



No. S128887 Vancouver Registry

Tercon Investments Ltd. et al

EIGHTH REPORT OF THE RECEIVER

April 4, 2013

No. S128887
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c.B-3, AS AMENDED and SECTION 39 OF THE *LAW AND EQUITY*
ACT,
R.S.B.C. 1996 C.253, AS AMENDED

BETWEEN:

DUMAS HOLDINGS INC.

Petitioner

**TERCON INVESTMENTS LTD., TERCON A.C. LTD.,
TERCON EQUIPMENT LTD., TERCON CONSTRUCTION LTD.,
TERCON MINING LTD., TERCON ENTERPRISES LTD.,
TERCON MRC LIMITED, FNP VENTURES INC., TERCON MINING PV LTD.,
TERCON EQUIPMENT ALASKA PARTNERSHIP; AND
TERCON ALASKA LTD.**

Respondents

**EIGHTH REPORT TO THE COURT SUBMITTED BY
FTI CONSULTING CANADA INC.,
IN ITS CAPACITY AS COURT-APPOINTED RECEIVER**

INTRODUCTION

1. On December 14, 2012 (the “**Date of Appointment**”), FTI Consulting Canada Inc. was appointed as receiver (the “**Receiver**”) of all of the assets, undertakings and properties (the “**Property**”) of Tercon Investments Ltd., Tercon A.C. Ltd., Tercon Equipment Ltd., Tercon Construction Ltd., Tercon Mining Ltd., Tercon Enterprises Ltd., Tercon MRC Limited, FNP Ventures Inc., Tercon Mining PV Ltd., Tercon Equipment Alaska Partnership and Tercon Alaska Ltd. (collectively, “**Tercon**” or the “**Company**”) pursuant to the order of Mr. Justice Sewell (the “**Receivership Order**”) granted upon the petition of Dumas Holdings Inc. (“**DHI**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 as amended* (the “**BIA**”) and section 39 of the *Law and Equity Act R.S.B.C 1996 c. 253, as amended*.
2. As described in the First Report, the Asset Purchase and Sale Agreement dated as of December 21, 2012, was entered into, subject to Court approval, between the Receiver as Vendor and Ritchie Bros. Auctioneers (Canada) Ltd. (“**RB Canada**”) and Ritchie Bros. Auctioneers (America) Inc. (“**RB America**”, RB Canada and RB America together being “**Ritchie Bros**”) as Purchasers (the “**APA**”) with respect to the Equipment and Miscellaneous Property of Tercon (as such terms are defined in the APA).
3. On January 15, 2013, Mr. Justice Sewell granted an Order (the “**Approval and Vesting Order**”) *inter alia* approving the APA and the Return Protocol, as defined in the First Report.
4. On January 21, 2013, Mr. Justice Sewell granted the following Orders:
 - (i) An Order, *inter alia*, providing for the setting up of certain reserves by the Receiver from proceeds of realization and authorizing the distribution of funds in excess of the reserves to HSBC (the “**Distribution Order**”; and

- (ii) An Order, *inter alia*, authorizing and directing the Receiver, unless otherwise agreed with HSBC and DHI, to file assignments in bankruptcy for and on behalf of each of the Tercon companies and providing for the co-ordination of the Receivership Proceedings and the bankruptcy proceedings (the “**Bankruptcy Co-Ordination Order**”).
5. On February 28, 2013, Mr. Justice Sewell granted an Order, *inter alia*, authorizing FTI Consulting Canada Inc., in its capacity as receiver of Tercon Construction Ltd. to issue and file an application for a Bankruptcy Order against Tercon Equipment Ltd. (the “**Tercon Bankruptcy Application Order**”).
 6. On March 21, 2013, Mr. Justice Sewell granted an order approving a procedure for the submission, evaluation and adjudication of claims against Tercon or against the bonds issued by Trisura Guarantee Insurance Company (“**Trisura**”) in relation to certain Tercon projects (the “**Claims Procedure Order**”).
 7. To date, the Receiver has filed seven reports on various aspects of the Receivership. Each of the reports, and the orders made in the Receivership proceedings are posted on the Receiver’s website at <http://cfcanada.fticonsulting.com/tercon>.
 8. The purpose of this, the Receiver’s Eighth Report, is to provide information to the Court to support the Receiver’s request for the granting by the Court of an Order:
 - (i) that the Receiver is not required to continue to hold the TEAP Reserve established pursuant to paragraph 3(h) of the Distribution Order and that the Receiver is authorized to make payments to HSBC from monies previously held as the TEAP Reserve in accordance with the provisions of the Distribution Order; and

