an « AA » rated building but, on the other hand, prompted Cadillac and the Subtenants to protect themselves in requesting Statoil to undertake to fill in the financial gap, if need be.

80 Statoil has adopted quite an awkward position in arguing that section 11 of the Assignment[FN43] gives it an « option », but not an obligation, to cure HII's default, while recognizing that it has no such option vis-à-vis the Subtenants pursuant to section 2 of the NDAs[FN44], but an obligation to cure HII's default.

81 When asked by the Court what was the alternative to its « alleged option », Statoil replies « to simply refuse meeting » its obligations, thereby forcing a tripartite damages litigation, before the civil courts of Alberta, between itself, Cadillac and the Subtenants.

82 The real debate would then only be with respect to mitigation of damages.

83 This is just unacceptable.

84 But, as further argued by Statoil, in any event, as the conditions precedent have not been satisfied, its obligations under the Assignment and the NDAs have not been triggered yet.

6.3.2 Conditions precedent

85 As mentioned above, those conditions precedent are the following:

- a. Cadillac manifests its clear intent to terminate the Head Lease by way of notice or otherwise to Statoil;

- b. Cadillac delivers a notice of default to HII, with a copy to Statoil; and
- c. HII fails to rectify the default specified in the notice within the required time.

6.3.2.1 Notice to terminate the Head Lease

86 Statoil argues that Cadillac has not as yet sent to it a notice of intent to terminate the Head Lease, or otherwise indicated that it intended to terminate the Head Lease.

87 Section 11 of the Assignment[FN45] does not provide for such a notice, nor section 2 of the NDAs [FN46].

88 Furthermore, the Notice of Default[FN47] clearly states that failing payment of the sums claimed therein, Cadillac :

[. . .] will, without further notice to you, exercise all rights and remedies as are available to it at law, including at its option, terminating the lease.

89 In any event, the Court is of the opinion that Statoil has been clearly notified that Cadillac was considering terminating the Head Lease.

6.3.2.2 Notice of Default sent to HII, with a copy to Statoil

90 Statoil maintains that no notice of default has been properly sent to HII, the HII Stay having never been lifted.

91 Statoil is correct that, before sending the Notice of Default to HII, Cadillac should have obtained a lifting of the HII Stay, but this was not necessary to put Statoil on notice.

92 In any event, if need be, the HII Stay could be lifted on a *nunc pro tunc* basis to permit the sending of the Notice of Default[FN48].

6.3.2.3 Erroneous payment issued by Statoil to Cadillac

93 Statoil maintains that the September 27, 2011 default payment by Statoil of \$561,279.56 to Cadillac was issued in error[FN49].

94 At the time the payment was made, the September rent had not been paid by HII and therefore, pursuant to subsection 7(a) of the Assignment[FN50], Statoil had an obligation towards Cadillac to pay it.

95 The Court retains from the proof that Statoil did not make the September 27, 2011 payment in error, including, *inter alia*:

- a. the September 16, 2011 email from François Parent of Statoil to Wendy L. Cardell of Cadillac[FN51]
;
- b. the September 27, 2011 email from François Parent of Statoil to Wendy L. Cardell of Cadillac[FN52]
;

c. the Payment advice from Statoil to Cadillac, dated September 27, 2011, with the reference « DEFAULT - HOMBURG 09/13/2011 »[FN53].

96 It appears to the Court that Statoil changed its strategy after the payment. This is not a payment made in error.

6.3.3 Conclusion

97 Statoil does not raise any substantive argument to support its position. Its reliance on very technical issues indicates simply a desire to avoid its clear obligations under the Assignment and the NDAs.

6.4 Is there any reason not to release HII from its obligations under the Head Lease, the Assignment and the Subleases, and therefore not to enforce the contractual default remedial procedure provided under the Assignment and the NDAs?

6.4.1 Restriction under Section 32(9)(d) of the CCAA

98 Statoil argues that, by its Motion, HII is in fact disclaiming the Subleases, in contravention of Section 32(9)(d) of the CCAA.

