

COUNSEL SLIP

COURT FILE

NO.: CV-19-00615560-00CL
CV-19-00630908-00CL

DATE: Feb. 28, 2020.

NO. ON LIST 6+7.

Bandfield Construction Company Limited et al.

TITLE OF PROCEEDING

vs.

The International Union Operating Engineers, Local 793 et al.

COUNSEL FOR:

- PLAINTIFF(S)
- APPLICANT(S)
- PETITIONER(S)

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- DEFENDANT(S)
- RESPONDENT(S)

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Court File Number: CV-19-630908-0001

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FILE/DIRECTION/ORDER

ERNST + YOUNG INC
Plaintiff(s)

AND

JOHN AQUINO et al
Defendant(s)

Case Management Yes No by Judge: _____

Counsel	Telephone No:	Facsimile No:
<u>COUNSEL SLIP ATTACHED</u>	<u>ATTACHED</u>	

- Order Direction for Registrar (No formal order need be taken out)
 Above action transferred to the Commercial List at Toronto (No formal order need be taken out)

Adjourned to: _____
 Time Table approved (as follows):

① John Aquino, Marco Casuso,
Giuseppe Anastasio and
Lucia Coccia - Condese
move for an order to
consent this application

_____ Date

_____ Judge's Signature

Additional Pages _____

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Judges Endorsment Continued

into an action. E & Y, in its capacity as the Monitor of Bondfield Construction Company Limited and KSV Kofman Inc., in its capacity as Trustee - in Bankruptcy of Forma - Con oppose the motions.

② The Monitor commenced this application in November

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2019 seeking a declaration
That certain transfers of
money from Bondfield to
Third Parties were transfers
at under value for the
purpose of s. 96 of the
Bankruptcy and Insolvency
Act, R.S.C. 1985, c. B-3 ("BIA")
and that the respondents
are jointly and severally

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Judges Endorsment Continued

Liability to Bondfield for the
value of the Impaired
Transactions.

③ The Monitor commenced the
proceeding as an application
because the BIA provides that
such proceedings are to be
brought "on application
by the Trustee". The
Monitor submits that "These

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Judges Endorsment Continued

is no basis to depart from the ordinary, statutory rule that the within proceeding be addressed by way of application as the moving parties have failed to prove the existence of material facts in dispute that would require a trial to resolve." I agree with and accept the Monitor's

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Judges Endorsment Continued

submission for the following
reasons.

④ Prior to its appointment as
Monitor, Ex 4 conducted a
forensic review into
financial irregularities at
Bondfield and identified
19 suppliers with
irregularities in their
invoices and/or payments

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Judges Endorsment Continued

They received from Bondfield.
("Suppliers of Interest")

⑤ To date, EY has identified
577 invoices recorded in
Bondfield's accounting systems
from Suppliers of Interest
during the period 2011 & 2018.
In the five-year period
prior to Bondfield's insolvency
The Suppliers of Interest

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Judges Endorsment Continued

received \$33,183 and
USD \$35,030 from Bondfield.

⑥ EY has determined
that,

(a) None of the Suppliers of
Interest were legitimate
suppliers of Bondfield;

(b) The services or materials
referred to in the invoices
from the Suppliers of Interest

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were either not supplied or
were supplied by another
entity;

(c) There are no relevant
documents in connection
with the purported work by
The Suppliers of Interest; and

(d) The amounts claimed in
the invoices from the
Suppliers of Interest were

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Judges Endorsment Continued

inflated relative to the
services or supplies claimed to have
been provided.

⑦ EY has also identified
many other irregularities
with respect to transactions
between Bondfield and the
Suppliers of Interest.

⑧ It is clear on the
evidence uncovered by the

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Monitor that the impugned transactions with the suppliers of interest were improper transfers at undervalue.

In support of the Monitor's application it has provided 5 Reports and Supplementary Report including 1,114 pages of documents that detail the particulars

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pertaining to the Suppliers of
Interest and the Impugned
Transactions. Each of the
Moving Parties on this
Motion were involved in
the Impugned Transactions.
⑨ In the Moving Parties
evidence filed in support
of this Motion,
(a) None of the Moving

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parties provide any explanation
for the Impugned
Transactions;

(b) None of them deny their
involvement in the
Impugned Transactions;

(c) None of them deny
their connections with the
Supplier of Interest or
that they were acting on

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a non-arms length basis
with Bondfield;

(d) None of them deny that
they personally benefitted
from the Impugned Transactions;

(e) None of them overt that
Bondfield received any value
from the Impugned Transactions;

(f) None of them provide
any evidence whatsoever to

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rebut the "Bodges of Fraud"
outlined in the Monitor's
evidence in support of its
application.

(10) Rather, the moving
papers boldly assert
with no particulars that
there are material
facts in dispute and
issues of credibility to be

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resolved. None of the
alleged factual disputes
or credibility issues
pertain to the merits of
the dispute. Further, the
Moving Parties have not
provided any evidence
to explain the payments of
over \$33 Million to the
Suppliers of Interest as to

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contradict the Honorable's
evidence that the Impugned
Transaction were tainted
at undervalue.

① On a motion to consent
an application to a trial
The court must assess
whether "the forensic
machinery of a trial" is
required for a fair and

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just process"; having
regard to,

(a) Where the Legislature
has stipulated that a proceeding
may proceed by application
There is a prima facie right
to proceed in that manner.

(b) The court should
not convert an application
to an action unless these

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all material facts in
dispute and the Court
cannot properly resolve
the material facts without
the benefit of a trial.

(12) The moving parties have
not met this test. The
evidence clearly establishes
that there are no issues
of credibility or material

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factual disputes that require
a trial. Bold allegations
that there are material
facts in dispute or
credibility issues without
any corroborating evidence
do not constitute grounds
for converting an application
into an action. The
Motion is therefore

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Dismissed.

(13) Although I have concluded that the moving parties have not adduced any evidence to support their request to convert the Monitor's application to an action, if they ultimately do adduce evidence before the application judge

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That persuaded the court of
the need for a trial of
an issue the applications
Judge may so order
under Rule 38.10(b).

⑭ If the parties cannot
resolve the costs of this
Motion they may schedule a
cost conference with the
April 21, 2020 Friday.