- (ii) authorizing the Receiver to pay, once the Alaskan Lien Claimant's Lien Claim is adequately proven in accordance with the Claims Procedure Order, the Accepted Lien Amount to each of the Alaskan Lien Claimants from the FGMI Receivable upon receipt of a certificate of discharge of the Alaskan Lien Claimant's Alaskan Lien Claim (all capitalized terms as hereinafter defined).

TERMS OF REFERENCE

9. In preparing this report, the Receiver has relied upon unaudited financial information of Tercon, Tercon's books and records, certain financial information prepared by Tercon and discussions with Tercon personnel and others. Future oriented financial information reported or relied on in preparing this report is based on assumptions regarding future events; actual results may vary from forecast and such variations may be material.
10. The information and advice described in this Report as being provided to the Receiver by its counsel, Borden Ladner Gervais LLP (the "**Receiver's Canadian Counsel**") and The Law Office of Cabot Christianson, P.C. (the "**Receiver's US Counsel**") and, together with Receiver's Canadian Counsel, the "**Receiver's Counsel**") has been provided to the Receiver to assist it in considering its course of action and is not intended as legal or other advice to, and may not be relied upon by, any other stakeholder.
11. Unless otherwise stated, all monetary amounts contained herein are expressed in Canadian Dollars. Capitalized terms not otherwise defined are as defined in the Receivership Order or in the Receiver's previous Reports.

THE TEAP RESERVE

BACKGROUND

12. Paragraph 3(h) of the Distribution Order states:

“3. The Receiver is authorized and directed to establish reserves in respect of the following proceeds of Property in the Receiver's possession ("**Proceeds**"), which Proceeds, notwithstanding the creation of such reserves, shall continue to be "Property" pursuant to the Receivership Order:

...

(h) An amount equal to: (i) the proceeds received by the Receiver, determined pursuant to the terms of the APA, from the sale of any Property (as defined in the Receivership Order dated Dec 14, 2012) that was transferred from Tercon Equipment Ltd. to Tercon Equipment Alaska Partnership (the "**Alaska Property**") pursuant to the Purchase and Sale Agreement dated December 6, 2012 that is referred to in paragraph 31 of the Affidavit of Steven Chambers, sworn December 13, 2012 and filed in support of the application for the Receivership Order, less (ii) the amount of the Equipment Lien Reserve held in respect of Registered Liens that have been registered against Alaska Property (the "**TEAP Reserve**");”

13. Paragraph 7 of the Distribution Order states:

“7. Notwithstanding anything set out in paragraph 5 and 6 above, no money from the TEAP Reserve shall be paid to HSBC without further order of the Court.”

14. The TEAP Reserve was established to protect the potential interests of creditors pending investigation of the transfer of the Alaska Property from Tercon Equipment Ltd. (“**TEL**”) to Tercon Equipment Alaska Partnership (“**TEAP**”) pursuant to the Purchase and Sale Agreement dated December 6, 2012 (the “**Alaskan Property Transfer**”) and an assessment of whether the proceeds of realization of the Alaska Property may be available to the unsecured creditors of the estate of TEL if the Alaskan Property Transfer could be voided by a trustee in bankruptcy.
15. The Alaskan Property Transfer and the TEAP Reserve are not relevant to the parties with Registered Liens registered against the Alaska Property, as reserves for those claims are provided for within the Equipment Lien Reserve.

