

2007 BCSECCOM 243

April 5, 2007

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Rules section 162(3) - Exemption from the requirement to include a formal valuation of the offeree issuer in an insider bid circular - An issuer wants relief from the requirement to obtain a formal valuation in connection with its insider bid for the outstanding equity securities of a target issuer - When the bid was announced, one or more formal bids for securities of the same class that is the subject of the insider bid had been made and were outstanding; the target issuer provided equal access to information concerning the target issuer and its securities, to the offeror in the insider bid and all offerors in the other formal bids; the takeover bid circular contains all necessary information for the offeror to rely on the auction exemption from the requirement to obtain a valuation and disclose prior valuations in OSC Rule 61-501 or Québec Policy Q-27

Applicable British Columbia Provisions

Securities Rules, B.C. Reg. 194/97, s. 162(3)

In the Matter of
the Securities Legislation of
British Columbia, Alberta, Saskatchewan, Manitoba,
Nova Scotia and Newfoundland and Labrador
(the “Jurisdictions”)

and

In the Matter of
the Mutual Reliance Review System for Relief Applications

and

In the Matter of
Homburg Acquisition Inc. (“HAI”), Homburg Invest Inc.
 (“Homburg” and, together with HAI, the “Filer”)

MRRS Document Decision

Background

The local securities regulatory authority or regulator (the “Decision Maker”) in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the “Legislation”) that the Filer be exempt:

2007 BCSECCOM 243

- (a) in all of the Jurisdictions, from the requirement under the Legislation that a circular in respect of an “insider bid” contain a summary of a valuation of the offeree issuer (the “Valuation Requirement”); and
 - (b) in the Provinces of Nova Scotia, Manitoba and Newfoundland and Labrador, from the Valuation Requirement in connection with any second step business combination or going private transaction pursued by the Filer.
- (collectively, the “Requested Relief”).

Under the Mutual Reliance Review System for Exemptive Relief Applications (“MRRS”):

- (a) the Nova Scotia Securities Commission is the principal regulator for this application; and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 -- *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

- 1) On February 27, 2007, HAI, a wholly-owned subsidiary of Homburg, made an offer (the “Offer”) to acquire all of the issued and outstanding units (the “Units”) of Alexis Nihon Real Estate Investment Trust (“Alexis Nihon”) other than the Units owned directly or indirectly by Homburg and its affiliates, but including the Units issuable upon the conversion of the Series A 6.20% convertible unsecured subordinated debentures of Alexis Nihon due June 30, 2014 (the “Convertible Debentures”) at a price of \$18.60 in cash per Unit. The Offer and accompanying circular (the “Circular”) were mailed to all holders of the Units and were filed on SEDAR with the applicable securities regulatory authorities, including the Decision Makers.
- 2) Homburg is a corporation governed by the *Business Corporations Act* (Alberta) (the “ABC”A”) having its head office in Halifax, Nova Scotia. The Class A Subordinate Voting Shares of Homburg are listed and posted for trading on the Toronto Stock Exchange and Euronext Amsterdam.

2007 BCSECCOM 243

The Class B Multiple Voting Shares of Homburg also trade on the Toronto Stock Exchange. HAI is a corporation governed by the ABCA having its registered office in Calgary, Alberta. HAI is a wholly-owned subsidiary of Homburg created solely for the purpose of making the Offer and has not otherwise carried on any business or activity.

- 3) On December 2, 2006, Cominar Real Estate Investment Trust (“Cominar”) offered to acquire all of the outstanding Units for \$17.50 per Unit payable in cash or 0.77 Cominar trust units (subject to a maximum amount of cash and a maximum number of Cominar trust units) pursuant to an offer and exchange as described in the offer made by Cominar and its circular dated December 20, 2006. The cash consideration offered by Cominar was increased to \$18.50 per Unit pursuant to a notice of variation and extension of Cominar dated January 26, 2007. Cominar’s offer expired February 22, 2007.
- 4) On January 30, 2007, Homburg and Alexis Nihon entered into a confidentiality agreement pursuant to which Homburg was provided access, from January 31, 2007 until February 15, 2007, to a data room set up by Alexis Nihon which, according to Alexis Nihon, contained substantially the same documentation and information that had been made available to Cominar to perform due diligence in connection with its offer. Summit Real Estate Investment Trust (“Summit”), the beneficial owner of 5,324,963 Units it had acquired on January 11, 2007, representing approximately 18% of the issued and outstanding Units, was also provided access to Alexis Nihon’s data room during this period. Subsequent to the due diligence it performed, Summit has not made an offer to purchase Alexis Nihon.
- 5) On February 14, 2007, Homburg announced its intention to make an all cash bid to acquire all of the issued and outstanding Units that it does not already own at a price of \$18.50 in cash per Unit. On February 16, 2007, Homburg announced that it submitted, on that same date, a binding written proposal to the board of trustees of Alexis Nihon proposing to increase its announced offer to acquire all of the issued and outstanding Units to \$18.60 in cash per Unit, conditional upon Homburg and Alexis Nihon entering into a support agreement following the termination of the combination agreement between Cominar and Alexis Nihon. On February 20, 2007, concurrently with the public announcement of the termination of the combination agreement between Alexis Nihon and Cominar, Homburg announced that it entered into a definitive support agreement with Alexis Nihon on February 19, 2007, under which Alexis Nihon agreed to support Homburg’s offer to acquire all of the issued and outstanding Units at a price of \$18.60 in cash per Unit.