99 However, what is being asked of the Court is not a disclaimer of the Subleases, but that new sublease agreements, incorporating the same terms and conditions as the Subleases, with a few exceptions, be entered into between Statoil and the Subtenants, the whole in accordance with section 3 of the NDAs[FN54].

100 The Subleases will terminate as a consequence of the enforcement of the contractual default remedial procedure but, simultaneously, there will be execution of new subleases with Statoil, as sublandlord, and the Subtenants, as the new subtenants.

101 Thus, the Court is of the opinion that what is being proposed is not in contravention of Section 32(9)(d) of the CCAA.

6.4.2 Prospects for a viable compromise or arrangement

102 Statoil argues that the Assignment Disclaimer is not supported by the prospects for a viable compromise or arrangement pursuant to Section 32(4)(b) of the CCAA.

103 Firstly, it is not necessary that a proposed disclaimer be essential for the restructuring; it has to be advantageous and beneficial[FN55].

104 Secondly, the proof is uncontradicted: HII does not occupy, but only manages, the Premises, and it will keep incurring a recurrent net monthly loss of \$245,000 up to June 30, 2018, excluding tenant improvements [FN56].

105 The Monitor confirms that the Assignment Disclaimer will enhance the prospects for a viable compromise or arrangement, while minimizing, or even, eliminating entirely, any losses of Cadillac and the Subtenants resulting therefrom[FN57], thereby reducing potential claims to be filed in HII's plan of compromise or arrangement.

106 The benefit is self-evident : HII must eliminate this ongoing liability if any plan of compromise or arrangement is to be filed.

6.4.3 Hardship suffered by Statoil

107 Statoil, the Canadian subsidiary of a global multi-billion dollar oil and gas exploration and production company, with approximately 37,000 employees worldwide[FN58], certainly assessed its risks when it signed the Assignment and the NDAs.

108 At that time, the Premises were to be vacated and the annual market rent per square foot was between \$14 and \$16, while it was \$34 under the Head Lease.

109 Statoil is a sophisticated entity and could foresee the financial impact of its undertakings under the Assignment and the NDAs. It cannot, today, argue under Section 32(4)(c) of the CCAA that the Assignment Disclaimer is causing it significant financial hardship.

6.4.4 No prior discussion pursuant to paragraph 28(e) of the Initial Order

110 Paragraph 28(e) of the Initial Order provides for a disclaimer « to be on such terms as may be agreed between HII and the relevant party ».

111 What ever might be agreed between HII and Statoil with respect to the ensuing restructuring claim by Statoil in HII's plan of compromise or arrangement, will have no effect at all on Statoil's obligations vis-à-vis Cadillac and the Subtenants.

6.4.5 Conclusion

112 Therefore, the Court is of the opinion that there is no need to extend the delay to permit a contestation by Statoil of the Assignment Disclaimer as, at the end of the day, the Head Lease will still stand, but with Statoil as tenant, and the Subleases will, indirectly, still stand, but with Statoil as sublandlord, the whole in accordance with the contractual default remedial procedure agreed to by the parties under the Assignment and the NDAs [FN59], and which survive any disclaimer[FN60].

113 In refusing to respect its clear obligations and undertakings under the Assignment and the NDAs, Statoil is causing prejudice and financial hardship to Cadillac and the Subtenants, and to HII's restructuring process.

114 The Court is of the opinion that granting the order sought is a fair, equitable, practical and efficient solution to HII's default under the Head Lease.

114 *FOR ALL THE ABOVE REASONS, THE COURT:*

115 *DISMISSES* Statoil's contestation of the Motion;

116 *DISMISSES* Statoil's request for an extension of the delay to permit a contestation by it of the Assignment Disclaimer;

117 *DECLARES* that, for all legal purposes, the conditions precedent provided for under section 11 of the Assignment and section 2 of the NDAs have been satisfied, and *ORDERS* that all the steps of the contractual de-

fault remedial procedure provided therein and in section 3 of the NDAs be implemented immediately;

118 *PRAYS ACTE* of the undertaking of Cadillac not to terminate the Head Lease and to consent to the re-assignment of the Head Lease to Statoil;