INVESTIGATION INTO THE ALASKAN PROPERTY TRANSFER

16. The results of the Receiver’s investigation into the Alaskan Property Transfer were set out in a Memorandum Regarding Transfer of Assets to TEAP attached as Appendix A to the Receiver’s Third Report (the “**Transfer Memo**”). A copy of the Transfer Memo is attached hereto as Appendix A for ease of reference. In summary:
 - (i) TEAP was established in a manner that was consistent with the tax advice of PricewaterhouseCoopers LLP for a tax efficient structure for equipment to be used on the Kinross project based in the US;
 - (ii) Internal documents are consistent with the creation of TEAP for the purpose of leasing the equipment to Tercon Alaska Limited (“**TAL**”) and the transfer of the Alaska Property to facilitate that process;
 - (iii) Mr. Chambers, a person with direct knowledge of the transfer who the Receiver questioned regarding the transfer, was able to explain all aspects of the transfer and locate documentation relating to inquiries regarding the transfer;

- (iv) TEAP carried on business in Alaska and is the Tercon entity that issued purchase orders, was named in supplier invoices and, prior to the receivership, was paying its accounts from its own bank account;
- (v) No documents have been located that suggest that TEL was carrying on business in Alaska or holding itself out as the owner of the Alaska Property. On the contrary, it explicitly represented to its primary secured creditor that it did not have operations or property in Alaska;
- (vi) The Purchase and Sale Agreement between TEL and TEAP (the “TEAP APA”) was dated December 6, 2012 with an effective date of March 1, 2012. The books and records of TEL and TEAP support the proposition that the Alaskan Property Transfer took place in March 2012;

- (vii) The TEAP APA defines the purchase price for the transfer of the Alaska Property as:

“In consideration for the transfer of the Purchased Assets to the Purchaser pursuant to this Agreement, the Purchaser hereby assumes all such rights and obligations and agrees to be bound by, observe and perform all of the terms and conditions to be observed and performed by the Vendor under each of the Guarantee and Security Agreement as if it were an original signatory thereto (the “**Purchase Price**”).”

- (viii) There appears to be no reasonable basis for a position that a transfer of the Alaska Property from TEL to TEAP was done to hinder, defeat, delay or defraud creditors.

PERFECTION OF HSBC SECURITY AGAINST TEAP AND TEL

17. As reported in the Receiver's First Report, the Receiver's US Counsel has reviewed the security granted by TAL and TEAP to HSBC and has confirmed to the Receiver that the said security is properly registered under the Uniform Commercial Code ("UCC") in the State of Alaska. Accordingly, HSBC has a validly perfected security interest in assets owned by TAL or TEAP located in Alaska.
18. The Receiver's Canadian Counsel has reviewed the security granted by TEL to HSBC (the "**TEL Security**") and has confirmed that the said security is properly registered under the *Personal Property Security Act* of British Columbia (the "**BC PPSA**") and that HSBC has a validly perfected security interest in assets of TEL pursuant to the TEL Security. The Receiver's Canadian Counsel has advised the Receiver that the TEL Security had attached to the Alaska Property prior to the time of the transfer of the Alaska Property from TEL to TEAP pursuant to the Alaskan Property Transfer.
19. The question as to whether the proceeds of realization of the Alaska Property may be available to the unsecured creditors of the estate of TEL if the Alaskan Property Transfer could be voided by a trustee in bankruptcy is therefore dependent on:
 - (i) Whether the Alaskan Property Transfer could be successfully challenged and declared void as against a trustee in bankruptcy of TEL pursuant to the provisions of the BIA (as, for example, a preference that is voided pursuant to section 95 of the BIA or a transfer at undervalue that is voided pursuant to section 96 of the BIA); and
 - (ii) If the Alaskan Property Transfer was declared void, such that the proceeds from the sale of the Alaska Property were returned to the estate of TEL, would such proceeds be available for the unsecured creditors of TEL or would the proceeds be subject to the TEL Security.

20. The Receiver takes no position on the likelihood of success of any challenge to attempt to void the Alaskan Property Transfer. However, given (i) the Receiver's understanding regarding the reasons of Justice Morawetz in *Tucker v. Aero Inventory (UK) Ltd.* (2011), 80 C.B.R. (5th) (O.S.C.J.); (ii) the application of those principles to this matter, which indicate that any proceeds returned to the estate of TEL as a result of voiding the Alaskan Property Transfer would be subject to the TEL Security; and (iii) the matters noted below, there is no apparent reason for the Receiver to assess the potential rights of a trustee to challenge the Alaskan Property Transfer because the benefit of the proceeds would in any event be paid to HSBC.
21. As noted in the Fifth Report, HSBC did not register a security interest in the assets of TEL under the UCC in Alaska. However, the Receiver's US Counsel has informed the Receiver that:

- (i) *Alaska Statute 45.29.301* governs perfection and priority of security interests and the section provides:

"Except as otherwise provided in AS 45.29.303 - 45.29.306, the following rules determine the law governing perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral:

(1) except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral;

...

