

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **FORME DEVELOPMENT GROUP INC.** AND
OTHER COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*, R.S.C. 1985, c. C-36, AS AMENDED

**COST SUBMISSIONS OF FERINA CONSTRUCTION LIMITED
AND CERTAIN OTHER JOINING CREDITORS
(FEBRUARY 20, 2020 HEARING)**

1. The Court has invited submissions on costs following the disposition of a motion that was brought by the court-appointed Monitor in this CCAA proceeding and heard on February 20, 2020 (the "**Motion**").¹ The Monitor's Motion was opposed by the Non-Applicants, of which Mr. Wang is the sole shareholder, officer and director and directing mind who therefore provides instructions to counsel on behalf of the Non-Applicants. In these costs submissions, references to the Non-Applicants include Mr. Wang personally, and costs are being sought on a joint and several basis against the Non-Applicants and Mr. Wang.

2. These costs submissions are filed by Ferina Construction Limited ("**Ferina**"), which filed a motion record in support of the relief sought by the Monitor on its Motion and in opposition to the steps taken by the Non-Applicants which led to the Motion being required.² For the benefit of the Court and to avoid multiple costs submissions being received from five other creditors who

¹ Capitalized terms not otherwise defined in these submissions have the meaning ascribed to them in the Monitor's Twelfth Report and the Monitor's Supplement to the Twelfth Report.

² In addition to supporting the Monitor's Motion, Ferina's motion record sought a termination of the separate BIA proceeding commenced by Mr. Wang, and involves the same facts as those in the Monitor's Motion. That motion involving Mr. Wang's NOI proceeding is scheduled to be heard on March 31, 2020 and is supported by the same creditors.

were represented by counsel at the Motion and who also seek costs against the Non-Applicants and Mr. Wang, those creditors have requested that Ferina's costs submissions be considered filed in support of their request for costs as well.³ All creditors seek the same amount.⁴

3. The Motion was opposed by the Non-Applicants. In addition, on the eve of the Motion, the Non-Applicants brought a motion seeking to terminate the CCAA proceeding and to undermine and negate the effect of various Orders issued in this proceeding, including the Initial Order, the Order confirming the Undertaking given by the Non-Applicants and Mr. Wang (the "**Undertaking**"), and the Claims Procedure Order. Mr. Wang had been involved in negotiating the form of each of these Orders, and did not oppose any of them.

4. The Court has the discretion to address unreasonable positions and conduct in a proceeding through an award of costs, especially where the "Three-Cs" of the Commercial List were blatantly ignored at every turn. For the following reasons, Ferina and the joining creditors submit that Mr. Wang and the Non-Applicants should be jointly and severally liable to pay their substantial indemnity costs in respect of the Motion.

5. The following steps were taken in this proceeding, which necessitated the Motion being brought by the Monitor:

(a) An *ex parte* 9:30 Chambers attendance was held on January 30, 2020 wherein approval for an Order was granted amending the Undertaking. Mr. Larry Ellis of Cassels Brock & Blackwell LLP ("**CBB**") (then counsel to the Non-Applicants, now of Miller Thomson LLP) and Mr. Chris Besant of Gardiner Roberts LLP (also counsel to the Non-Applicants) attended the Chambers Appointment **without notice** to the Monitor or any parties on the Service List. A prior attempt by Mr. Wang to amend the Undertaking to permit the payment of legal fees had been made by way of motion on notice to all parties on the Service List. It was vigorously opposed, and terms were imposed such that the payment was not made;

³ See the last page of these submissions for the specific creditors who are seeking costs. Rather than creditors having to incur the additional expense of preparing individual Bills of Costs, the parties request the Court's discretion in awarding \$5,000 as a conservative fixed amount for each party in the circumstances of this case.

⁴ While these costs submissions slightly exceed the 5 page request, since they are filed on behalf of 6 creditors represented by separate counsel, we seek the Court's indulgence in considering same on that basis.

- (b) No materials were provided to the Court at the *ex parte* Chambers attendance in support of an amendment to the Undertaking, and the Court was led to believe that the relief was unopposed;
- (c) One day following the *ex parte* Chambers attendance a Motion Record prepared by Mr. Ellis of CBB was filed with the Court – without having been served on the Monitor or any counsel on the Service List in this proceeding. Separate from the issue of (lack of) service, the Motion Record did not disclose that:
- (i) four of the Non-Applicants that were subject to the Undertaking had filed assignments in bankruptcy in the prior week;
 - (ii) Mr. Wang (also subject to the Undertaking in his personal capacity) had filed a Notice of Intention to File a Proposal in the prior week;
 - (iii) a security interest had purportedly been granted by the Non-Applicants to Gardiner Roberts LLP over the funds subject to the Undertaking – unbeknownst to the Monitor or the creditors in whose favour the Undertaking was obtained and confirmed by court Order – and that the effect of the amendment to the Undertaking that was sought would result in that secured creditor holding those funds; and
- (d) The order sought on an *ex parte* basis would have resulted in the funds being held by new counsel for the Non-Applicants (Gardiner Roberts LLP), who were not subject to any fee cap, unlike the Non-Applicants’ former lawyers CBB.
- (e) The bankruptcies of the four Non-Applicants served no valid purpose and was done with a view to taking the determination of creditor claims outside of the Claims Procedure Order under the supervision of the Monitor, and placing it in the hands of a trustee in bankruptcy selected by the Non-Applicants - who were to be represented by the law firm that Mr. Ellis had recently joined.⁵