2007 BCSECCOM 243

- 6) Homburg is the beneficial owner of 5,274,539 Units, representing approximately 18% of the issued and outstanding Units as of February 26, 2007, which it acquired through the facilities of the Toronto Stock Exchange and pursuant to private agreements between December 27, 2006 and January 24, 2007, the date on which Homburg became an “insider” of Alexis Nihon.
- 7) Because Homburg is an affiliate of HAI and exercises control and direction over more than 10% of the Units, the Offer is technically an “insider bid” for purposes of the Legislation.
- 8) Neither Homburg nor HAI nor any of their affiliates has, or ever has had, any board or management representation in respect of Alexis Nihon nor, after reasonable inquiry, do they have knowledge of any material information concerning Alexis Nihon or its securities that has not been generally disclosed.
- 9) Based on the facts represented in paragraphs 3, 4 and 5, HAI, in making the Offer in the provinces of Ontario and Québec, is entitled to rely on the auction exemption available under subparagraph 2.4(1)4 of Ontario Securities Commission Rule 61-501 (“Rule 61-501”) and Regulation Q-27 of the Autorité des Marchés Financiers (“Regulation Q-27”) from requirements comparable to the Valuation Requirement. HAI has provided relevant disclosure in the Circular in order to enable HAI to rely on the exemptions in Rule 61-501 and Regulation Q-27.
- 10) In accordance with subparagraph 2.2(1)(b) of Rule 61-501 and Regulation Q-27, HAI has disclosed in the Circular that, after reasonable inquiry, it is not aware of any prior valuation (as such term is defined in Rule 61-501 and Regulation Q-27).
- 11) If within 120 days after the date of the Offer, the Offer has been accepted by holders of not less than 90% of the issued and outstanding Units, other than Units held at the date of the Offer by or on behalf of HAI or an affiliate or associate of HAI such as Homburg, and HAI acquires such deposited Units under the Offer, HAI currently intends to acquire the Units not deposited under the Offer on the same terms as the Units acquired under the Offer pursuant to the provisions of Section 6.27 of the contract of trust of Alexis Nihon (a “Compulsory Acquisition”).
- 12) If HAI takes up and pays for Units validly deposited under the Offer and the right of Compulsory Acquisition described above is not available or HAI elects not to pursue such right, HAI currently intends to cause a special meeting of unitholders of Alexis Nihon to be called to consider a consolidation, amalgamation, arrangement, merger, capital reorganization,

2007 BCSECCOM 243

amendment to the contract of trust of Alexis Nihon or other transaction involving Alexis Nihon and HAI or an affiliate of HAI for the purpose of enabling HAI or an affiliate of HAI to acquire all Units not acquired pursuant to the Offer (a “Subsequent Acquisition Transaction”).

- 13) In connection with any Subsequent Acquisition Transaction, HAI intends to rely on the exemption available under subparagraph 4.4(1)(5) of Rule 61-501 and Regulation Q-27, respectively, from the formal valuation requirement in that:
- a. the business combination with Alexis Nihon will be effected by HAI or an affiliated entity of HAI following the formal bid constituted by the Offer and will be in respect of the Units that will be the subject of the Offer;
 - b. the business combination will be completed no later than 120 days after the date of the expiry of the Offer;
 - c. the consideration per Unit paid by HAI or an affiliated entity of HAI in the business combination would be at least equal in value to, and in the same cash consideration as, is being paid by HAI under the Offer;
 - d. the intent of HAI to acquire the remainder of the Units under a Subsequent Acquisition Transaction is disclosed in the Offer and the Circular; and
 - e. the expected tax consequences of the Offer and the Subsequent Acquisition Transaction, to the extent currently known to the Filer, are disclosed in the Offer and the Circular.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The Decision of the Decision Maker under the Legislation is that the Requested Relief is granted provided that the Filer complies with the other requirements in the Legislation applicable to formal take-over bids.

H. Leslie O'Brien
Chairman
Nova Scotia Securities Commission

R. Daren Baxter
Vice-Chair
Nova Scotia Securities Commission