(3) except as otherwise provided in (4) of this section, while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs

...

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral;

...

(4) the local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection.”

- (ii) As a result, section *AS 45.29.301* provides that the local law of the location of the debtor determines whether a secured creditor is perfected and the local law of the location of the collateral determines the priorities of security interests;
- (iii) The proper law to determine whether the security interest of HSBC is perfected in respect of the property of TEL (including property of TEL located in Alaska), is the law of British Columbia;
- (iv) As noted above, the Receiver’s Canadian Counsel has confirmed that HSBC has a validly perfected security interest in assets of TEL pursuant to the TEL Security and the BC PPSA;
- (v) As a result, a registration by HSBC in Alaska under the UCC against TEL is unnecessary; and

- (vi) If a challenge to the Alaskan Property Transfer was successfully undertaken by the trustee in bankruptcy of TEL, any proceeds of the Alaska Property returned to the estate of TEL would be subject to the TEL Security and the benefits of any such challenge would therefor accrue solely to HSBC.

CONCLUSION AND REQUEST FOR RELEASE OF TEAP RESERVE

22. Accordingly, it is the Receiver's view that, subject only to the interests of a creditor with a Registered Lien against the Alaska Property that had priority to the security of HSBC, the proceeds of the Alaska Property are payable to HSBC.

23. Paragraph 4 of the Distribution Order provides:

“4. For greater certainty, to the extent that the Receiver holds proceeds in respect of any item of Alaska Property in the Equipment Lien Reserve, it shall not be required to hold an amount in the TEAP Reserve in respect of a Registered Lien filed against the same item of the Alaska Property.”

24. As a result of the fact that the Receiver has made a provision for all Registered Liens in the Equipment Lien Reserve, HSBC has a priority interest in all of the proceeds in the TEAP Reserve. Except for the prohibition set out in paragraph 7 of the Distribution Order, the Receiver would be permitted to distribute the proceeds of the Alaska Property pursuant to the provisions of the Distribution Order.

25. Accordingly, the Receiver seeks an Order that the Receiver is not required to continue to hold the TEAP Reserve established pursuant to paragraph 3(h) of the Distribution Order and that the Receiver is authorized to make payments to HSBC from monies previously held as the TEAP Reserve in accordance with the provisions of the Distribution Order.

26. If the Order is granted, the Receiver intends to forthwith make an interim distribution of proceeds to HSBC in accordance with the provisions of the Distribution Order.

PAYMENT OF LIEN CLAIMS

27. Paragraph 3(e) of the Distribution Order states:

“3. The Receiver is authorized and directed to establish reserves in respect of the following proceeds of Property in the Receiver's possession ("**Proceeds**"), which Proceeds, notwithstanding the creation of such reserves, shall continue to be "Property" pursuant to the Receivership Order:

...

(e) Out of any funds received by the Receiver in respect of any Tercon Project, the aggregate of the amounts of all claims for lien that have been preserved in accordance with applicable lien legislation or that may constitute trust funds pursuant to applicable lien legislation (the "**Lien and Trust Reserve**");”

28. Paragraph 22 of the Distribution Order states:

“22. No disbursements from the Bonded Project Reserve or the Lien and Trust Reserve shall be made without further Order of the Court, on notice to all affected parties.”

29. Pursuant to the provisions of the Claims Procedure Order, any party with a Lien Claim is required to prove its claim prior to the Claims Bar Date.