⁵ Mr. Ellis’ statement that he would not be involved in the matter at his new firm Miller Thompson LLP is irrelevant. As former counsel for the Non-Applicants, his new firm was conflicted in acting for the Trustee in bankruptcy whose statutory duty is to act on behalf of unsecured creditors.

6. The Non-Applicants had no reasonable prospect of success on the Motion, particularly in view of the support for the Monitor's position confirmed by all creditors. Ferina and other creditors advised the Non-Applicants prior to the Motion that they supported the Monitor's position and opposed the position being advanced by the Non-Applicants. Notwithstanding, the Non-Applicants chose to put their creditors to further unnecessary expense and proceed in opposing the Motion brought by the Monitor. Even after the Court suggested that the matter proceed by way of an Order on a without prejudice basis to avoid further time and costs being incurred, the Non-Applicants rejected that opportunity and proceeded to argue the Motion.

7. Ferina submits that the Non-Applicants considered there to be no real consequence to taking an unreasonable position, as they were spending creditors' money to do so. Having managed to: (i) obtain an amendment to the Undertaking without notice to any affected party, and (ii) grant security in favour of their counsel over the funds subject to the Undertaking, the Non-Applicants simply chose to "double down". This decision caused Ferina and other creditors to incur fees that should be addressed through an award of costs.

Lack of Full Disclosure and Lack of Notice Should Not Be Condoned

8. Judges of the Commercial Court rely on counsel to make full disclosure of all facts and circumstances that could impact the relief sought. If a Judge hears a matter in Chambers at a 9:30 attendance on the basis that it is on consent or unopposed, it goes without saying that *notice has actually been given* to parties, including the court-appointed Monitor. Had notice been provided, the Monitor, Ferina and other creditors would have had an opportunity to attend and object to the amendments to the Undertaking and it could not have proceeded at a Chambers appointment. The Motion brought by the Monitor to reverse the effect of the amendments to the Undertaking would not have been required, and Ferina and other creditors would not have been put to further unnecessary cost in continuing to protect their rights.

9. Ferina and other creditors do not attend in Court on motions to simply extend the Stay Period in the CCAA proceeding, or where court approval of a specific transaction is sought. Attendance by counsel for Ferina on the Motion was as a direct result of the *ex parte* steps taken by the Non-Applicants and the position taken by the Non-Applicants on the Motion which was ultimately unsuccessful.

10. Relief sought on an *ex parte* basis requires the highest degree of disclosure of all material facts. The Motion Record dated January 31, 2020 filed by Mr. Ellis one day after the Chambers attendance did not disclose: (i) the assignments in bankruptcy filed by four of the Non-Applicants in the prior week; (ii) the BIA proceeding commenced by Mr. Wang in the prior week; (iii) the security granted by the Non-Applicants in favour of their counsel over funds that were subject to the Undertaking for the benefit of creditors in the CCAA proceeding. All of these facts were relevant to the Undertaking which was the subject matter of the *ex parte* Chambers attendance and the Motion Record that was filed, and none of them were disclosed. The Motion Record was filed with the Court without having been served on anyone, including the Monitor in whose favour the Undertaking was obtained for the benefit of creditors.

11. The *ex parte* Chambers attendance and the filing of a motion record without it having been served were improper in every respect, and amount to a collateral attack on the Undertaking. The failure to make full and frank disclosure runs contrary to the principle of transparency in CCAA proceedings and reflects a failure of the Non-Applicants and Mr. Wang to act in good faith, as ultimately found by the Court in the disposition of the Motion.

No Reasonable Basis to have Opposed the Motion

12. The assignments in bankruptcy of the Non-Applicants served no valid purpose and were entirely duplicative. They were also a collateral attack on the heavily negotiated building blocks in this CCAA proceeding, including the Initial Order, the Undertaking and the Claims Procedure Order.⁶

13. The (super) Monitor has acted in good faith in this proceeding.⁷ There was no credible evidence to the contrary. Nevertheless, in opposing the Motion for a Stay Extension and in seeking to support the steps taken without notice, the Non-Applicants took the unreasonable position that the CCAA proceeding should be terminated and the Applicants and Non-Applicants assigned into bankruptcy. The effect of this would be to unravel more than a year's worth of work in this CCAA

⁶ Endorsement of Justice Hainey dated February 20, 2020, para (vi)(b).