119 *DECLARES* that, as of the date of this Order (the « *Assignment Date* »), all rights and obligations of Statoil under the Head Lease assigned to HII pursuant to the Assignment are re-assigned to Statoil, and *ORDERS* HII to surrender possession of the Premises (as defined in the Assignment) to Statoil, as at the Assignment Date;

120 *DECLARES* that, in conformity with the terms of the Head Lease and the Assignment, Statoil remains liable to remedy all monetary defaults under the Head Lease and the Assignment;

121 *DECLARES* that, as at the Assignment Date, the rights of the Subtenants and of HII under the Subleases are terminated, and that the Subtenants are deemed to have attorned to Statoil as sublandlord under new sublease agreements for the remainder of the term of the Subleases and upon all of the same terms and conditions as contained in the Subleases, as contemplated under the NDAs and, for greater clarity, save for the exceptions provided at section 3 of the NDAs (the « *New Sublease Agreements* »);

122 *PRAYS ACTE* of Statoil's undertaking in the NDAs to honour the rights of the Subtenants pursuant to the New Sublease Agreements, and *DECLARES* that Statoil has the obligation to honour the rights of the Subtenants pursuant to the New Sublease Agreements;

123 *PRAYS ACTE* of HII's undertaking to withdraw the Head Lease Disclaimer (Exhibit R-26), and *DECLARES* that the Head Lease is not disclaimed;

124 *PRAYS ACTE* of the obligation of Statoil under Subsection 7 (a) of the Assignment to remain liable during the balance of the term of the Head Lease for the observance and performance of all of the terms, covenants and conditions contained in the Head Lease, notwithstanding any disclaimer of the Assignment;

125 *DECLARES* that the Assignment Disclaimer (Exhibit R-27) has no effect on the obligations of Statoil towards Cadillac under the Head Lease and the Assignment, and *DECLARES* that Statoil remains liable to perform all of its obligations to Cadillac under the Head Lease and Assignment;

126 *DECLARES* that the Subtenant Notices (Exhibit R-28) have no effect on the obligations of Statoil towards the Subtenants under the NDAs;

127 *DECLARES* HII to be released from all of its obligations pursuant to the Head Lease, the Assignment and the Subleases, subject to the right of Cadillac, Statoil and the Subtenants, or any other interested person, to file, if required, a proof of claim for any loss suffered in relation to the Head Lease Disclaimer (as if it has not been withdrawn by HII and had come into effect on October 30, 2011), to the Assignment Disclaimer and to the Subtenant Notices, and to the present Order, which provable claims, as the case may be, shall be treated in an eventual claims process in the CCAA process and subject to an arrangement or compromise under the CCAA;

128 *ORDERS* the provisional execution of the present Order notwithstanding appeal;

129 *THE WHOLE* with costs against Statoil, but limited only to HII's costs.

FN1 R.S.C., 1985, c. C-36.

FN2 Exhibit R-1.

FN3 Cross-examination of François Parent by counsel to HII, p. 38.

FN4 Exhibit R-1, section 8.03(b).

FN5 Exhibit FP-2, section 9.

FN6 Exhibit R-2.

FN7 Exhibit R-2, section 7(a).

FN8 Exhibit R-2, section 10.

FN9 Exhibit R-2, section 8(a).

FN10 Exhibits R-3, R-5, R-7, R-9, R-11, R-13, R-15, R-17, R-19, R-21 and R-23.

FN11 Exhibit D-4, section 4(a).

FN12 Cross-examination of François Parent by counsel to HII, p. 48.

FN13 Exhibits R-4, R-6, R-8, R-10, R-12, R-14, R-16, R-18, R-20, R-22 and R-24, p. 4, paragr. Q and R, and section 2.

FN14 Cross-examination of François Parent by counsel to HII, p. 91; Cross-examination of François Parent by counsel to Cadillac, p. 25.

FN15 Exhibit R-2, section 11.

FN16 Exhibit R-25.

FN17 Undertaking #6 to the cross-examination of François Parent by counsel to HII.

FN18 Exhibit #6 to François Parent's detailed affidavit in support of Statoil's contestation of Motion; Cross-examination of François Parent by counsel to Cadillac, p. 33.