30. The statutory period for the registration of liens under *Alaska Statute 34.35* has now expired. As reported in the Receiver’s Seventh Report, the following Lien Claims (collectively, the “**Alaskan Lien Claims**”) have been registered against the Fort Knox property in Alaska where Tercon undertook the Fort Knox Project:

Lien Claimant	Registration No.	Unpaid Amount	Interest & Fees	Total Lien Claim
		US\$	US\$	US\$
North Central Rental & Leasing, LLC ¹	2013-001804-0	317,087.00	20,037.00	314,412.00
Midstate Equipment Inc.	2012-026532-0	148,781.25	12,191.41	160,972.66
Stutzman Engineering	2012-026286-0	13,440.00	1,130.00	14,570.00
N.C. Machinery Co.	2013-003074-4	929,798.16	TBC	TBC
Total		1,409,106.41	33,358.41	TBC

¹Registration for \$317,087.00. Total Lien Claim subsequently confirmed as \$314,412.00 by counsel to the Lien Claimant

31. As noted above, each of these Lien Claimants (collectively, the “**Alaskan Lien Claimants**”) is required to prove its Lien Claim in accordance with the provisions of the Claims Procedure Order. The Receiver has reviewed the documents provided to by the Alaskan Lien Claims and is satisfied that the quantum of each of the Alaskan Lien Claims, including interest and fees (each an “**Accepted Lien Amount**”) is valid and has been adequately proven in accordance with the Claims Procedure Order other than the Lien Claim of N.C. Machinery Co. which is yet to provide documentation supporting the entire amount claimed.
32. The Receiver’s US Counsel has reviewed the Alaskan Lien Claims and has informed the Receiver that in each case (subject to review of the documentation yet to be submitted by N.C. Machinery Co.):
- (i) the goods and/or supplied are of the nature that can be validly liened under *Alaska Statute 34.35*;

- (ii) the Lien Claim has been validly registered in accordance with the provisions of *Alaska Statute 34.35*;
 - (iii) that the Alaskan Lien Claimant is entitled to claim legal fees and interest in connection with the Lien Claims; and
 - (iv) the Lien Claim ranks in priority to the security interests of HSBC and DHI against the accounts receivable owing by Fairbanks Gold Mining Inc. (“**FGMI**”) in respect of the Fort Knox Project.
33. Accordingly, it is the Receiver’s view that, subject to reviewing the documentation yet to be provided by N.C. Machinery Co., the Alaskan Lien Claims are valid and enforceable Claims ranking in priority to the security interests of HSBC and DHI against the accounts receivable owing in respect of the Fort Knox Project. The Receiver has reviewed the matter with both HSBC and DHI who have both informed the Receiver that they concur with the Receiver’s assessment.
34. As noted in the Seventh Report, FGMI has acknowledged that the amount of US\$4,176,581.31 is payable to the Receiver (the “**FGMI Receivable**”).
35. FGMI has not, at the date of this report, paid the FGMI Receivable. The Receiver has discussed arrangements for payment with counsel to FGMI, as follows:
- (i) FGMI will pay the FGMI Receivable, less \$1.5 million, to the Receiver;
 - (ii) FGMI will pay \$1.5 million to the Receiver’s US Counsel which funds will be held escrow, to be released to pay each of the Accepted Lien Amounts once:
 - (a) An Order authorizing payment of the Alaskan Lien Claims has been granted;

- (b) The Alaskan Lien Claimant has delivered in escrow a lien discharge certificate which will be released from escrow once the Alaskan Lien Claimant's Accepted Lien Amount has been paid; and
- (c) In the case of N.C. Machinery Co., the Receiver is satisfied that the Lien Claim is adequately proven.

36. Accordingly, the Receiver seeks an order authorizing the Receiver to pay, once adequately proven, each of the Accepted Lien Amounts from the FGMI Receivable upon the Alaskan Lien Claimant providing to the Receiver or its Counsel a certificate of discharge for the Alaskan Lien Claimant's Alaskan Lien Claim.

The Receiver respectfully submits to the Court this, its Eighth Report.

Dated this 4th day of April, 2013.

FTI Consulting Canada Inc.
in its capacity as receiver of
Tercon Investments Ltd., Tercon A.C. Ltd., Tercon Equipment Ltd.,
Tercon Construction Ltd., Tercon Mining Ltd., Tercon Enterprises Ltd.,
Tercon MRC Limited, FNP Ventures Inc., Tercon Mining PV Ltd.,
Tercon Equipment Alaska Partnership and Tercon Alaska Ltd.
and not in its personal or corporate capacity



Nigel D. Meakin
Senior Managing Director



Jeff Rosenberg
Managing Director

Appendix A

The Transfer Memo