⁷ Endorsement of Justice Hainey dated February 20, 2020, para (iii).

proceeding and put all creditors to additional expense and delay in the recovery of any available funds.

No Rule Against Costs in CCAA Proceedings

14. There is no rule against awarding costs in CCAA proceedings,⁸ including in favour of a party that supports another's motion. For example, in *Return on Innovation*, Justice Newbould awarded \$12,000 in costs in favour of a creditor that supported the Monitor's motion for a determination of claims.⁹

15. Like the creditors in *Return on Innovation*, Ferina and the other supporting creditors seek an award of costs for supporting the Monitor's motion. The issues on the Monitor's motion were important to Ferina and other creditors. If the Monitor was unsuccessful, the funds subject to the Undertaking would be held by the Non-Applicant's new law firm, who had not agreed to be bound by any fee cap as currently existed.

16. The Non-Applicant's new law firm now claims to be a secured creditor of the Non-Applicants with a claim for more than \$250,000 in unpaid legal fees which it may have attempted to set off. Ferina and the other creditors would have been prejudiced by the needless delay and expense that would arise from the bankruptcies of the Non-Applicants, which would have stayed the CCAA claims process and timely completion of the proceeding.

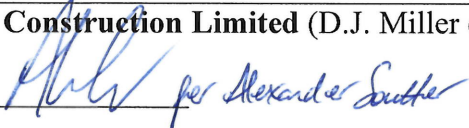
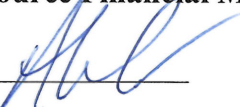
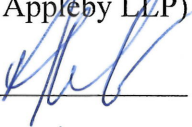
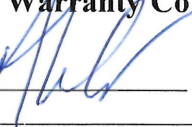
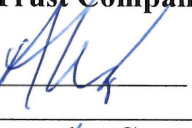
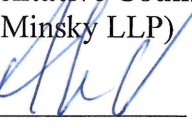
17. The Non-Applicants' position on the Monitor's Motion was unreasonable, and stood little chance of success. As directing mind of the Non-Applicants, Mr. Wang ought to have known that, and he knew that the steps taken by the Non-Applicants at his direction were strongly opposed by his creditors and that he no longer had any economic interest in the funds subject to the Undertaking. He knew that creditors would incur significant costs in reviewing the materials at issue on the motion (including the late-served materials of the Non-Applicants) and in attending to support the Motion brought by the Monitor.

⁸ *Return on Innovation Capital Ltd v Gandi Innovations Ltd*, 2011 ONSC 7465 at paras 5-7 (Commercial List, per Newbould J) [*Return on Innovation*], cited with approval in *Urbancorp Toronto Management Inc (Re)*, 2019 ONCA 757 at para 82.

⁹ *Return on Innovation* at paras 2, 13, 16, and 24.

18. The Non-Applicants and Mr. Wang chose to ignore the Court's suggestion to resolve the Monitor's motion without prejudice to all parties' rights and arguments. The rejection of this proposal was tantamount to rejecting an offer to settle, and should be considered in determining the scale of costs to be awarded.

19. Ferina and the supporting creditors submit that the Non-Applicants and Mr. Wang (as the directing mind of those companies) should be jointly and severally liable to pay their substantial indemnity costs in respect of the Monitor's motion.

DETAILS	FEES
Review of the Monitor's Motion Record, Factum, Book of Authorities, and the Monitor's 12th Report and Supplement to the 12th Report; Review of the Bankrupt Non-Applicant's Motion Record, Factum, and the First Report of the Bankrupt Non-Applicants' Trustee; Preparation for and attendance at the Monitor's motion (10:00 AM – 3:00 PM)	
Ferina Construction Limited (D.J. Miller of Thornton Grout Finnigan LLP) Per: <u></u>	\$5,000
First Source Financial Management Inc. (Jeff Larry of Paliare Roland LLP) Per: <u></u>	\$5,000
2586614 Ontario Inc., 2592898 Ontario Inc., 2620094 Ontario Inc., 2627235 Ontario Inc., 2638796 Ontario Inc., 2646429 Ontario Inc., 2603616 Ontario Inc., 2611622 Ontario Inc., 10226190 Canada Ltd., 2557725 Ontario Inc., 2612316 Ontario Inc., Wenguang Liu and Yan Yan (Dominique Michaud of Robins Appleby LLP) Per: <u></u>	\$5,000
Tarion Warranty Corporation (Adam Slavens of Torys LLP) Per: <u></u>	\$5,000
Home Trust Company (George Benchetrit of Chaitons LLP) Per: <u></u>	\$5,000
Representative Counsel for the Birchmount Purchasers (James Harnum of Koskie Minsky LLP) Per: <u></u>	\$5,000

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Proceedings commenced at Toronto

COST SUBMISSIONS of FERINA CONSTRUCTION
LIMITED and CERTAIN OTHER JOINING CREDITORS
(February 20, 2020 Hearing)

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