FN19 Exhibit R-26.

FN20 Exhibit R-27.

FN21 Exhibit R-28.

FN22 Exhibit R-2, section 10.

FN23 Exhibit D-1.

FN24 Exhibit R-29.

FN25 Exhibit R-30.

FN26 *Supra*, note 15.

FN27 Exhibits R-4, R-6, R-8, R-10, R-12, R-14, R-16, R-18, R-20, R-22 and R-24, section 3.

FN28 Exhibit R-25.

FN29 Exhibits R-4, R-6, R-8, R-10, R-12, R-14, R-16, R-18, R-20, R-22 and R-24.

FN30 Exhibit R-2.

FN31 Case Management Order #5, dated October 7, 2011.

FN32 Rule 11.25 of the *Alberta Rules of Court*, Alta. Reg. 124/2010.

FN33 Section 11 of Exhibit R-2, *supra*, note 15, and section 2 of Exhibits R-4, R-6, R-8, R-10, R-12, R-14, R-16, R-18, R-20, R-22 and R-24, *supra* note 13.

FN34 Affidavit of François Parent, paragr. 23-34.

FN35 Section 11 CCAA; *SemCanada Crude Company (Re: Celtic Exploration Ltd.)* (2010) 495 A.R. 367, at paragr. 133 (Alta Q.B.).

FN36 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, paragr. 19, 58, 61, 68, 70, 71; *Grant Forest Products Inc. (Re)*, 2009 CarswellOnt. 6099, 58 C.B.R. (5th) 127 (Ont. S.C.J.).

FN37 9145-7978 *Québec Inc.* (Arrangement relatif à) [2007] R.D.I. 483, paragr. 8, 10, 11 (Q.C.A.).

FN38 *Phillips v. Phillips*, [2006] CarswellAlta 46, paragr. 62, 78, 82-83, 85 (Alta C.A.).

FN39 *Smoky River Coal Ltd. et al. (Re)* (1999), 237 A.R. 326, at paragr. 11, 53, 60, 69-70, 72 (Alta C.A.); *Sulphur Corp. of Canada Ltd. (Re)* (2002), 319, at paragr. 35 (Alta Q.B.).

FN40 *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, paragr. 80-82; *Gauntlet Energy Corp. (Re)*, 2003 ABQB 718, paragr. 58, 66-67; *Playdium Entertainment Corp. (Re)* (2001) 31 CBR (4th) 302, paragr. 14, 16-17, 26, 32-33, 42; *T. Eaton Co. (Re)*, (1997) 46 CBR (3d) 293, paragr. 1-4, 6 (Ont. Ct. J., Gen. Div.).

FN41 *Hayes Forest Services Limited (Re)* 2009 BCSC 1169 (CanLII, paragr. 51; *Nexient Learning Inc. (Re)*, 2009 CanLII 72037, paragr. 59 (Ont. S.C.).

FN42 Monitor's Third report, dated November 4, 2011, paragr. 28.

FN43 *Supra*, note 15.

FN44 *Supra*, note 13.

FN45 *Supra* note 15.

FN46 *Supra* note 13.

FN47 Exhibit R-25.

FN48 *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd.*, [2006] CarswellAlta 1036, paragr. 40-44 (Alta Q.B.).

FN49 Affidavit of François Parent, paragr. 23-34.

FN50 Exhibit R-2.

FN51 *Supra*, note 17.

FN52 *Supra*, note 18.

FN53 Undertaking #3 to the cross-examination of François Parent by counsel to HII.

FN54 *Supra*, note 27.

FN55 AbitibiBowater Inc. (Arrangement relatif à), 2009 QCCS 2188.

FN56 *Supra*, note 42, paragr. 18.

FN57 *Supra*, note 42, paragr. 28.

FN58 Cross-examination of François Parent by counsel to HII, pages 11-12; Cross-examination of François Parent by counsel to Cadillac, pages 30-31.

FN59 *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 SCR 60, paragr. 26-29, 42.

FN60 Exhibit R-2, section 7(a).

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